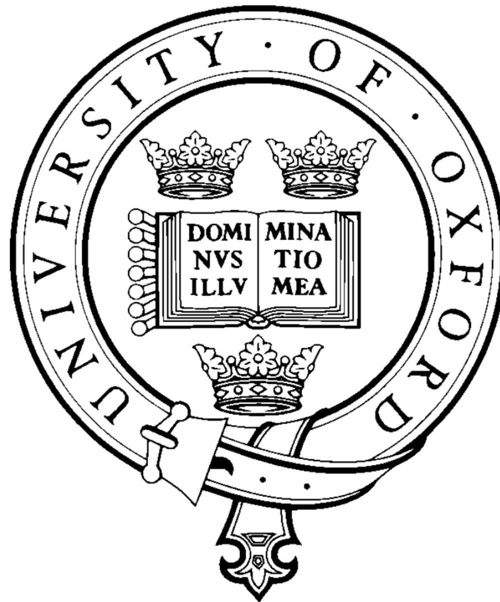
Stronger Than They Seem:
'Parchment Barriers' and the State of Judicial Independence in Hungary and Poland



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Abstract

Judicial independence has been a particularly salient issue in the context of the rule of law in democracies and hybrid regimes in recent years. Actions to encroach on this independence are taken very seriously, evidenced by the Article 7 procedures against Hungary and Poland. A political consensus seems to exist that certain legal changes to their constitutional courts should be condemned as threats to judicial independence. In empirical works on the subject, however, a very different consensus exists, finding no strong relationship between ‘parchment barriers’, or de jure independence, and de-facto judicial independence. The gap between the political and scholarly consensuses is an important one, because resolving it should dictate policy responses to the very real problem of captured courts. This begs an interesting question– how have legal changes to the regulation and makeup of judiciaries affected actual judicial outcomes? This paper first inspects and reconsiders the key characteristics of de jure judicial independence, showcasing the need for more conceptual clarity between the relevant legal or constitutional provisions and the actual changes to the structures which judges, governments, and citizens operate within. It then analyzes constitutional court behavior in two country cases: Hungary and Poland. A two-part analysis is performed for each country case. First, the effects of all legal changes which occurred on overall court outcomes are estimated. Second, the specific mechanism of how changes to the judicial appointment process can influence individual judge behavior is investigated. The results of these analyses provide tentative evidence that the legal changes to the constitutional courts of both countries are related to a decrease in the likelihood of a case being decided against the preferences of the ruling government. In both cases, this appears to be at least partly driven by the behavior of judges appointed through more politicized appointment processes, which rule in favor of the government more often. Ultimately, the paper provides support for the notion that formal rules can and do affect behavior. It also highlights the inherent relationship between calls to increase the democratic representation and legitimacy within minority institutions, and the greater possibilities of their majoritarian capture.

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Chapter 1: Introduction

> "Judicial independence has become like freedom: everyone wants it, but no one knows quite what it looks like." – Tom Ginsburg[1]

In the first annual Rule of Law Report issued by the European Union, published in 2020, judicial independence is mentioned 23 times. The second paragraph of the introduction of the report asks, "What is the rule of law?" and promptly answers:

> "The rule of law is enshrined in Article 2 of the Treaty on European Union as one of the common values for all Member States. Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts."[2]

The emphasis on "independent and impartial courts", and indeed the creation of an annual Rule of Law Report at all, appears to be in large part a response to recent legal changes concerning the judiciaries of two member states in particular: Poland and Hungary. In Poland, political battles have ensued over court-packing and judge intimidation. In Hungary, headlines have been made by the practice of 'constitutionalizing' laws, since the Fidesz government has held the two-thirds supermajority necessary to enact constitutional amendments, as well as unilaterally selecting constitutional court judges.[3] Yet, as Brad Epperly (2019) notes, "if judicial decisions being motivated by personal attitudes is a signal of de facto dependent courts… then de facto independence as a concept becomes effectively meaningless."[4] Essentially, if courts comprised of partial judges are not independent courts, there are virtually no independent courts in existence. Especially in the context of the controversy surrounding judicial independence in the EU currently, this is an important point to be made. There should be collective debate about what types of judicial independence are valued and should be supported in judicial institutions– but in order to have these collective debates, we need to know how different rules actually cultivate or detract from judicial independence in practice.

This is ultimately a debate about how and to what extent formal rules can shape behavior, which is the foundation of any rules-based society. The question of how rules are implemented, complied with, and how they affect society is present in virtually every realm and field of political science research. How do voter laws affect political participation and democratic quality? Under what conditions are international treaties effectively enforced? What are the disparate impacts of criminal policy among different groups? Everyone interacts with rules and laws in some form. Because collective rules are created for the purpose of shaping the societies we want to live in, the relationship between the intentions of these rules and their impact in daily life should be particularly important to us.

The controversy surrounding judicial independence in the EU is one such arena from which we can analyze the impact of rules on behavior, and is deeply connected to particular visions of democracy. Broadly speaking, the term judicial independence describes two distinct but interrelated concepts. Firstly, judicial independence may refer to a hearing by an impartial and independent tribunal in an individual case. A second usage of the term relates to the structure of

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[1] Melton and Ginsburg, "Does De Jure Judicial Independence Really Matter?"
[2] European Commission, "2020 Rule of Law Report."
[3] Kovács and Scheppele, "The Fragility of an Independent Judiciary."
[4] Epperly, *The Political Foundations of Judicial Independence in Dictatorship and Democracy*.

constitutional democratic governance, and refers to the separation of powers between the judicial, executive, and legislative branches of government. In this case, a certain level of independence of the judiciary from the other branches of government is necessary for the existence of a system of checks and balances. Most definitions of judicial independence within political science intend to capture components of both concepts, dealing with "the functional separation of sources of public power in a state and the preservation of impartial adjudication."[5]

While judicial independence has long been important in the context of non-democracies or transitioning regimes, it is interesting the degree to which this has become a salient issue within democracies as well. Take, for example, the Article 7 procedures against Hungary and Poland which declare a "clear risk of a serious breach by a Member State of the values referred to in Article 2", or the fundamental values of the European Union. Threats to the independence of the judiciary were some of the most compelling reasons for triggering Article 7(1) in both cases. The report of the proposal by the European Parliament to begin Article 7 proceedings against Hungary cited a "deep concern about the recent developments in Hungary which are jeopardising the rule of law and hampering the application of the principles stated in Article 2 TEU, including, inter alia, those concerning the functioning of the constitutional system, the independence of the judiciary and of other institutions and the systematic removal of checks and balances."[6] The Commission identified "more than 13 laws affecting the entire structure of the justice system in Poland" which have "systematically enabled [the executive and legislative branches] to politically interfere in the composition, powers, administration and functioning of the judicial branch." A political consensus seems to exist that these legal changes should be condemned as threats to judicial independence, the separation of powers, and constitutional democracy as a whole.

In the world of scholarly literature on the subject, however, a very different consensus exists. A majority of the judicial politics research has found no relationship between 'parchment barriers' (constitutionally-established protections of the judicial branch from inappropriate influence by the government) and the level of independently-decided rulings.[7] Globally, some countries without constitutionally-enshrined protections exhibit high levels of judicial independence in practice; others just as easily brush past strong protections in their laws and constitutions, as informal practices trump institutional barriers.[8] The gap between the political consensus and the scholarly consensus is an important one, because resolving it should dictate policy responses to the very real problem of captured courts. This begs an interesting question, which motivates this research– how have legal changes to the regulation and makeup of the judiciaries in Hungary and Poland affected judicial independence in practice? How do these changes actually affect the court's likelihood to rule in the interests of government, despite the merits of the case?

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[5] Rankin, "Mapping Judicial Independence."

[6] "REPORT on a Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on Which the Union Is Founded."

[7] Smithey and Ishiyama, "Judicial Activism in Post-Communist Politics"; Helmke, "The Logic of Strategic Defection"; Herron and Randazzo, "The Relationship Between Independence and Judicial Review in Post-Communist Courts"; Popova, "Politicized Justice in Emerging Democracies"; Ríos-Figueroa and Staton, "An Evaluation of Cross-National Measures of Judicial Independence"; Epperly, *The Political Foundations of Judicial Independence in Dictatorship and Democracy*.

[8] Helmke and Levitsky, "Informal Institutions and Comparative Politics"; Rankin, "Mapping Judicial Independence."

1.1 Scholarly and Normative Implications

Judicial independence is an interesting lens through which to analyze the impact of rules on behavior for a number of reasons, not least of which because it is a component of the rule of law. The term 'rule of law,' in its most basic conception, connotes certain procedural requirements, including trial by an independent and impartial court.[9] More substantively, the rule of law can refer to a society in which all actors – government, military, and civilian alike – are bound by formal rules and predictably operate under those constraints. More normative conceptions of the rule of law may also include certain liberal values, such as the inviolability of private property or the respect for certain fundamental human rights.[10] Though not a proxy, judicial independence is nonetheless a substantive and key component of the rule of law. Not only is it one of the most basic procedural requirements for the rule of law, but it is also central to the separation of powers between different branches of government in constitutional democracies.

The topic of judicial independence in the cases of Hungary and Poland also applies to discussions of 'democratic backsliding'. To see what many term democratic backsliding in an EU member state clearly has implications for the academic literature on transitions and democratization processes. The politicization of courts is one of the key steps for governments attempting to consolidate power.[11] There is, however, potential for some push-back on this count. It must be remembered that socialist legacies in these countries have given law a bad name as 'telephone law'[12] and textual formalism[13] remain in Central and Eastern European (CEE) judiciaries. Insulated judiciaries may exacerbate existing problems of inefficiencies and a lack of legitimacy resulting from too great a chasm between democratic mandates and unaccountable institutions like the courts. Cristina Parau (2011) argues that "constitution-makers in CEE… have elevated the judiciary to a privileged position beyond the reach of democratic accountability or checks and balances" to an extent which is unnecessary for achieving judicial independence, and which may have pushed the courts too far out of reach of any democratic involvement.[14]

This brings up a few normative questions. As Venelin Ganev (2009) notes, "those who wish to curb the arbitrary exercise of political power must face the prospect that institutionally insulated judiciaries may operate in ways inimical to the advancement of the Rule of law."[15] An unaccountable and unrepresentative court could be problematic in a normative sense. A fully insulated judicial branch may not be desirable if judicial independence is not of value in and of itself, but is rather "instrumental to the pursuit of other values."[16] This depends on whether the institutional insulation of the judiciary is itself of value, or if it is only sought after because of what that particular institutional set-up is thought to produce. This research does not attempt to provide an answer this question; however, it informs this normative debate by investigating what exactly the institutional set-up produces in terms of actual judicial outcomes. Relatedly, this forces the question of where high courts obtain their legitimacy from in constitutional democracies. As Kim Lane Scheppele (2002) asks, "do judges justify the exercise of their power to check politicians in

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[9] Waldron, "The Rule of Law."
[10] Waldron.
[11] Levitsky and Way, *Competitive Authoritarianism*; Levitsky and Ziblatt, *How Democracies Die*.
[12] Ledeneva, "Telephone Justice in Russia."
[13] Matczak, Bencze, and Kühn, "Constitutions, EU Law and Judicial Strategies in the Czech Republic, Hungary and Poland."
[14] Parau, "The Role of Courts in a Democracy."
[15] Ganev, "The Rule of Law as an Institutionalized Wager."
[16] Ferejohn and Kramer, "Independent Judges, Dependent Judiciary."

the name of democratic values or as a check on democracy (populism) run amok?"[17] What is the appropriate relationship between majoritarian and non-majoritarian institutions in a liberal democracy? This touches on the inherent tension between the representative and liberal elements of democratic governance. A final normative implication of this research is whether or not we believe that partial courts– that is, courts with judges whose political or judicial beliefs sway a certain way– can still be independent and, in our eyes, legitimate courts. This has obvious implications for what kinds of rules are necessary for the desired outcome.

