Introduction

The increased judicialization of politics over time has rendered the institutional design of courts both contentious and significant. As courts play a larger role in shaping policy, citizens and policymakers increasingly grapple with the powers of courts, selection of their judges, and their role in society in both backsliding and more established democracies. Despite claims that independent courts are important for governance and the separation of powers, politicians, past and present, often seek to control the powers of courts and judicial selection to seemingly control policy outcomes. At times, politicians successfully manipulate these two facets of courts to achieve their own ends. At other times, the composition of political actors and public sentiment as well as the strength of certain courts defies such blatant methods for controlling courts.

The institutional design of courts, especially high courts, has become a salient political issue because courts often make extraordinary decisions invalidating laws approved by the elected branches. For example, in 1995, the South African Constitutional Court struck down a section of its Criminal Procedure Act of 1977 and abolished the death penalty.\(^1\) In recognition of the values espoused by the post-apartheid period, the Court found that this section had violated the state’s commitments to human rights found in its interim Constitution. Similarly, the Constitutional Court of Romania in 2010 found unconstitutional a lustration law that would have prohibited former communists from holding political office.\(^2\) The Court reasoned that adopting such a law so many years after the country’s democratic transition would violate citizens’ rights to run for office or avoid punishment under ex post facto laws. In 2013, the United States Supreme Court issued a groundbreaking decision striking down the Defense of Marriage Act, because it

\(^1\) S. v. Makwanyane and Another Constitutional Court of South Africa, (3) SALR 391 (CC) (1995).
\(^2\) Decision No. 820 of June 7, 2010, Romanian Constitutional Court.
violated the due process and equal protection guarantees of the United States Constitution. This decision was later referenced by this same court when it struck down discriminatory state laws and legalized same-sex marriage nationwide. In 2015, in response to technological innovations, the Indian Supreme Court struck down a section of India’s controversial Information Technology Act, which had allowed the police to arrest individuals for making comments on social network sites that caused “annoyance or inconvenience.” The Court explained that this article violated the constitution’s guarantee of free speech. All these examples show how high courts empowered with constitutional review powers check other branches of government, uphold provisions of the constitution, and create societies’ laws and policies. The decisions are dictated in many ways by the composition of courts and their ability to exercise constitutional review. As used in this study, constitutional review refers to “the authority of an institution to invalidate the acts of government—such as administrative decisions, and judicial rulings—on the grounds that these acts have violated constitutional rules, including rights” (Stone Sweet 2000: 21).

Although constitutional review tends to be viewed as normatively valuable, there is an inherent tension between providing high courts with enough freedom and power to hold elected politicians accountable to constitutional mandates and ensuring that courts, as oversight agencies, can also be held accountable if they misuse their power. Friedman (2004, 2005) notes that the institution of constitutional review provides citizens with both a “hope and a threat” (2005: 309). There is the hope that constitutional review will be used to constrain governments that overstep their powers or fail to respect citizens’ rights. In contrast, there is the looming threat that constitutional review will be misused such that courts will inappropriately interfere with the work of the elected branches or that courts’ decisions will be biased by the preferences of individual judges. Relatedly, in more fragile democracies, delegating oversight of elected officials to non-elected courts may provide insurance and safeguards for outgoing politicians (Ginsburg 2003; Finkel 2004) but is just as likely to signal an “accountability deficit” (Moreno et al. 2003) or simply a means of “hegemonic preservation” (Hirschl 2004).

5 U.S. v. Windsor, 570 US 744 (2013). The Defense of Marriage Act or DOMA defined marriage as a union between heterosexual couples only.
8 Similarly, Vanberg (2005) defines constitutional review “as the power of judicial bodies to set aside ordinary legislative or administrative acts if judges conclude that they conflict with the constitution” (p. 1).
9 These same arguments are found in popular discourse about judicial activism. Some classify courts as activist if they strike down laws that a segment of the population supports. Some classify courts as passive or deferential if they fail to invalidate policies that a segment of the population opposes.
10 Moreno et al. (2003) suggest that the proliferation of non-elected branches to supervise the elected branches will not make elected officials more accountable to the public for its transgressions.
Despite the “hope” and “threat” that constitutional review provides to governments, the majority of high courts worldwide have the power to review and find unconstitutional laws enacted by the elected branches of government. In exercising constitutional review, high courts prevent the elected branches from overstepping their powers and protect minority rights that may be overlooked by presidents, legislators, or other bureaucracies. In exercising constitutional review, courts also uphold the values found in a country’s constitution. Even in semi-authoritarian regimes, high courts have been empowered with constitutional review to constrain, or give the appearance that they are constraining, the executive. When high courts invalidate laws, they voice a stern objection to policies approved by the elected branches of governments past or present. When they uphold laws, high courts signal approval for agreements made by the elected branches. Despite the prevalence of constitutional review worldwide, we know very little about what conditions lead judges and high courts to invalidate laws and what aspects of the decisions themselves may make it more likely that they are influential and will be followed.