1.2 Preview

The paper proceeds in the following way. First, the academic literature on the topic, as well as the questions that remain unanswered in that literature, are reviewed. While the judicial independence literature is rich, there is little consensus on what kinds of laws should best promote judicial independence in practice,[18] which may explain why previous empirical works have not found a relationship between these laws and judicial outcomes. In the theoretical section, these laws are examined more closely, and a distinction between two mechanisms through which law may affect court behavior are identified. There are laws which would theoretically induce judges to change their behavior and vote more or less sincerely, and there are laws which may systematically bias or constrain the court through compositional or procedural changes, but without affecting the sincerity of an individual judge's decision. This distinction is an important one, since the inducement or coercion of judges is typically seen as a greater threat to judicial independence than structural constraints put on the court. The primary theoretical expectation of the paper is that the legal changes which occurred in Hungary and Poland have decreased the likelihood that the high courts of each country rule against the preferences of the government.

To test this, judicial behavior is analyzed on two levels for each country case. Two empirical questions are asked. Firstly, do the laws which supposedly threaten the judicial independence actually produce courts which are less likely to act as a constraining force on the government? Changes in overall high court behavior are investigated through a structural breaks analysis and through logistic regressions which model the effect of legal changes on the likelihood that the court rules against the government. Secondly, is a more politicized judicial appointment process at least partially responsible for these changes in overall court outcomes? This mechanism is explored through a network analysis and panel regressions where the effect of the politicized appointment process on the likelihood of a judge to rule against the government is estimated in cases where judges of both appointment types are simultaneously on the bench. This two-part identification strategy aims to find a balance between understanding how court outcomes have changed on a larger scale over time, while also including a more rigorous investigation into one of the potential causal mechanisms of how these laws can change behavior.

The results from both country cases appear to support the notion that the legal changes in these countries impacted the behavior of the high courts. In line with theoretical expectations, the Hungarian and Polish high courts are less likely to rule against the preferences of the government after the legal changes took place in each country. Moreover, in both Hungary and Poland, the judges selected through more centralized appointment processes are less likely to vote against the

[17] Scheppele, "Declarations of Independence: Judicial Reactions to Political Pressure."
[18] Ríos-Figueroa and Staton, "An Evaluation of Cross-National Measures of Judicial Independence."

government than judges selected by the previous appointment procedures. The results, implications, and lingering questions are summarized in the final chapter.

The normative implications of this research are particularly interesting. In Hungary, there is no indication that the sincerity of the decisions of judges have changed in response to laws passed by the government– and yet, cases are more frequently decided in the government's favor. This makes the question of whether partial courts can be viewed as legitimate, independent courts difficult to answer. In Poland, there is a possibility that the behavioral independence of individual judges is threatened, but there are also clear impacts of laws which restrict the competences and powers of the high court. This suggests that while the sincerity of a judge's decision is typically valued as a higher form of judicial independence than the powers and competences of the court, it is possible that changes to these structural factors have just as great a potential to manipulate court outcomes in favor of the government which introduces them.

Chapter 2: Literature Review

This section reviews the existing literature on judicial independence and the impact of formal rules on judicial outcomes. First, the concepts of de jure and de facto independence are introduced. Next, existing literature on the relationship between de jure and de facto independence is reviewed, followed by a summary of alternative explanations of de facto independence. Scholars generally find a tenuous relationship between the laws which enshrine judicial independence and the actual outcomes of court cases in practice. However, there has been limited work done on theory-based conceptualizations of de jure independence. This highlights an important research gap in the judicial politics literature, since it is possible that an empirical relationship between the laws which govern the judiciary and judicial outcomes in practice may exist when measures of de jure independence are based on more careful theoretical conceptualizations. This also begs the question of whether there are certain combinations of laws which are more important to the preservation of judicial independence than others.

2.1 Conceptualizing De Jure and De Facto Independence

Judicial independence is a broadly studied topic. The concept is always a relational one[19] and asks, independent from whom? At its simplest, judicial independence means that judges can and do consistently decide cases based on their own interpretation of the law rather than that of any other actor.[20] Independence is generally considered high when judges and courts have both the autonomy to make sincere decisions and the power to have those decisions respected and followed.[21] While autonomy is often contrasted with higher levels of accountability in the judiciary, Georg Vanberg notes that accountability and independence are not necessarily mutually exclusive. Judicial autonomy requires that judges are free from "inappropriate considerations", such as the preferences of the executive, which is fully compatible with "mechanisms that can ensure that judges will, in fact, be guided by appropriate considerations in reaching decisions."[22]

Scholars have separated the concept of judicial independence into 'de jure' and 'de facto' independence. The former denotes judicial independence as enshrined by the law and in theoretical terms. Generally speaking, de jure independence requires the legal insulation of judges from improper influence and a formalized mandate which gives the judiciary enough power to enforce their rulings. Judicial systems with autonomous appointment processes, long or lifetime tenures, a high degree of job security, and no eligibility for a second term are generally theorized to be the most institutionally insulated.[23] Constitutional courts with broad competences to exercise judicial review, with autonomous procedural power, and whose decisions are immune from being overturned by other actors are theorized to be the most powerful.[24]

In contrast, other scholarly works take interest in judicial independence in practice, or de facto independence. To this end, many political scientists have focused on judicial independence as an outcome identified not by provisions within a constitution but by patterns of rulings in courts. One

[19] Burbank and Friedman, *Judicial Independence at the Crossroads*.
[20] Becker, *Comparative Judicial Politics*.
[21] Linzer and Staton, "A Global Measure of Judicial Independence, 1948-2012"; Reid, "Examining the Development of Judicial Independence - Kirk A. Randazzo, Douglas M. Gibler, Rebecca Reid, 2016."
[22] Vanberg, *Establishing and Maintaining Judicial Independence*.
[23] Epstein, Knight, and Shvetsova, "Selecting Selection Systems."
[24] Smithey and Ishiyama, "Judicious Choices."

approach maintains that de facto judicial independence is achieved when rulings do not consistently fall in line with the preferences of a specific group; in effect, no interest group can expect to win all the cases they would like to win.[25] Other means of identifying de facto independence include observing ideological patterns in judicial appointments and promotions.[26] Recently, more studies have utilized expert surveys as a method of measuring de facto independence. Interestingly, these measures generally correlate very highly.[27]

It is important to note that while the literature tends to analyze independence of judges from the other branches of government, there exist many potential answers to the question, independence from whom? Internal independence may also be a relevant form of independence to study. Internal independence could mean freedom from the influence of other judges on the court, such as the court president, or freedom from influence by superior judges or judicial councils.[28]

2.2 The Relationship Between De Jure Independence and De Facto Independence

Rather than focus on one type of judicial independence or the other, this paper is interested in the relationship between the two. Are the provisions in the constitution and statutes which are intended to create, protect, and empower independent courts successfully doing so? Much of the existing literature on this question gives a rather disheartening answer. As of yet, there is no clear empirically established relationship between formal insulation of the judiciary and independent judicial outcomes. Despite institutional safeguards on paper, numerous studies have found these 'parchment barriers' ineffective at ensuring that judges are protected from interventions by other actors, because informal institutions can trump formal ones under certain conditions.[29] Conversely, there also exist countries, such as New Zealand or Sweden, which do not have constitutional protections for judicial independence but which maintain strong cultures and histories of de facto judicial independence.[30]

Perhaps the most decisive evidence of the lack of a relationship between de jure and de facto independence is an evaluation of 13 cross-national studies of judicial independence in which the surveyed indicators of de jure and de facto independence are weakly correlated, and in some cases, negatively correlated.[31] In the post-socialist context, both Smithey and Ishiyama (2002) and Herron and Randazzo (2003) fail to find a significant relationship between their respective indexes of de jure independence and the exercise of judicial review. Smithey and Ishiyama review twenty different post-socialist countries, evaluating the impact of their judicial power score on the likelihood of the high court striking down a law, including covariates for effective number of parties, attitudes towards the judiciary, the presence of a bill of rights, and federalism. They find that only the effective number of parties and popular attitudes towards the courts have consistent

[25] Popova, "Politicized Justice in Emerging Democracies."
[26] Ramseyer and Rasmusen, *Measuring Judicial Independence*.
[27] Linzer and Staton, "A Global Measure of Judicial Independence, 1948-2012."
[28] Kosař, "Politics of Judicial Independence and Judicial Accountability in Czechia."
[29] Smithey and Ishiyama, "Judicial Activism in Post-Communist Politics"; Herron and Randazzo, "The Relationship Between Independence and Judicial Review in Post-Communist Courts"; Helmke, "The Logic of Strategic Defection"; Helmke and Levitsky, "Informal Institutions and Comparative Politics"; Helmke and Rosenbluth, "Regimes and the Rule of Law"; Popova, "Politicized Justice in Emerging Democracies"; Epperly, *The Political Foundations of Judicial Independence in Dictatorship and Democracy*.
[30] Rankin, "Mapping Judicial Independence."
[31] Ríos-Figueroa and Staton, "An Evaluation of Cross-National Measures of Judicial Independence."

effects on the exercise of judicial review.[32] Herron and Randazzo evaluate patterns of judicial review in seven different post-socialist countries, adding covariates for economic conditions, civil liberties, presidential power, political fragmentation, litigant type, and case issue type.[33] Economic conditions and presidential power are found to have effects on the exercise of judicial review, but not the de jure protections. However, both studies used time-invariant scores for de jure independence, and only took into account the initial five to ten years of operation of the high courts of these countries. More recently, Epperly (2019) has evaluated the Hungarian case. While he primarily investigates the relationship between the level of political competition and de facto independence in Hungary, he does note that the jury is still out on whether the legal changes to the Constitutional Court have changed the behavior of the Court as a whole.[34] In interviews with members of the Court and those close to it, it is generally felt that while the Court's competencies have been restricted as a result of the legal changes, the behavioral independence of individual judges has been preserved. However, these interviews were completed in 2013, before the selection of a President of the Court by the parliament (rather than by the judges, as previously) and more recent nominations to the bench by Fidesz.

Clearly, constitutional protections are neither necessary nor sufficient for the establishment of de facto judicial independence, nor is there a one-to-one relationship between de jure and de facto judicial independence (if there is any relationship at all). It seems unfair, however, to completely write off the possibility that formalized protections can have an impact on judicial behavior under certain conditions. Hayo and Voigt (2007) argue that while de jure independence has a weak relationship with the de facto measure, finding a 0.22 partial correlation, that this is still the strongest determinant of de facto independence out of all they test, which include public confidence in the legal system, economic conditions, level of democratic consolidation, and freedom of the press.[35] Melton and Ginsburg (2014) build on and improve this measure, and find that de jure protections do increase de facto independence when they specifically include provisions for autonomous judge selection and judge removal.[36] In particular, they note that these empirical results contradict the general consensus that formal rules have a limited role to play, and urge for further research on the subject. This leads to a more interesting question of under what conditions the level of de jure independence might have a stronger or weaker effect on the level of de facto independence, and when formal rules might play a stronger role in shaping outcomes.

The uncertainty surrounding the empirical relationship between de jure and de facto independence may be due to the underdevelopment of clear conceptualizations of de jure independence. Intuitively, it seems as though measuring judicial independence as enshrined in the law would be more straightforward than measuring judicial independence in practice. Yet upon examination of the various measures of de jure independence, it becomes clear that there is far less consensus on what qualities of the law ought to be included in the measure. Ríos-Figueroa and Staton (2014), in their survey of the literature, find much higher content validity and measurement consistency in the de facto measures of judicial independence than their de jure counterparts.[37] What is more worrisome is that the smallest correlation between the de facto measures is still larger

[32] Smithey and Ishiyama, "Judicial Activism in Post-Communist Politics."
[33] Herron and Randazzo, "The Relationship Between Independence and Judicial Review in Post-Communist Courts."
[34] Epperly, *The Political Foundations of Judicial Independence in Dictatorship and Democracy*.
[35] Hayo and Voigt, "Explaining de Facto Judicial Independence."
[36] Melton and Ginsburg, "Does De Jure Judicial Independence Really Matter?"
[37] Ríos-Figueroa and Staton, "An Evaluation of Cross-National Measures of Judicial Independence."

than the largest correlation between the de jure measures, suggesting a low level of concept validity. They partly attribute this to a lack of careful conceptual work on the incentive mechanisms for the various parts of different de jure indexes. Rather than looking to simply measure changes to formal rules, indexes of de jure independence "are looking to measure the incentives that rules are likely to induce, and these incentives are very much unobservable."[38] They conclude that, as of yet, there is no clear 'bundle' of characteristics which should constitute de jure independence.

2.3 Alternative Explanations

Interestingly, it is not formal rules which are the most prominent determinants of de facto judicial independence in the literature. One of the most prominent theories in the literature on judicial independence is that of political competition. This approach is particularly well-suited to explaining the creation of independent judicial systems, rather than their maintenance over time. It argues that a democratic political system with a high level of political competition ensures that judges behave independently. This is because politicians choose to empower and protect independent judiciaries as a form of insurance for if and when they next lose an election.[39] This is essentially the logic of the prisoner's dilemma, where the costs to politicians of an independent court (that can constrain government action) are high, but each still prefers this to an unconstrained political opponent. On the other hand, when political competition is minimal and successful re-election is highly likely, the incentives of keeping an insurance policy decrease. From the judge's perspective, regular alternations of power mean that judges, if their term durations exceed that of the terms of politicians, can count on troublesome politicians eventually being voted out of office. Relatedly, some literature emphasizes the importance of political fragmentation among veto players, for example between a bicameral legislature, within a coalition government, or between the legislative and executive branches.[40] The greater the number of actors involved in the process, the less likely they are to successfully unite to threaten the court.

An interrelated area of study is the effect of potential public backlash on judicial independence.[41] In this approach, governments are unlikely to take actions to capture a court if it seems politically costly, whether through elections or by the mobilization of civil society against them.[42] Relatedly, a judge may feel more comfortable ruling against the government's preference if they believe the electorate will support the legitimacy of their decision. In this sense, the potential for public backlash can affect the likelihood of a government to pursue legal changes which capture the court, as well as the likelihood of a judge or court to constrain government action. What is less studied but perhaps just as important is how perceived inefficiencies and corruption within judiciaries cultivate a public backlash against the courts themselves. Jay Krehbiel (2020) finds that the European Court of Justice, as an unpopular court in situations of high public awareness, is significantly more constrained in its decision-making and more frequently rules in favor of member states so as not to provoke public backlash and lose legitimacy.[43]

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[38] Ríos-Figueroa and Staton.
[39] Finkel, *Judicial Reform as Political Insurance*; Epperly, *The Political Foundations of Judicial Independence in Dictatorship and Democracy*.
[40] Bill Chavez, "The Evolution of Judicial Autonomy in Argentina."
[41] Whittington, "Legislative Sanctions and the Strategic Environment of Judicial Review"; Vanberg, *Establishing and Maintaining Judicial Independence*.
[42] Vanberg, "Establishing Judicial Independence in West Germany."
[43] Krehbiel, "Public Awareness and the Behavior of Unpopular Courts."

The democratic context of the country also affects the behavior of judges and political actors in both of the above explanations. Important qualities may include, but are not limited to, civil and political freedoms such as the freedoms of the press/expression/association, and the presence of free and fair elections. To some degree, the duration of democratic experience is also a factor. If judicial independence has not been fully normalized, and feedback mechanisms such as a free press or free and fair elections are not fully functional, the electoral costs of capturing a court may be lower. Maria Popova (2012) shows how variations in democratic context can alter the effect of the previously mentioned mechanisms.[44] She finds that in a case where political competition is high in a neither fully democratic nor fully authoritarian context, the benefits of capturing a court may exceed the potential costs from public backlash. Capturing the courts is thus a method to further ensure electoral success in a competitive political environment when public backlash through civil society mobilization and punishment at the polls is unlikely. This mechanism also applies to judges and courts. Gretchen Helmke (2002) shows that judges may rule against incumbents in an attempt to preempt any potential disciplinary action by the next expected government.[45] In this case, political competition in the sense of an alternation of power is insufficient to protect judicial independence, as judges still pre-emptively rule in the preferences of the incoming government.

While these are the most prominent strands of research on the determinants of judicial independence, these are certainly not the only explanations for de facto judicial independence in the literature. There are case-specific and judge-specific factors which have been shown to affect the level of de facto judicial independence. Certainly, some cases are more political or open to interpretation than others.[46] Similarly, individual judge characteristics undoubtedly affect de facto independence. These could be demographic, such as educational experience and attainment, place of birth, age, or professional experience.[47] Another factor of clear importance in the judicial decision-making process is the legal philosophy of the judge themselves. This can be influenced by legal education and precedent, international experts, or civil society groups.[48] This may also be influenced by the political ideology of the judge.[49]

2.4 Research Gaps

The literature which aims to explain de facto judicial independence, while rich, contains some research gaps which motivate the research topic at hand. First, very little research conducted on the relationship between de jure and de facto judicial independence has analyzed legal *changes*. Most cross-national studies (both within post-socialist Europe and globally) which have considered this question have built on fixed, static measures of de jure independence, rather than investigating the effects of these laws over periods of legal change. It is probable that laws matter more under certain conditions, and less under others. Perhaps codified rues have a greater impact

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[44] Popova, "Politicized Justice in Emerging Democracies."
[45] Helmke, "The Logic of Strategic Defection."
[46] Herron and Randazzo, "The Relationship Between Independence and Judicial Review in Post-Communist Courts."
[47] Matczak, Bencze, and Kühn, "Constitutions, EU Law and Judicial Strategies in the Czech Republic, Hungary and Poland."
[48] Matczak, Bencze, and Kühn; González Ocantos, *Shifting Legal Visions*.
[49] Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*; Ginsburg, *Judicial Review in New Democracies*; Harris and Sen, "Bias and Judging."

immediately after they have been changed than a set of rules which, having been the same for years, are subject to the gradual establishment of informal patterns of behavior. There is also reason to believe that legal changes to the courts may have different effects in different democratic contexts.

Secondly, there is a clear lack of conceptual work on which specific legal provisions constitute de jure independence, which combinations of laws are more or less effective, and if there are necessary or sufficient parts. There appears to be very little understanding as to how individual laws specifically affect the behavior of governments, citizens, and judges. For example, do judges empirically change their behavior in favor of the government if their salaries are malleable through statute by the legislature or executive? Do they actually respond to this disincentive, or do they call the government's bluff and continue to vote how they see legally befits the cases before them? Though these may initially seem to have obvious or intuitive answers, we really have very little idea about how these laws affect the incentive structures and the boundaries of the judicial decision-making process. Moreover, the majority of the empirical testing which has attempted to answer these questions has already made fundamental assumptions about how these laws operate because they rely heavily on composite indexes of de jure judicial independence.

Finally, and perhaps most importantly, there is the gap between academic thought and the political responses to these legal changes in the real world. The legal changes which have occurred in Hungary and Poland have been widely condemned by EU representatives and a majority of the member states as being fundamentally illiberal and antidemocratic. If de jure judicial independence is not a good in itself, but is valued because of the kind of judicial outcomes it is thought to produce, then these legal changes should only be condemned if they do in fact decrease the de facto level of judicial independence in those countries. Yet the academic conclusion has generally been that formal rules have a minimal impact, if any, on de facto independence, and that other factors are much stronger determinants of judicial independence in practice. If we truly value constitutional democracies with a separation of powers and a constitutional court which operates independently, then the gap between the academic consensus that such 'parchment barriers' do not matter, and the political consensus that these legal changes constitute a clear and present danger to not only judicial independence but to liberal democracy itself, needs to be bridged.

Chapter 3: Theory

This chapter outlines the expected theoretical mechanisms which link de jure and de facto judicial independence. Fundamentally, this research tests one of the central assumptions in most theories of judicial independence: that the outcomes of rulings actually change as the rules which govern the judiciary allow for more politicization. First, theoretical linkages between formal rules and behavior are discussed. Next, two distinct types of causal mechanisms are identified: 1) legal changes which alter the behavior of individual judges through incentives and disincentives, and 2) legal changes which alter the composition, competences, and cases of the court. Finally, a discussion of alternative explanations is included before a summary of the theoretical expectations.

3.1 Connecting Formal Rules and Behavior

There are more theoretical reasons to believe that politicization would cause a decrease in independent judicial outcomes than there is empirical evidence of the relationship. There exist many cases where de jure independence does not guarantee de facto independence, or where countries without constitutionally protected judicial independence– where laws governing the judicaries are open to normal legal change by a majority government– continue to respect judicial independence.[50] Empirically, de jure protections are insufficient, and sometimes unnecessary, to ensure de facto independence. However, as more recent studies acknowledge, this does not eliminate the possibility that laws can influence judicial behavior under certain conditions.[51]

To take a step back, the question of whether legal changes to the high court affects judicial outcomes implies that institutional change has the potential to alter court behavior. In essence, it assumes that formal rules can and do matter. This assumption is by no means taken for granted, and there has been fruitful debate over the relative importance of "formal institutions" versus "informal politics", especially within the growing literature on democratic consolidation and hybrid regimes.[52] While it seems clear from this literature that both formal institutions and informal politics can affect behaviors and outcomes, what is more interesting is the ways in which they may interact with each other. Hale (2011) notes that "recent theoretical work suggests that one of the ways that formal institutions can have political effects is by inducing change in informal rules… formal institutions may still matter, but not in the way theories and practitioners often assume."[53] This research does not attempt to concretely parse between the informal and formal mechanisms at play in affecting judicial outcomes. However, formal rules may have a greater impact on outcomes than previously theorized. The following theoretical mechanisms for how legal changes can affect judicial behavior and outcomes may be incomplete, with interactions between formal rules and informal practices also being part of the story.