While most countries allow courts to review laws passed by legislators or decreed by executives, there is enormous variation in the constitutional review powers afforded to courts as well as how judges are selected. Some countries allow courts at all levels to review the constitutionality of laws, while other countries limit such review to their highest courts. Some governments provide their courts with broad powers to review legislation prior to enactment, while others limit their review to laws after enactment and in some only within a certain time period after enactment. Some countries allow courts to review laws abstractly – allowing them the broadest powers most akin to those held by legislators, while other countries only allow courts to review laws within a case and controversy. Many high courts, within some procedural limits, are required to review all cases presented to them, although a few have broader discretion to choose what cases they will review (see Fontana 2011). In some countries, the effect of constitutional review is limited to only the parties to the action (i.e., *inter partes*), while in others this review has broader effects (i.e., *erga omnes*). Some governments further demand obligatory review by the courts of certain types of laws. Policymakers also may restrict constitutional review through rules regarding access to high courts and limiting it to certain political actors rather than all citizens. While these parchment descriptions of constitutional review may provide one way of evaluating a high court’s strength or influence over the other branches of government, analyzing the variations in use of these powers in practice is another.

9 It puzzles many scholars as to why authoritarian governments would empower independent courts. Some reasons include the need to provide credible commitments to citizens and outside investors (Weingast 1997), and to provide insurance that an independent court exists to protect those in powers’ interests once out of power (Ginsburg 2003).

10 For example, the Peruvian Constitutional Tribunal, when exercising its constitutional review function, is limited to reviewing laws that are not more than six years old (Dargent 2009).
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Besides wide variability in the type of constitutional review available to most high courts in the world, there is tremendous variation in how judges are selected, although in most cases judges are selected by some elected officials. Judicial selection provides a means for elected and other political actors to choose agents who may serve the selectors’ purpose, which is especially important considering the expansive powers that courts hold as well as the increasing judicialization of politics seen worldwide. Judicial selection methods also may enhance diversity and representation on the bench, such that different viewpoints or judicial philosophies are considered on a collegial court. One particular method for selecting judges on high courts that is quite prevalent, and the focus of this book, is mixed judicial selection of constitutional court judges whereby different political or other actors select specific portions of a high court. About 52 percent of high courts worldwide use a form of this selection method, which allows different selectors to fill some of the seats on the court with the type of constitutional adjudicator that the selecting institution believes is most appropriate. Further, this method, in some of its forms, allows all three government branches to choose a specific number of judges allowing for a balance of branch representatives to serve on the court.

While there have been a significant number of studies regarding the creation of constitutional courts (Hirschl 2000; Finkel 2004; Ginsburg 2003), their normative value (Bickel 1986), as well as a large number of single court studies that investigate the use of constitutional review outside the United States (see Garoupa et al. 2021a for a review of these studies), there are fewer empirical studies that evaluate how judges and courts respond to the preferences of elected officials from a comparative perspective, especially in high courts outside of the United States (but see, Kapiszewski 2012; Sadurski 2008; Schwartz 2000; Garoupa and Ginsburg 2015). Interactions among elected branches and constitutional courts are vital for understanding what laws and policies a country ultimately adopts. If high courts are unable to constrain the other branches of government, then laws and policies simply reflect the decisions of the majority of those controlling the legislative agenda. In turn, if courts are effective in invalidating laws, then the ultimate policy that arises is based not only on the preferences of elected politicians but also those of non-elected, professionally trained judges who have been tasked with upholding the constitution. The decisions of all these various bodies and the individuals who work within them are of course constrained by institutions and the political context more generally. A richer understanding of the constitutionality of the laws a country adopts can be achieved by studying how individuals and courts make decisions within the broader political and legal context in which they operate.

Alarie and Green (2017) study how institutional design affects judicial decision-making on appeals on several common law courts. As such, they do not deal specifically with constitutional review.
1.1 Area of Inquiry and Scope of the Book

The substantial variation in the propensity in which courts with seemingly similar powers choose to invalidate laws calls into question whether courts’ powers alone determine how influential and independent courts are in the policy-making process. For example, some courts are bold in confronting their government despite few powers granted to them. Indeed, the United States Supreme Court was never granted the power to review legislation, and some argue that the founding founders never intended it to have such powers (MacGregor Burns 2010). However, despite this limitation, the Court was able to create its own powers by invalidating the Judiciary Act of 1789. In a more recent example, the Bulgarian Constitutional Court, created after the fall of the Berlin Wall in 1989, was provided with the power to review abstractly legislation a posteriori or after enactment when requested by a limited number of political actors, similar to a number of newly created courts in Eastern Europe. However, despite its seemingly ordinary constitutional review powers and the refusal to allow citizens to bring cases directly before it, this constitutional court has historically overturned around 50 percent of the laws it has been asked to review. Unlike the above examples, where courts that have relatively few powers are bold in confronting other branches of government, there are other examples of courts that are given broad powers to review legislation but are hesitant to use them. For example, the Japanese Supreme Court has the power to determine the constitutionality of any order, regulation, or official act (Japanese Constitution 1946, Article 81), but rarely strikes down laws (see Law 2011).

The above examples suggest that the powers afforded courts do not entirely explain when courts will choose to strike down laws. We do not know why some courts with seemingly similar powers more actively check the elected branches, while others do not. Likewise, it is unclear what conditions make it more or less likely that judges and high courts will exercise judicial vetoes, defined as striking down a law passed by the elected branches as unconstitutional. While it would be challenging to have one theory describing the determinants of striking down laws for all high courts, it is possible to broadly theorize some of the correlates of judicial vetoes on a subset of constitutional courts, namely those with abstract review powers who choose their judges by a mixed selection method, which seeks to staff these courts with representatives chosen by the different branches. As such, this book is concerned with a broad, but more limited, inquiry: How does the mixed selection of justices work in these courts?

12 When discussing judicial independence, Feld and Voigt (2003) and Voigt et al. (2015) and others make the important distinction between de jure and de facto independence. De jure judicial independence refers to the written laws and rules of the game that define courts’ powers and procedures and the rules regarding appointing, disciplining, and removing judges as well as defining judges’ tenure, salaries, and immunity from prosecution. De facto judicial independence assesses whether judges themselves can make independent decisions in fact.

13 Marbury v. Madison, 5 US 137 (1803).
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Constitutional court judges influence decisions to invalidate or strike down laws under abstract constitutional review? To answer this question, the book provides a general theory about how mixed judicial selection in its many forms influences judicial decision-making and tests this theory within the specific institutional configurations and political context of the Chilean and Colombian constitutional courts. As will be discussed in more detail in later chapters, these two mixed selection courts closely follow the Kelsian constitutional court model originating in Europe and have similar powers and selection rules. Further, by studying two courts within Latin America, the comparison controls for many factors because these two courts share the same legal tradition and legal culture, and the Colombian Court even considered the Chilean Tribunal among others as a model for its own (Legislative History of Colombia’s Constitutional Assembly April 8, 1991: 16). Furthermore, the debates surrounding the selection of judges to these courts were roughly similar in their aspiration to construct a balanced court that represented the various branches of government.

The scope conditions of the current study also limit it to an analysis of these courts’ abstract review of legislation passed by the legislature currently in power in Chile and Colombia at the time of constitutional review. Such stringent scope conditions again allow for a more fruitful comparative analysis but, as discussed later in the book, limit the generalizability of the empirics. While a more comprehensive review of all types of constitutional review decisions may provide a better landscape of the power of constitutional courts to effectuate policy, it prevents me from focusing on judicial selection and quorum rule fluctuations as other types of review mandate smaller court sizes and, in the case of the Chilean Tribunal, different voting rules. Indeed, the focus on the two courts on one particular type of constitutional review allows me to control for a host of factors and allows a closer examination of the arguments presented in this book.