A more specific version of this question is how constitutional text actually influences actors in practice. Constitutions are 'self-enforcing' in that they rely on checks and balances through each actor being incentivized to prosecute rule violations made by the others, rather than relying on an external entity to police actions within the system.[54] A legal text which specifies competencies, especially a constitutional text, reduces the potential for interference by other actors within the

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[50] Rankin, "Mapping Judicial Independence."
[51] Melton and Ginsburg, "Does De Jure Judicial Independence Really Matter?"
[52] Hale, "Formal Constitutions in Informal Politics."
[53] Hale.
[54] Weingast, "The Political Foundations of Democracy and the Rule of the Law."

system. By contrast, "any gap in that protection creates an opportunity that the other branches of government can exploit."[55] Clearer and more specific texts related to judicial independence incentivize the production of information about interference with the judiciary, especially when the competences originally shared by multiple actors are changed or centralized to be centered in only one actor.[56] As Melton and Ginsburg note, this is because each actor "has an incentive to protect its constitutionally assigned powers."[57] Thus, in the self-enforcing system, texts alter behavior insofar as the actors hold each other accountable.

3.1.1 Legal Changes to the Constitutional Court

These rule changes also affect the behavior of constitutional courts. The primary theoretical expectation of this research is that after legal changes which decrease de jure independence are enacted, the likelihood of the court ruling against the preferences of the government will also decrease. This occurs through two types of core mechanisms. The first mechanism (Type I) is via incentives and disincentives. Strategically, when a judge's tenure, promotion opportunities, or discipline is subject to a certain actor, their behavior should be tailored to the preferences of the entity they are accountable to. When legal changes are enacted which increase the politicization of the judiciary, judges become more accountable to government actors, such as members of parliament or the executive branch. Judges, as strategic actors, may then change their behavior accordingly and refrain from handing down a ruling contradictory to the preferences of the political actor regardless of the merits of the case.

If the judiciary is less dependent upon a government actor, by contrast, their behavior may cease to depend on the preferences of the government, instead depending on the merits of the case. For example, when a judge is accountable to an autonomous judicial council, they have an interest in ruling in a way that complies with the expectations of their superiors, which ideally is ruling in a professional and meritocratic way. It is important to note that this does not necessarily imply that the judges are, on an individual level, fully independent, as they may still be accountable to the judicial councils and superior judges.[58] However, in this example the judiciary as a whole is still independent from inappropriate influence of elected officials. This is also true if the number of actors involved in judicial governance is higher, and actor preferences are fragmented. For example, judges will be less beholden to the government as a whole if legal changes require multiple stages of consensus, such as decisions by an executive and bicameral legislature. The higher the number of veto players, the more diffuse the preferences of the government, and thus the more independent the judges.[59] Finally, it is also important to re-emphasize the point made by Vanberg (2008) that independence from undue influence by external actors is not incompatible with sanctioning mechanisms, such as the impeachment of a judge on normatively appropriate grounds.[60]

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[55] Melton and Ginsburg, "Does De Jure Judicial Independence Really Matter?"
[56] Elkins, Ginsburg, and Melton, *The Endurance of National Constitutions*; Melton and Ginsburg, "Does De Jure Judicial Independence Really Matter?"
[57] Melton and Ginsburg, "Does De Jure Judicial Independence Really Matter?"
[58] Ferejohn and Kramer, "Independent Judges, Dependent Judiciary"; Kosař, "Politics of Judicial Independence and Judicial Accountability in Czechia."
[59] Bill Chavez, "The Evolution of Judicial Autonomy in Argentina"; Melton and Ginsburg, "Does De Jure Judicial Independence Really Matter?"
[60] Vanberg, *Establishing and Maintaining Judicial Independence*.

The second type of mechanism (Type II) does not have to do with changing individual judge behavior, but rather with structural factors. These laws may influence the composition of judges on the court, the cases which may be reviewed, or both. In game theory terms, these laws can alter the inputs in terms of cases and judges, but do not incentivize behavioral change of the players. To demonstrate this more clearly, consider the examples of court appointments, which alters court composition, and procedural rules, which may change which cases are reviewed. If appointment processes become increasingly politicized, new appointees will be selected in part because the government responsible for appointing those judges believes they already hold political views which align with the government's own preferences.[61] This can be seen in cases as diverse as the United States,[62] Japan,[63] and Hungary.[64] Regardless of incentive structure, then, these judges should be more likely to rule in favor of the government which appointed them. If governments have more centralized power in appointing these judges (as opposed to appointment procedures which might require compromise between multiple veto players), it is likely that their rulings will more often fall in line with the government which selected them. Regarding procedure, if a legal change grants the government more power over the order in which cases are reviewed, that government may be able to prevent the court from reviewing a case they expect to be decided against them. As seen in these examples, different laws may each have their own specific causal mechanism. However, for the purposes of this research, these mechanisms will be broadly grouped into incentives (Type I) and structural (Type II) changes.

Furthermore, different combinations of these legal provisions may differently affect de facto independence. It is evident from existing literature that judicial independence is not additive in the sense that an extra constitutional provision for some aspect of judicial independence corresponds to a linear increase in de facto independence. Melton and Ginsburg argue that this is because "those who wish to interfere with courts need only find one hole in the judicial armor."[65] Instead, they expect that a specific combination of de jure qualities is necessary for effective judicial independence. The result of their analysis is that appointment and removal processes work conjunctively to best protect judicial independence. However, it is not clear why these should theoretically matter more than other characteristics. There is no reason to believe that, for example, a government hypothetically withholding a judge's salary is significantly different from removing the judge from the bench– both would be a warning to other judges and might alter the behavior of the remaining judges. Perhaps changes to appointment and removal processes are more frequently utilized in the constitutional states they analyzed, and were thus more frequently observed in their data, rather than those changes being substantially more influential than others.

It is quite possible, however, that mechanism is an important distinguisher in these bundles of legal changes. A possible difference between Type I and Type II changes is the degree of severity. Inducement (Type I) is normatively perceived as a greater threat to judicial independence than changes to structure (Type II).[66] However, it is not immediately clear whether this distinction also results in a difference in the level of de facto independence. Would a court with virtually no power with judges producing sincere opinions be more de facto independent than a powerful court filled

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[61] Epperly, *The Political Foundations of Judicial Independence in Dictatorship and Democracy*.
[62] Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*.
[63] Ramseyer and Rasmusen, *Measuring Judicial Independence*.
[64] Pócza, Dobos, and Gyulai, "The Hungarian Constitutional Court: A Constructive Partner in Constitutional Dialogue."
[65] Melton and Ginsburg, "Does De Jure Judicial Independence Really Matter?"
[66] International Bar Association, *Minimum Standards of Judicial Independence*.

with judges sufficiently intimidated by a government? The research here cannot test each of the mechanisms of each individual law– however, by grouping legal changes at the very least by these two mechanism types, it is possible that some clarity on this question can be gained. Still, Type II changes which centralize government control without blatantly incentivizing judges are likely to be more common in democracies, as they may not incur the same political costs as the introduction of Type I changes would. Therefore, we might expect to see a stronger effect of Type II changes empirically in constitutional democracies.

3.2 Incorporating Alternative Explanations

As outlined in the literature review, there are three important system-level factors which may also affect the level of de facto judicial independence: the level of political competition, potential public backlash, and democratic context. The research here does not intend to specifically test the influence of these factors, but does incorporate them into the further analyses. Political competition and public backlash affect both the decision of governments to pass laws which change legal protections for judicial independence, as well as the judicial responses to those changes. In cases with high levels of political competition and high levels of potential public backlash, de facto judicial independence should be very high because judges can assume that the government in power will eventually be voted out and that any government attempts to interfere with rulings by the court will be met with electoral costs and a hostile reaction by the public.[67]

Conversely, when the level of political competition decreases, judicial behavior should change based on expectations that a government will maintain power for longer. When this occurs in conjunction with legal changes which politicize the judiciary, the effect on judicial behavior is intensified because the perceived likelihood of that government leaving office decreases. If the level of potential public backlash is low, judges may feel that the public will not act against government interference in the judiciary.[68] This may be due to an apathy or distrust in the legal system, or a low capacity for civic engagement and mobilization. Judges may even fear a potential reversal of this mechanism, where judicial decisions which go against the normative preferences of the public provoke a backlash against the courts themselves.[69] Judges may then tread more carefully when handing down rulings if their legitimacy as an institution is in question. One would thus expect that the negative effects of politicization on judicial independence would be stronger in cases where civil society is less prominent or where the legitimacy of the courts, in view of the public, is lower.

Thirdly, it is important to incorporate democratic and temporal contexts into the theoretical expectations of the impacts of legal changes on de facto judicial independence. We would expect that legal changes which 'move' judicial independence in the opposite direction–for example, a legal change which theoretically limits judicial independence in a previously highly-independent institutional setting– has a greater effect than a legal change in the same direction. To give an over-simplified example: the hypothetical addition of constitutionally enshrined protections of judicial independence in a country like New Zealand or Sweden should not alter court behavior significantly, because de facto judicial independence is already high in those countries. Conversely, laws which further subordinate a judiciary which is already highly dependent on the

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[67] Epperly, *The Political Foundations of Judicial Independence in Dictatorship and Democracy*.
[68] Vanberg, *Establishing and Maintaining Judicial Independence*.
[69] Krehbiel, "Public Awareness and the Behavior of Unpopular Courts."

government should not alter judicial outcomes as much as a significant legal change in a mid-range case.

Finally, there are individual judge characteristics which could affect their decision-making and thus their dependence or independence on the court. The most well documented of these is political ideology: judges who are more politically aligned with a particular government should rule against the interests of that government less frequently. This is particularly relevant because it is theorized that if laws allow for a single government actor to have more centralized control over the selection of judges, the judges will likely be selected in part because they are perceived to be biased in favor of that government. Other demographic or case-specific factors may also come into play, but judge ideology is the most theoretically clear and empirically evidenced of these.[70]

3.3 Summary

The primary theoretical expectation of this research is that changes to de jure judicial independence can change the level of de facto judicial independence. This is theorized to occur through two types of mechanisms: incentive mechanisms (Type I), where individual judge behavior changes as a result of inducements and disincentives, and structural mechanisms (Type II), where compositional and procedural constraints affect judicial outcomes by changing the inputs (cases and judges) to the court without influencing the incentive structures of judicial decision-making. Because Type II changes are normatively perceived as lesser threats to judicial independence, we may observe a stronger impact of Type II changes empirically in constitutional democracies overall, simply because they are more likely to occur. However, in the case that both types of changes occur in a constitutional democracy, it is not yet clear whether changes to incentives or structure would be more impactful on actual judicial outcomes. In terms of contextual factors, a higher level of political competition and potential public backlash should mitigate the effect of legal changes which decrease judicial independence, whereas legal changes which occur in a context of low political competition and low potential public backlash should have a stronger negative effect on de facto judicial independence.