1.2 Brief Overview of the Main Arguments and Approach

What drives individual judges’ and courts’ decisions to strike down laws as unconstitutional? The theory I develop here diverges from a strictly attitudinalist viewpoint in which judges have policy preferences correlated with their political party...
allegiances and tend to vote those preferences sincerely constrained only by the law and the facts of the case (Segal and Spaeth 2002). Under such an attitudinalist approach, courts’ decisions are based on the simple aggregation of individual preferences under a majority rule. Courts tend to strike down laws when the court’s aggregated preferences diverge from those of the legislature and president (see Dahl 1957; Tsebelis 2002). This view has been criticized on several fronts. While judges may hold sincere preferences, scholars espousing approaches rooted in theories of strategic interaction and positive political theory (PPT)\textsuperscript{16} posit that judges do not always vote their sincere preferences for several reasons. As part of the “strategic revolution,” scholars have shown that while judges may want to make decisions in accordance with their political policy preferences or attitudes, they often need to vote strategically to avoid retaliation from other branches of government that may harm their own employment or the court’s strength as an institution (Epstein and Knight 1998). Judges also may behave strategically to curry favor with a new government (Helmke 2002), to foster collegiality within the court (see Songer and Siripurapu 2009 on the highly consensual Canadian Supreme Court), to have more input in the majority opinion (Cameron and Kornhauser 2017a), or to strengthen the role of the court.

Scholars also have criticized attitudinalists for theoretic and methodological reasons. Theoretically, judges have a myriad of preferences unrelated to policy outcomes (Epstein and Knight 2013) and the myopic focus on policy outcomes misses the fact that judges have numerous other objectives that their votes may support. Methodologically, attitudinalists and others also have failed to demonstrate how “the ideological direction of a vote [usually liberal or conservative] determines the outcomes that a judge cares about” (Cameron and Kornhauser 2017b: 538).\textsuperscript{17} Further, judges’ political preferences or allegiances do not seem to drive all decisions as evidenced by the number of unanimous cases issued by judges with opposing party preferences (see Songer and Siripurapu 2009; Fischman 2015).

\textsuperscript{16} McCubbins et al. (2007) state that like other strategic theories, “PPT assumes that individuals recognize that the consequences of their actions can depend on and affect the actions of others, and take this dependence into account when making decisions,” and that PPT specifies “how choices and consequences are jointly determined by multiple actors, and characterizes people’s choices as strategies within a game” (p. 1664).

\textsuperscript{17} Cameron and Kornhauser (2017b) assert more succinctly that many judicial attitudinal scholars do not elaborate how the ideological direction of a vote determines the outcomes that the judge cares about. What is the relation between the dispositional vote and job satisfaction, external satisfaction, salary, and leisure; i.e., how does the judge’s vote affect the arguments in the agent’s utility function? How do judges value the direction of this disposition? Do they value it at all? (p. 538)

These authors’ critiques apply to some attitudinalists who try to determine if the judges’ political preferences influence the outcome of their vote, which in such studies is coded as conservative or liberal.
Finally, attitudinal explanations may only explain a fraction of a court’s decisions, such as those that are most salient (see Unah and Hancock 2006).

Diverging from an attitudinal approach focusing on judges’ policy preferences, this book thus attempts to determine what drives judges’ and courts’ decisions in constitutional review cases. The micro (judge-level) and macro (court-level) arguments are summarized in Figure 1.1 and discussed more thoroughly in Chapter 2. The arguments apply to Kelsian constitutional courts in which the judges are chosen through some type of mixed selection method and that are empowered to review legislation abstractly. The empirical analyses in subsequent chapters focus on the Chilean and Colombian mixed selection constitutional courts. As depicted in Figure 1.1, correlates of judicial vetoes or a court’s declaration that a law or part of a law is unconstitutional are derived from the following:

1. The legal and political context under which a law is drafted as well as the type of review triggered by the law and its subject matter;
2. Judges’ constitutional adjudicator types informed by the institutions that select them and their individual goals; and,
3. Court composition, collegial norms, and the court’s own goals.

I briefly discuss these below and provide a more detailed description in Chapter 2.

The legal and political context that a court finds itself in at the time of constitutional review shapes its response. What I mean by legal and political context is the character of the legislation under review (which depends on the composition of the enacting legislature and its voting rules, which may vary by type of legislation), the manner in which constitutional review is triggered, and the subject area of the law reviewed. Judges and courts do not set their own agendas but rather react to and
review legislation previously written and approved by the elected branches. Unlike
the United States Supreme Court, many constitutional courts, including those in
Chile and Colombia, do not have discretionary review and thus must review most
cases that appear before them. Indeed, the laws under scrutiny themselves provide
the fodder for constitutional judges’ and courts’ decisions and thus constrain how
much influence judges and courts are likely to have in the policy-making process.
The content of the laws reviewed reflects the characteristics and attitudes of legisla-
tors and the constituents they represent as well as the compromises that occur during
the legislative process to ensure the approval of legislation – in short, politics. The
content of law, shaped by the political process, is also determined by the legislative
voting rules that inform the type of compromises legislators are able to make.