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[70] Segal, *The Supreme Court and the Attitudinal Model Revisited*; Ginsburg, *Judicial Review in New Democracies*; Harris and Sen, "Bias and Judging."

Chapter 4: Research Design

Having laid out the theory to be tested, this section explains the selected research methods. Using a comparative case study approach, a quantitative analysis is used first to analyze trends in constitutional court rulings, and then to investigate the effect of one specific legal change – that of a more politicized judicial appointment process – on individual judge behavior. First, the case selection strategy, data collection, and operationalization of the independent and dependent variables will be discussed. Next, the strategy for identifying effects of legal changes on judicial behavior is outlined. Two empirical questions are asked: firstly, are the high courts overall less likely to rule against the preferences of the government after laws are changed such that the courts are more politicized? To attempt to answer this question, a changepoint analysis will identify structural breaks in outcomes while logistic regressions will model the effect of legal changes on court behavior. Secondly, do more politicized judicial appointment processes actually lead to the selection of judges whose behavior is more observably biased in favor of the government which selected them? A network analysis will endogenously identify patterns of judge behavior, while a panel regression analysis will more rigorously test the effects of appointment process on the likelihood of a judge voting for or against a government's preferences. Together, these analyses will provide an overall picture of how judicial outcomes have changed over time, while also almost directly observing one specific mechanism which could potentially be a part of the causal story.

4.1 Case Selection

For this research, the comparative case study method is used. A comparative case study approach has the benefits of the single-unit case study where causal mechanisms can potentially be identified and traced without the biases of a larger cross-unit analysis. The addition of a second case allows for a stronger argument about causal relationships to be made, if similar relationships are observed within the two cases.[71] This is a popular case selection strategy, defined by Przeworski and Teune (1970) as the method of "most similar systems."[72] Case selection begins by defining the relevant universe of cases, identifying variables that should be similar or different within those cases, and choosing an appropriate number of cases based on those identified similarities and differences.[73]

The primary motivation in case selection is an observed change in the laws which govern constitutional courts. Specifically, this change should occur in a constitutional democracy (in a minimalist conception of the term) and in a way that theoretically alters the state of judicial independence. This kind of legal change is uncommon, as it may require constitutional amendment, and is generally a part of a democratizing 'shock' to the political system. It is unusual to observe significant changes to the laws governing the constitutional court after these transitions. Two prominent cases of such changes, however, are Hungary and Poland. To this author's knowledge, with the exceptions of Hungary and Poland, the only other significant legal changes in the region in the post-transition period are a constitutional amendment in 2003 strengthening the Romanian Constitutional Court[74] and a recent constitutional amendment passed in December 2020 in Slovakia, limiting the Constitutional Court's powers of judicial review. It is an implicit

[71] Gerring, "What Is a Case Study and What Is It Good For?"
[72] Przeworski and Teune, *The Logic of Comparative Social Inquiry*.
[73] Nielsen, "Case Selection via Matching."
[74] Kuti, "The Romanian Constitutional Court: Muddling through Democratic Transition."

hypothesis of this paper that formal rules can influence behavior and outcomes by changing strategic incentive structures and constraining or empowering different actors. In order to observe this mechanism, cases need to be selected in which the rules have changed over time. It is unique that legal changes in Hungary and Poland have occurred to such a significant degree (and in the same region), and it is this variation that will be leveraged in the research design.

The first case to be analyzed is that of Hungary. Legal changes regarding the Constitutional Court starting in 2010 were significant. Hungary has regularly made headlines as a primary example of 'democratic backsliding' in Europe. By many measures (both theoretical and empirical), Hungary had one of the strongest and most active Constitutional Courts in the post-socialist region.[75] Beginning in 2010, however, Fidesz held a two-thirds majority in the National Assembly and passed constitutional amendments which changed the existing procedures governing the Constitutional Court. Changes to judicial appointment processes included a proportional rather than parity vote and the addition of four seats on the Court.[76] The Court's competences were also restricted in cases regarding budgetary matters, and the Court was prevented from ruling on the constitutionality of any constitutional amendments. Crucially, this allowed the Fidesz super-majority to 'constitutionalize' legislation that had previously been ruled unconstitutional.[77] The majority of these changes are categorized as changes to structure (Type II). If laws do indeed affect behavior, this relationship should be clearly observed in the Hungarian case given the degree to which these laws changed. Finally, while the case was not selected upon this feature, because of the establishment of a predominantly bipolar party system dominated by MSZP and Fidesz, there is more ground on which to infer government preferences on the outcomes of a case, allowing for an analysis of court behavior past the general exercise of judicial review.[78]

The second case selected, Poland, is chosen for its potential to further investigate the theoretical distinction between the two mechanisms described in the previous section. Changes to the Constitutional Tribunal in Poland, initiated at the end of 2015, have been even more publicized than those in the Hungarian case. While these have not been constitutional changes, there have been many legal changes to the Tribunal which would theoretically affect the incentive structure of individual judges (Type I), explaining the greater amount of domestic and international outrage. In 2015, an attempt by both Civic Platform (PO) and then the Law and Justice party (PiS) to appoint five, rather than three, judges resulted in a legal battle between the Constitutional Tribunal, Supreme Court, and the government.[79] Finally, while there are many regional and historical similarities between Hungary and Poland, making the cases comparable, they also exhibit different contexts concerning competing factors. In Poland, PiS has not been as electorally successful as Fidesz has in Hungary, and in Poland a viable opposition remains a potential threat to the ruling party. Furthermore, the historically active civil society in Poland contrasts with the relative lack of civic engagement in Hungary (though this has recently become a realm in which the government

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[75] Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*; Stone Sweet, *Governing with Judges [Electronic Resource]*; Sadurski, *Rights before Courts*.
[76] Pócza, Dobos, and Gyulai, "The Hungarian Constitutional Court: A Constructive Partner in Constitutional Dialogue."
[77] Kovács and Scheppele, "The Fragility of an Independent Judiciary."
[78] Herron and Randazzo, "The Relationship Between Independence and Judicial Review in Post-Communist Courts"; Smithey and Ishiyama, "Judicial Activism in Post-Communist Politics"; Pócza, *Constitutional Politics and the Judiciary*.
[79] Wołek and Kender-Jeziorska, "The Polish Constitutional Tribunal : Deference beyond the Veil of Activism."

is taking a primary role.)[80] This allows for a potential comparison of the impacts of legal changes in different democratic and political contexts.

4.2 Data Collection

Within these countries, the level of analysis is twofold: the overall outcomes of the constitutional courts is first considered, and the behavior of the individual judges on those courts is then more carefully analyzed. Relevant data is widely available for the constitutional courts of these countries (Hungary: 1990 – 2020; Poland: 2002 – 2020). Constitutional court outcomes are also of greater interest to governments because they have the potential to constrain executive and legislative action, making government preferences on certain cases easier to establish. If the court is ruling on the constitutionality of a law passed by the government currently in power, we can assume the government prefers that the court not strike down the law.[81] A constitutional court is also a court of last instance, and therefore represents both the most powerful check on the executive and legislative branches as well as the last opportunity for the judiciary to act as such. The cases reviewed by the constitutional court are therefore some of the most important, if the political value of an independent judiciary partially comes from its ability to check the other branches of government. Finally, as per Linzer and Staton (2015), measures of de facto independence of constitutional courts have a 0.98 correlation to measures of de facto independence of all other national courts.[82] As changes to the constitutional courts in these countries have been accompanied by changes to the lower courts as well, analyses of the constitutional courts may also give a general indication of the state of affairs in national judiciaries as a whole.

Two original datasets per country were constructed for this analysis. Full texts of the court cases were scraped directly from the official websites of the constitutional courts.[83] Basic text analysis and searches for key phrases were used to code individual case outcomes, the type of complaint, the plaintiff type, the subject of the case, the date of the ruling, and the date of the law being reviewed (if applicable). Each case comprises one unit of observation. Some cases comprise multiple rulings (for example, finding a law consistent with one article of the constitution, but inconsistent with a different article). If substantial unconstitutionality was found in any part of the case, the case was coded as having found unconstitutionality. Types of unconstitutionality were not differentiated in the data (for an interesting analysis of the variety of unconstitutional rulings in Central Europe, see Pócza 2019).[84] If all complaints of unconstitutionality in the case were rejected by the court, the case was coded as being rejected. Other outcomes coded include an early termination or a suspension of the case, with no decision on the constitutional complaints. For each case, the votes of individual judges on each case are also recorded, which are used in the later analyses.

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[80] Schreier, *25 Years After*.
[81] Helmke, "The Logic of Strategic Defection"; Carrubba, Gabel, and Hankla, "Judicial Behavior under Political Constraints."
[82] Linzer and Staton, "A Global Measure of Judicial Independence, 1948-2012."
[83] "Alkotmánybíróság | Kezdőlap"; "Trybunał Konstytucyjny: Trybunał Konstytucyjny."
[84] Pócza, Dobos, and Gyulai, "The Hungarian Constitutional Court : A Constructive Partner in Constitutional Dialogue."

Table 4.1. Summary of Collected Data

	Hungary	Poland
Number of cases	10,303	1,151
Year Range	1990 – 2020	2002 – July 2020
Totals by outcome	Unconstitutionality established: 1,471 Complaint rejected: 7, 438 Procedure terminated: 2,042 Suspended: 64 None of the above: 232	Unconstitutionality established: 736 Ruled inconsistent with Constitution: 598 Law invalidated: 138 Complaint rejected: 415

4.2.1 Measuring De Jure Judicial Independence

The variation I aim to capture is the legal changes concerning constitutional courts which either a) alter the incentive structure enough to change judicial behavior, causing a judge to rule differently than they might otherwise have (Type I), or b) change the structural conditions such that, without judge behavior being altered, the government gets its way more often than before (Type II). However, there is little consensus as to what specific 'bundle' of characteristics should be included in a core index of de jure judicial independence.[85] While acknowledging that an all-encompassing measure of de jure independence cannot be achieved here, this section will focus on evaluating the theoretical mechanisms of how various legal changes might alter the outcome of interest: the likelihood that a case is decided against the preferences of the ruling government. Listed below in Table 4.2 are different characteristics which have been used in previous measures of de jure independence, and an indication of whether they are included in the following empirical analyses.

Table 4.2. Characteristics in Different Indexes of Judicial Independence

Characteristic	**Included in analysis?**
Judicial Review	Yes; structure (Type II)
Judicial independence provision in constitution	No
Judge tenure (duration)	Yes; structure (Type II)
Judicial removal processes	Yes; incentives (Type I)
Ability for decisions to be overturned by non-judicial actor	Yes; incentives (Type I)
Professional requirements for judge selection	No
Highest court has final say over lower courts	Duplicate
Difficulty in amending constitution	Duplicate
Appointment procedures	Yes; structure (Type II)
Re-election of judges	Yes; incentives (Type I)
Control over salary/resources	Yes; incentives (Type I)
Accessibility of highest court	Yes; structure (Type II)
Procedural control	Yes; structure (Type II)

[85] Melton and Ginsburg, "Does De Jure Judicial Independence Really Matter?"; Ríos-Figueroa and Staton, "An Evaluation of Cross-National Measures of Judicial Independence."

Disciplinary action	Yes; incentives (Type I)
Court-packing	No
Transparency	No

A majority of these characteristics have clear theoretical linkages to one of the two mechanism types outlined previously. The factors which operate via incentives and disincentives are considered, for the purposes of this research, to comprise a measure of Type I de jure independence. Specifically, if the ruling government can threaten to reduce a judge's salary, preemptively terminate the judge's term, or easily discipline the judge, there is a disincentive for judges to rule against the government's preferences. Relatedly, if the government can reward compliant judges with re-election or an elongated term, judges have an incentive to rule in the government's favor. The ability to overturn decisions is less clear; however, previous research has shown that as strategic actors, courts are less likely to rule against actors they believe will not comply with the ruling.[86] For this reason, it is included as a Type I change.

There are also structural factors which could theoretically affect judicial outcomes, some by altering the composition of the court. The most observable of these is the appointment process. If the executive can nominate a judge without needing consensus from other veto players, the government will likely install more highly partisan judges who they believe support the government's positions already. Regarding tenure duration, the length of a judicial post has no impact on behavioral independence, so long as the term length is fixed instead of malleable, and re-election is not an option. However, the effects of term length are moderated by appointment process. While a lifetime appointment may be no different from a ten-year term in a system where the appointment process requires consensus, a longer tenure in combination with a highly politicized appointment process may facilitate a court which rules much more often in favor of the government which selected them. As such, the scores for appointment and tenure are interacted in the measure.

Other structural factors may alter the types of cases reviewed and their outcomes. If a government has greater control over court procedure (even indirectly, such as through a chosen court President), cases may be allocated and ordered strategically in their favor. Similarly, if the competences of the court to rule on certain laws is limited, or if the requirements for bringing a constitutional complaint to the court are made more restrictive, the likelihood that a case is decided against the government's favor may decrease.

There are, however, certain characteristics in the literature which do not seem to be linked to de facto judicial independence. One is whether the constitution contains a provision for upholding an independent judiciary (or in this case, an independent constitutional court). At first glance, a constitutional provision for judicial independence would be an obvious signal that a government respects judicial independence. But a simple assertion should not matter if specific provisions, such as appointment or removal processes, were to go against it. At best, a general provision of judicial independence is a reflection of the other specific laws governing the judiciary; at worst, it

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[86] Vanberg, *Establishing and Maintaining Judicial Independence*; Carrubba and Zorn, "Executive Discretion, Judicial Decision Making, and Separation of Powers in the United States"; König and Mäder, "The Strategic Nature of Compliance."

has little to no influence.[87] This is supported by the various countries with no constitutional provision for judicial independence, but with long histories of de facto independence.[88]

Other characteristics on the list may be duplicates, or over-capture the same effect. This is true for the characteristics of "difficulty in amending constitution" and "highest court has competence over lower courts." An easily amended constitution should not matter in itself; it should matter if and when the ruling government actually changes the various other provisions, such as the judicial appointment or removal processes. The same goes for the highest court having finality over decisions made by lower courts. In the case of general judicial independence, it might be useful to include this in a measure of de jure independence; however, when looking specifically at constitutional courts, this effect is already captured by asking whether or not the court's decision can be overturned by any other actors. The level of professional requirements is a characteristic which in some contexts may arguably stand on its own; however, in the interest of a more parsimonious 'bundle' of characteristics, it will not be included. In this case, the effect should be captured by the analysis of appointment processes. Court-packing is not included for the same reason; the effect is captured jointly through the laws regarding appointment and removal processes. Transparency is not included, because it is possible that transparency could have cross-cutting effects. More transparency in the court may encourage sincere decision-making in situations where the ruling government prefers an independent high court, but discourage sincere decision-making where doing so could result in penalties if the government prefers greater control over the high court. Ultimately, either potential effect is dependent on the other factors, and so is not included. A summary of the coding for the independent variable is provided below. Composite, Type I, and Type II scores are calculated by averaging the components.

Table 4.3. Operationalizing De Jure Judicial Independence

Characteristic	Mechanism Type	Coding (1 = Independent, 0 = Dependent)
Judicial removal processes	Incentives (Type I)	1 if fixed retirement, 0 if determined by ruling government
Disciplinary proceedings	Incentives (Type I)	1 if immunity is high and exposure to disciplinary actions is low, 0.5 if exposure to disciplinary processes are moderate/exceptions to immunity are moderate, 0 if judges are expansively subject to disciplinary processes with no specified immunity
Ability for decisions to be overturned by non-judicial actor	Incentives (Type I)	1 if final, 0.5 if possible to overturn in irregular process, 0 if possible to overturn in regular process
Re-election of judges	Incentives (Type I)	1 if no, 0 if yes
Control over salary/resources	Incentives (Type I)	1 if autonomous to the Court, 0.5 if shared control, 0 if controlled by government statute
Accessibility to highest court	Structure (Type II)	1 if easily accessible, 0.5 if moderate restrictions on access, 0 if inaccessible
Procedural control over allocation of cases	Structure (Type II)	1 if Court controls procedure, 0.5 if shared control with government, 0 if government controls procedure
Judicial Review	Structure (Type II)	1 if all laws subject to judicial review, 0.5 if some laws restricted from judicial review, 0 if no judicial review
Judge tenure	Structure (Type II)	1 if longer than parliamentary terms, 0.5 if same length as parliamentary terms, 0 if shorter than parliamentary terms

[87] Melton and Ginsburg, "Does De Jure Judicial Independence Really Matter?"
[88] Rankin, "Mapping Judicial Independence."

Appointment procedures	Structure (Type II)	1 if selection process has more than 4 veto players, 0.5 if 2-3 veto players, 0 if 1

4.2.2 Measuring Judicial Outcomes

The outcome of interest is the probability of a constitutional court case being decided against the preferences of the ruling government (or of an individual judge voting against the government). To identify this from the data, two things need to be established. Firstly, the case must be reviewing an action by a government in the form of legislation passed by the parliament or decrees issued by the executive. Secondly, the preferences of the government at the time of the ruling in the Court must be identified. Preferences are identified by making two assumptions:

1) A governmment prefers that the laws it has passed are not struck down by the Court as unconstitutional.
2) In an established party system with clear divisions between two major parties, a political party would prefer that the laws its opponents have passed are struck down by the Court as unconstitutional.

The first assumption is one that is both intuitive and well-documented, and it is frequently used in evaluations of de facto judicial independence.[89] Though there are notable exceptions to this rule– for example, Whittington (2005) identifies instances in which government actors use the courts to strike down a law they did not want to pass in the first place[90]– these exceptions should not apply on the scale of thousands of court cases over decades. The second assumption is less well-documented and depends upon a level of polarization where one side's loss is the other's gain. To account for the possibility that the second assumption doesn't hold, all analyses will be conducted on two separate data sets: one using only laws which have been passed by the same government in power at the time of the case, and one using both assumptions to code government preference on a case. Finally, the ruling outcome is compared to the government preference and the final outcome – whether the case was decided in line with the government's preference, against its preference, or neither – is recorded for each case. The same process is performed for individual judge votes, after identifying which judges dissented on the cases in the sample.

It is important to note that this measure cannot account for all the particulars of the case because that level of specificity would require individual expert coding for tens of thousands of cases. This is a crucial area of study for analyzing more specifically the effects of politicized courts on the most important cases.[91] However, a significant difference in the overall likelihood of cases being decided in or against the government's favor still signals a normatively interesting change in court behavior. In the context of the literature on democratic backsliding and illiberal turns in democracies, a common theme is the importance of 'un-leveling the playing field' in subtle yet systematic ways.[92] There may be specific, ground-breaking decisions where the court's actions in either constraining or empowering a government are particularly important, but we should also

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[89] Helmke, "The Logic of Strategic Defection"; Ríos-Figueroa and Staton, "An Evaluation of Cross-National Measures of Judicial Independence"; Carrubba, Gabel, and Hankla, "Judicial Behavior under Political Constraints."
[90] Whittington, "'Interpose Your Friendly Hand.'"
[91] Eötvös Károly Institute, "Analysis of the Performance of Hungary's 'One-Party Elected' Constitutional Court judges between 2011 and 2014."
[92] Levitsky and Ziblatt, *How Democracies Die*.

care about how the court constrains the government overall and over time. It is the latter that is dealt with here.

4.3 Identification Strategy

The goal of this paper is to evaluate the impact of a formal rules change on behavior. As in the majority of political science research, the counterfactual of how the court would have behaved had the legal changes not occurred cannot be directly observed. However, a number of steps can be taken to strengthen or weaken the confidence about the likelihood of the existence of a causal relationship between a formal rule change and the resulting behavior.[93] Two overarching analyses will be performed: one at the level of constitutional court outcomes, and one on the level of the behavior of individual judges on those courts. The first aims to identify changes in the overall behavior of the constitutional courts, while the second investigates the explanatory power of the specific legal changes to the judicial appointment processes on how judges on the constitutional courts behave.

For the former, the first hint at a causal relationship is identifying a structural break in the outcome of interest – the likelihood of the court deciding a case against the preferences of the ruling government – at or just after the time of a significant rules change. This is followed by statistical modeling of the theorized relationship between the formal rules change and court behavior with logistic regressions.[94] For the latter, individual judge behavior is considered to better understand how one potential causal mechanism – that of the appointment process – operates. In this section, judge behavior is first visualized in a network analysis to identify clusters of judges who vote similarly. Next, panel regressions are estimated where fixed effects are incorporated at the level of an individual case, and the behavior of judges appointed through different processes are compared.

4.3.1 Structural Breaks and the Effect of Legal Changes on Court Outcomes

The key assumption made regarding the quantitative identification strategy used in this paper is that one clear sign of a change in court behavior is if there is a significant change in the overall likelihood of a case being decided in or against the ruling government's favor. Rather than testing whether a number of different hypothetical cut-off points are more or less related to actual trends in court outcomes, a data-driven approach is utilized.

First, the changepoint of greatest difference is calculated. In this analysis, a finite set of observations comprise the data, which is split into two samples. All possible variations of samples are used in the calculation of a two-sample hypothesis test. In this case, the Mann-Whitney test is used, as the outcome of interest is non-normally distributed. The observation at which the difference between the two samples is maximized and at which the test statistic meets the chosen threshold requirements ($p < 0.05$) is the identified changepoint of greatest difference.[95] This analysis is performed on the outcome of interest – whether or not a case was decided against the preferences of the ruling government – in the full sample, as well as on monthly and yearly proportions as robustness checks. If the changepoint identified within the data is during or just after the period of institutional legal change, there may be greater confidence in the results of the

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[93] King, Keohane, and Verba, *Designing Social Inquiry*.
[94] Aneshensel, *Theory-Based Data Analysis for the Social Sciences*.
[95] Ross, "Parametric and Nonparametric Sequential Change Detection in R."

statistical models, should they support the theoretical expectations. If, however, no changepoint exists, or the identified changepoint is long before the institutional change takes place, there may be strong reason to rule out the possibility of a causal relationship between legal changes and court behavior.

Secondly, a sequential changepoint analysis is used where multiple changepoints may be identified. After a designated burn-in (set at five percent of the total number of observations), each additional observation is treated as the end of a finite set and tested for changepoints, using the same threshold and specifications as above. In this way, multiple changepoints are identified through a sequential analysis of the data. This is useful because it illuminates the degree of variation within the data and allows for a greater comparison of the changepoint of greatest difference with other points of significant change.