There are also distinct manners in which constitutional review is triggered, which
vary by the features of the law itself and inform court decisions. Some laws require
obligatory review by a tribunal as defined by their constitution or organic laws.
Undoubtedly, the legislature’s anticipation of the reviewing court’s reaction also will
shape the type of laws that are passed (see Langer and Brace 2005). Abstract consti-
tutional review in some countries may only be triggered by certain political actors. In
some countries review also may be triggered by citizen petitions.

Beyond constitutional review type, judges’ and courts’ decisions are also
conditioned on the subject matter of the law being reviewed (see Scherer 2004;
Amaral-Garcia et al. 2009). Certain subject areas are especially important or salient,
while others have been traditionally avoided by courts, such as foreign policy issues
by the United States Supreme Court or economic policy issues in other countries.
Certain subject areas may be more controversial over time causing courts to revisit
earlier decisions. Further, high courts may act more deferentially when reviewing
certain subject areas than others. Shapiro (2004) suggests, for example, that courts
are better at confronting other branches of government about rights but are less
instrumental when dealing with issues of separation of powers or federalism. Some
subject areas also may lead to more divisions among judges, such as cases on
abortion decided by the US Supreme Court or those dealing with separation of
powers issues or rights in new democracies. As such, judges’ and courts’ decisions
should be conditioned on the subject area of the law being reviewed.

Besides the legal and political context, understanding judges’ individual choice
requires a focus on judges’ roles in constitutional adjudication, the decision-making
forum within which they make decisions, and their attributes as influenced by their

18 It is acknowledged that some constitutional courts may issue advisory opinions and have other
tasks that are not related to constitutional review such as lifting the immunity of elected
politicians or deciding conflicts between branches of government.
19 For example, the US Supreme Court overturned its decision in Bowers v. Hardwick, 478 US
186 (1986) that had allowed states to criminalize sodomy with its decision in Lawrence v. Texas,
539 US 558 (2003), holding such action as a violation of the due process clause of the
Constitution.
selectors and the selection process. With both the legislative and judicial roles of the Kelsian constitutional courts in mind, policymakers choosing mixed selection, the focus of this book, favor a process that selects a specific number of judges chosen by different branches of government to appear in a constitutional court’s decision-making forum. In selecting constitutional judges, selectors are not simply looking for judges who will rubber stamp their policies, but rather those who will determine if a law is consistent with the values enshrined in the constitution (see Stotzky 2004). Institutions selecting constitutional court judges may not be especially concerned with whether judges’ votes mirror their own policy preferences because the role of the court is to determine the constitutionality of a law, not whether it is a good policy prescription. Additionally, in most constitutional courts, judges do not have lifetime appointments and often judges’ terms are not concurrent with their selectors. Thus, selectors are keen on filling constitutional courts with judges who are likely to represent an approach to constitutional adjudication that is most in line with the selecting institution’s role in policy-making even when individuals within those selecting institutions are no longer in office.

In turn, judges’ voting is highly correlated with their selecting institution, because the nominating institution has chosen a specific type of judge that it wants based on that judge’s prior record in a myriad of decision-making posts prior to service on the bench. Judicial candidates are not an unknown quantity but prestigious lawyers, judges, or law professors within a nation. Many constitutional court judges have also served in politics in governmental or non-governmental institutions. They are thus selected for their approach to constitutional law and decision-making more generally (see Garoupa and Ginsburg 2015: 153). Individual judges on mixed selection courts use their votes to enhance their own reputation and that of the court when this serves them. Judges want to be considered expert constitutional adjudicators and carry out their role in a way that is consistent with the selecting institutions’ conception of an expert constitutional adjudicator.

A key to solving the micro to macro problem relating to the mechanism from which individual choice is transformed into collective choice is understanding that the collegial forum itself provides judges with certain opportunities to maximize their influence on any case. In the mixed selection context, judges may have strategic concerns regarding their particular influence on the court in any decision. Policymakers choosing mixed selection systems generally, and in Chile and Colombia specifically, chose this selection method to have a specific balance of judges representing different institutions on the court at any one time. However, quorum rules and judges’ individual schedules ensure that on many cases, the intended balance of judges by institutional selector is not found. Therefore, individual judges may use their votes to enhance their power on a particular decision when the court composition allows it. Judges’ calculations about how to vote rely on the costs and benefits that the court composition, which fluctuates by case due to quorum rules, affords them. In certain compositions, judges