When it comes to modeling the effect of legal changes on judicial outcomes, an ideal statistical model will pursue an exclusionary strategy to rule out alternative explanations, as well as an inclusive strategy to establish the existence of a relationship between the independent and dependent variables.[96] As the outcome of interest in this research is binary (whether the court rules for or against the government), a binomial logistic regression is the most appropriate method. Unlike the changepoint analysis, a logistic regression allows systems-level covariates, which may vary on the scale of years, to be included in the same model as variables which may change on the scale of individual cases. Because the coefficients produced from the logistic regression are not constant (as the underlying model is nonlinear), average marginal effects can be calculated to better interpret the effect of the independent variables of interest.[97] Models using the cut-off point indicating the time of the greatest institutional change, the composite judicial independence score, as well as the split incentives (Type I) and structural (Type II) scores will be estimated.

A number of control measures are also incorporated in the model. The most prominent competing explanations for de facto judicial independence included in the model are the level of political competition and the capacity/propensity of public backlash. Using election data,[98] a measure of political competition is constructed by subtracting the proportion of seats held by the largest opposition party in the legislature from the proportion of seats held by the ruling party. This ‘distance’ between the ruling and largest opposition party is then subtracted from one so that a higher measure connotes a higher level of political competition. The lower the measure, the lower the level of political competition and the greater the centralization of power in the ruling party and/or the greater the fragmentation of the opposition. While straightforward, this measure thus captures both the electoral success and relative power of the ruling government as well as the relative unity or fragmentation of the opposition.

$$1 - \left(\frac{ruling\ party\ seats}{total\ seats} - \frac{largest\ opposition\ party\ seats}{total\ seats}\right)$$

The level of potential public backlash can be broken into two components: the capacity of the public to sanction the government, and the propensity for the public to do so. The capacity component is more easily addressed. The public must have access to enough information via the freedom of the press and government transparency to be able to identify cases of inappropriate

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[96] Aneshensel, *Theory-Based Data Analysis for the Social Sciences*.
[97] Aneshensel.
[98] “IFES Election Guide.”

interference in the judiciary. They must also pose a credible electoral threat to those actors in the next elections, meaning elections must be generally free and fair. The V-Dem dataset contains measures for the freedoms of expression and association, election fairness, and a 'civil society participation index', which are all included.[99] To address the propensity component, a measure of the average level of public trust in the legal system is introduced, taken from the European Social Survey.[100]

Case-specific controls, coded on the level of an individual observation, are also introduced in the models. These include a dummy variable for the mention of European law in the case and the presence of dissenting opinions. Following previous studies,[101] variables for complaint and plaintiff types are included. It is impossible to fully control for the merits of the case in these analyses, but the inclusion of these controls mitigates that problem to as large an extent as is possible. Other strategies would have been pursued (for example, incorporating the presence of amicus briefs filed by civil society organizations), but these were not available for less recent cases, preventing these routes from being taken.

4.3.2 Judicial Appointments and Individual Judge Behavior

While the above analyses aim to identify a broad relationship between legal changes and court behavior over time, they do not constitute a direct observation of the causal mechanisms. For each legal change, a separate story of causal linkages could be analyzed. This is beyond the scope of the paper. However, analyzing individual judge voting behavior allows for a much closer examination of how changes specifically to the judicial appointment processes affect judicial outcomes. This is a particularly interesting mechanism to study, firstly because appointment processes throughout the democratic world are often politicized, and it is not yet clear at what point political involvement in constitutional court appointments becomes empirically detrimental to the judicial independence of those courts. This is a unique opportunity to study this mechanism, since the judicial appointment processes of both countries have recently been centralized in the hands of the ruling governments.

A first look at the data will endogenously identify trends in judge behavior through a network analysis. Individual judges will be represented as nodes connected by edges in a visualization of the network. Each time two judges vote the same way on a particular case, they receive a tally of 1. The greater the proportion of identical votes by two judges out of all instances where they were both present on the judging panel for the same case, the smaller the distance between judge nodes. This means that judges who vote more similarly proportionately more often will be visually closer together in the network plot. The results of the network analysis should give a first indication as to the clusters of judges who most often make similar decisions. Specifically, as we are interested in the judges who have been appointed through new procedures, a comparison of how integrated or isolated the newer judges are within other groups may hint at the effect of appointment process on judicial behavior overall.

To statistically model the effect of the appointment process on judge behavior, linear panel regressions with fixed effects at the case level are performed. By considering the time interval in

[99] Coppedge, "V-Dem Dataset 2020."
[100] "European Social Survey | European Social Survey (ESS)."
[101] Herron and Randazzo, "The Relationship Between Independence and Judicial Review in Post-Communist Courts."

which judges appointed through two separate selection procedures are simultaneously sitting on the court ruling on the same cases, the impact of the new judicial appointment process on the propensity of a judge to vote against the government can be estimated. The beauty of this design is that only the variation in voting behavior between judges within the very same cases is captured. As such, it is possible to fully control for the merits of the case, as well as any political contextual factors. If within the period that these two groups of judges coexist on the courts (2010 – 2016 in Hungary, 2015 – 2020 in Poland) there is a significant difference in the likelihood of these groups of judges to rule against the preferences of the government, the evidence of how appointment process affects judge behavior would become almost directly observable.

4.4 Summary of Theoretical Expectations

The overarching theoretical expectation of this research is that rules can and do influence behavior. It is expected that a significant change in judicial outcomes will be found just after legal changes are implemented in Hungary and Poland which decrease the de jure level of judicial independence of the constitutional courts. As these changes are implemented, I expect to observe a decrease in the likelihood of a case being decided against the government's preferences. Specifically, I would expect to find a structural break in the data around or soon after January 2012 in Hungary and around or soon after December 2015 in Poland. This would be reflected in the logistic regressions by a significant decrease in the likelihood of the court ruling against the government after the cut-off point, and would be further supported by a positive, statistically significant relationship between the de jure judicial independence scores and the likelihood that the court rules against the government. When looking at individual judge behavior, I expect that judges appointed after changes to the selection processes in both Hungary and Poland vote more cohesively than previous groups of judges before them, and are significantly less likely to vote against the government's preferences. This is because an increase in the government's ability to select judges without compromise or negotiation with other veto players should facilitate the selection of judges whose political and legal biases are more aligned with the beliefs and policy preferences of the government.

Chapter 5: Hungary – from Consensus to Majoritarian Institution

This chapter analyzes the behavior of the Hungarian Constitutional Court (HCC). It begins with an overview of post-communist Hungarian politics and the specific legal changes made to the HCC. Next, the data collection process and general trends of judicial outcomes over the past thirty years will be discussed. Two empirical questions are asked: is the HCC a less constraining force on the government after the legal changes to the Court, and is this partially driven by the ability of the government to more easily select more sympathetic judges to the Court? When looking at the behavior of the Court as a whole, the first statistical analyses identify a structural break in the pattern of judicial outcomes. After this, logistic regressions estimate the effect of legal changes on the likelihood of the HCC to rule against the government. Then, the focus shifts to individual judge behavior. The effect of different appointment processes is tested first through a network analysis of judge behavior, followed by linear panel regressions which only identify variation in judge behavior within individual cases. Overall, the results suggest that the formal rules change had a significant impact on the HCC's behavior, which is now significantly less likely to rule against the government. This appears to be partially driven by changes to the appointment process; judges recently selected by Fidesz are more biased in favor of the government which selected them when compared to the behavior of judges selected under previous appointment conditions.

5.1 Post-Communist Hungarian Politics

After the fall of the communist government in Hungary, the country had been held up as an example of successful democratization in the region.[102] A multi-party democratic system was established in 1989 under a partially revised version of the 1949 constitution. The legislature is composed of a single National Assembly *(Országgyűlés)* which elects the Prime Minister, based on recommendation from the Hungarian President. The President has a largely ceremonial role but can veto laws and is commander-in-chief of the armed forces. When the first round of democratic elections after the communist regime were held in May of 1990, a center-right coalition called the Hungarian Democratic Forum *(Magyar Demokrata Fórum)*, or MDF, was elected and governed from 1990 – 1994. Quickly after this, an alternation of power between the communist successor party on the left and a right-wing party was established. The Hungarian Socialist Party (*Magyar Szocialista Párt*), or MSZP, governed from 1994 – 1998, while a coalition of Fidesz, an abbreviation for the Alliance of Young Democrats *(Fiatal Demokraták Szövetsége)*, the MDF, and the Independent Smallholders' Party governed from 1998 – 2002. MSZP won the next two elections, holding office from 2002 – 2010. During this time, Hungary joined NATO (1999) and acceded to the EU (2004).

In 2010, a variety of key events converged in the victory of the Fidesz-KDNP coalition. The MSZP government had been hugely discredited, first from a leaked tape of a private speech by then Prime Minister Ferenc Gyurcsány saying that the government had "lied morning, noon and night" to the public, which was followed by the economic ruin of the financial crisis.[103] Fidesz leader Viktor Orbán was particularly effective in weaving the narratives of government corruption and empty economic promises by the EU and IMF together in a way that resonated with unprecedented numbers of the Hungarian population. In the first of multiple landslide victories,

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[102] Dawson and Hanley, "The Fading Mirage of the 'Liberal Consensus.'"
[103] Palonen, "Transition to Crisis in Hungary."

Fidesz, in coalition with the Christian democrats (*Kereszténydemokrata Néppárt*, or KDNP), won over fifty percent of the popular vote and received 263 out of 386 seats in the National Assembly, controlling 68% of the parliament. With over two-thirds of the seats, the coalition, if unified, could pass virtually anything they wanted. This resulted in a wide variety of changes, most notably a new constitution. The new constitution was an unfinished project, begun in 1990 with the country's return to democracy, but which had been left incomplete due to lack of consensus. The changes were vast, and did not stop, as numerous amendments to the Basic Law were passed.

It is interesting that Fidesz, despite its radical liberal origins, has drifted so far rightward under Orbán. With the supermajority it has maintained in the National Assembly, many other cardinal laws, which do not affect judicial independence but are seen as similarly threatening to liberal democratic governance, have been passed. Laws which allow the government to censor media, restrict the operation of international NGOs in the country, and which disproportionately favor Fidesz in elections have been introduced.[104] These actions, among others, have prompted statements of condemnation among EU bureaucrats and politicians from other member-states.[105] Many scholars have looked back and asked why the EU did not respond more strongly at the time of these changes. One explanation is that Fidesz was still a member of the EPP, the largest party in the European Parliament. Another factor is surely that European law regarding 'rule of law' attributes is so vaguely worded that it is unclear exactly which clauses of the European treaties the Fidesz government has broken. Orbán has used this to his advantage, and in the strictest sense, the majority of Fidesz's actions have been legal.[106] Still, some action has been taken on the EU level: Article 7 proceedings have been initiated, Fidesz has left the EPP after being temporarily suspended, and the conditioning of EU funds on certain rule of law indicators is currently being discussed.[107]

5.1.1 The Hungarian Constitutional Court and Legal Changes

In 1990, the institutional set-up provided for a very high level of judicial independence for the HCC, as per most measures of de jure independence.[108] Anyone could bring a complaint of unconstitutionality to the Court through *Actio Popularis*, the Court had expansive powers of judicial review, and judges were appointed through a parity vote process which required consent from all political parties represented in the National Assembly. Using the measures of judicial independence outlined in the previous chapter, the HCC scored the highest possible independence score on all factors except one: judges elected to the Court could be re-elected for up to two nine-year terms. Initially, the HCC was envisaged as having fifteen judges. However, as a compromise during the round table talks in 1989, the first five judges were elected by the provisional (unelected) government, and in 1994, when the five spots once again opened, the parliament passed a constitutional amendment changing the number of judges from fifteen to eleven.[109] This was the only legal change to the Court until the summer of 2010, when the newly-elected Fidesz–KDNP supermajority passed constitutional amendments changing the nomination and selection processes

[104] Kornai, "Hungary's U-Turn."
[105] "Interview - Rule of Law in Poland and Hungary."
[106] Kornai, "Hungary's U-Turn."
[107] "Fidesz Friendless in the European Parliament"; "Fidesz Flounces Out of EPP."
[108] Smithey and Ishiyama, "Judicial Activism in Post-Communist Politics"; Sadurski, *Rights before Courts*.
[109] Kelemen, "Appointment of Constitutional Judges in a Comparative Perspective - with a Proposal for a New Model for Hungary."

for judges and limiting the Court's powers of judicial review. The nomination process was changed from a parity to a proportional vote, meaning that if a political party held a majority in the National Assembly, it would hold nomination power, and if it held a two-thirds majority, it would also hold confirmation power over the judicial selection process.[110] Judicial review was restricted on cases concerning public finance law, except those related to "human dignity, the protection of personal data, Hungarian citizenship, or the freedom of conscience and religion."[111]

Quickly after this, these and other changes were codified in Act CLI on the Constitutional Court of 2011 and the new Basic Law (Article 24), both going into effect on 1 January 2012. These resulted in significant changes to the governance and functioning of the Hungarian Constitutional Court.[112] Effective on 1 January 2012, the Court was expanded from eleven back to fifteen judges. Terms were lengthened from nine to twelve years and are no longer renewable. The Court President is now elected by parliament, not by the judges themselves, as previously. The retirement age limit for constitutional court judges was eliminated (though for other judges it was lowered from 70 to 62 in 2013, resulting in the finding of an EU law violation by the European Court of Justice). Judicial review is restricted in that any amendments to the Basic Law passed by a two-thirds majority vote in the National Assembly cannot be the subject of substantive considerations of unconstitutionality.[113] Finally, *Actio Popularis* was abolished. This was followed by further amendments to the Basic Law in force on 25 March 2013, including an amendment preventing the HCC from applying legal precedent from the previous constitution.

These changes are coded as outlined in the previous chapter. The variation in the composite, Type I (incentives), and Type II (structural) scores is summarized below in Figure 5.1. It is interesting that while the Type II and composite scores for de jure judicial independence decrease, the Type I score actually increases. This is because very few Type I changes occurred, one of which being the elimination of renewable terms, increasing de jure independence. These scores are not meant to be linearly interpreted– for example, a 0.1 increase in the composite score is not theoretically linked to a 0.1 increase in de facto judicial independence. However, these measures are useful for representing different types of legal changes over time.

When looking at the variation in the different de jure scores, a cut-off point appears to occur around 2011 or 2012. The point of the largest institutional change in this case is 1 January 2012, when the new Hungarian constitution first went into effect. It is true that these were not the first legal changes to occur– changes to the nomination process were made in the summer of 2010, and judicial review was slightly restricted as well. However, a majority of the changes occurred with the new constitution. Moreover, a lagged effect is expected specifically with changes to the appointment process, since seats did not immediately vacate. Other changes, by contrast, should have immediate effects. Similarly, on 1 January 2012, the Court was expanded from ten to fifteen seats, amplifying the effects of changes to the appointment process. For these reasons, the identified cut-off point is 1 January 2012 when the new Hungarian constitution first took effect.

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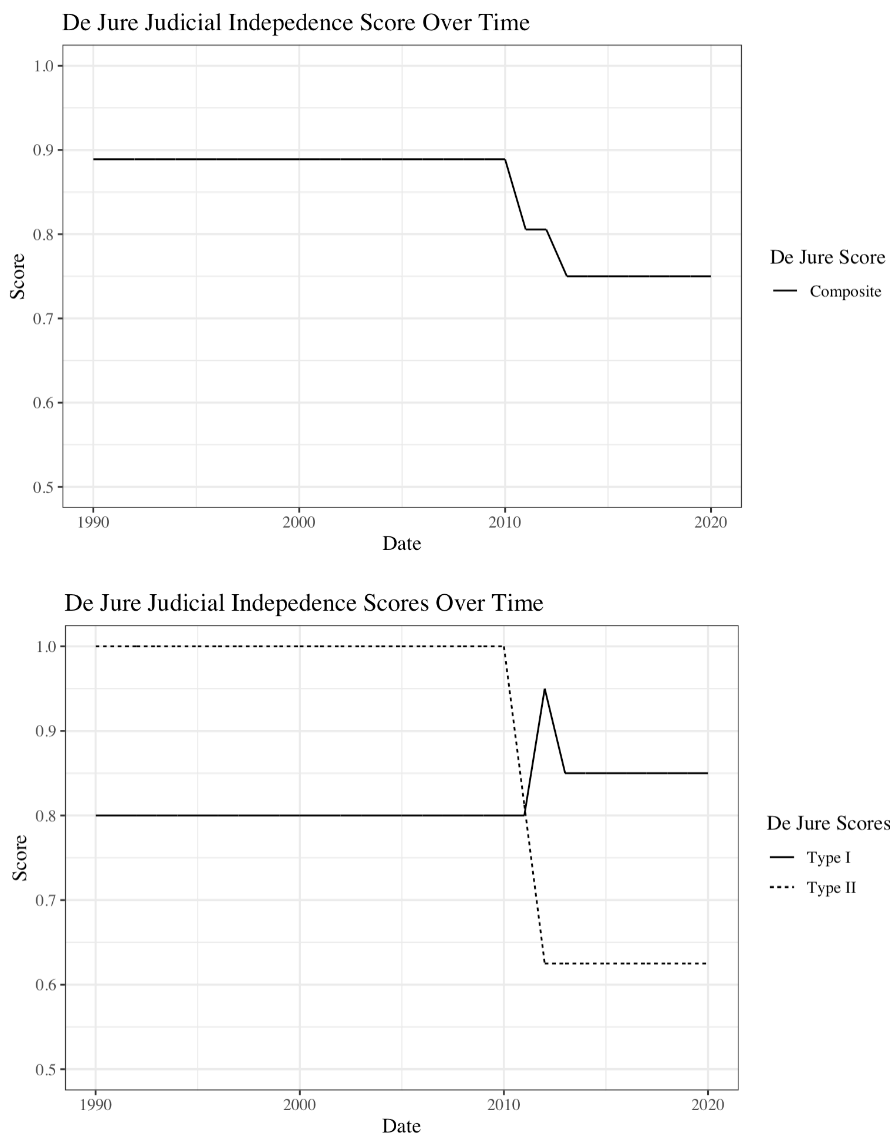
[110] Kovács and Scheppele, "The Fragility of an Independent Judiciary."
[111] Pócza, Dobos, and Gyulai, "The Hungarian Constitutional Court : A Constructive Partner in Constitutional Dialogue."
[112] Kelemen, "The New Hungarian Constitution."
[113] Kovács and Scheppele, "The Fragility of an Independent Judiciary."

Figure 5.1. Variation in the Independent Variable



5.2 Data Overview

As described in the previous chapter, an original dataset is constructed by collecting court cases directly from the HCC's website.[114] Each case is one observation, and an overview of the trend of outcomes over time is produced below in Figure 5.2. The two major outcomes are either that the constitutional complaint was accepted, and unconstitutionality of some kind is established, or that the constitutional complaint is rejected, and no unconstitutionality is found. Some cases are merely interpretive and contain no outcome, while other cases are terminated or suspended without an outcome.

[114] "Alkotmánybíróság | Kezdőlap."

Figure 5.2. HCC Case Outcome Types Over Time

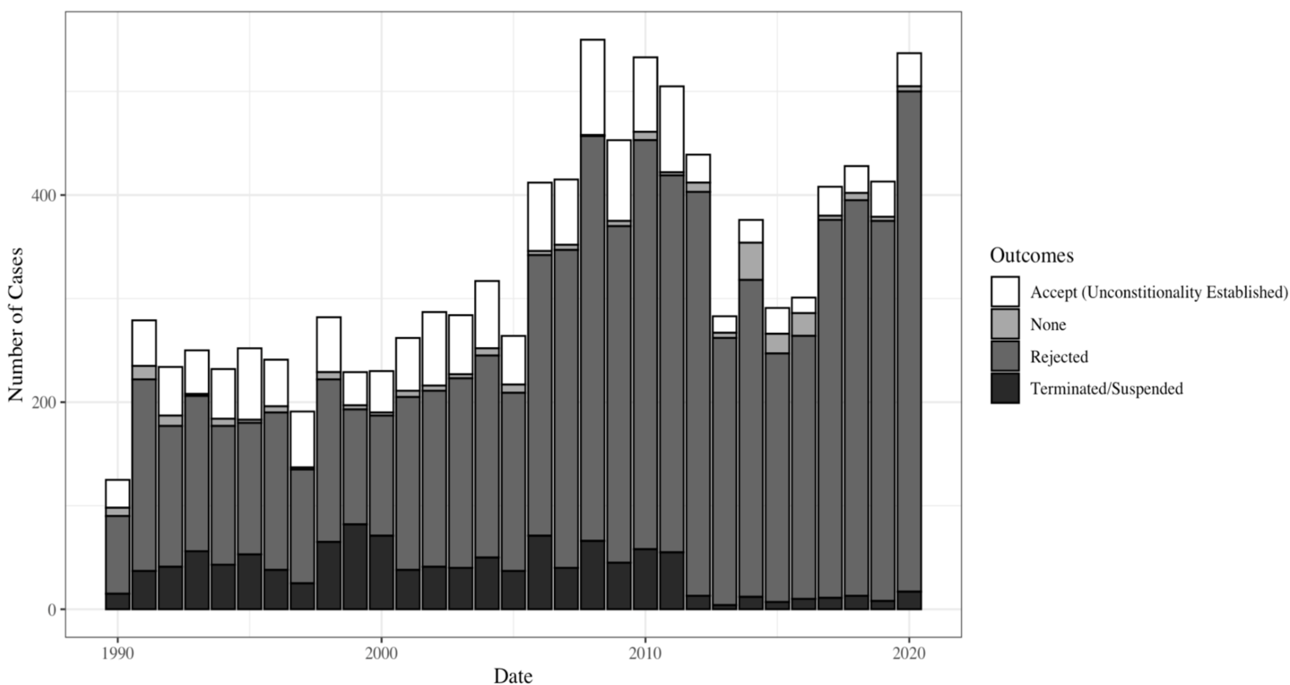
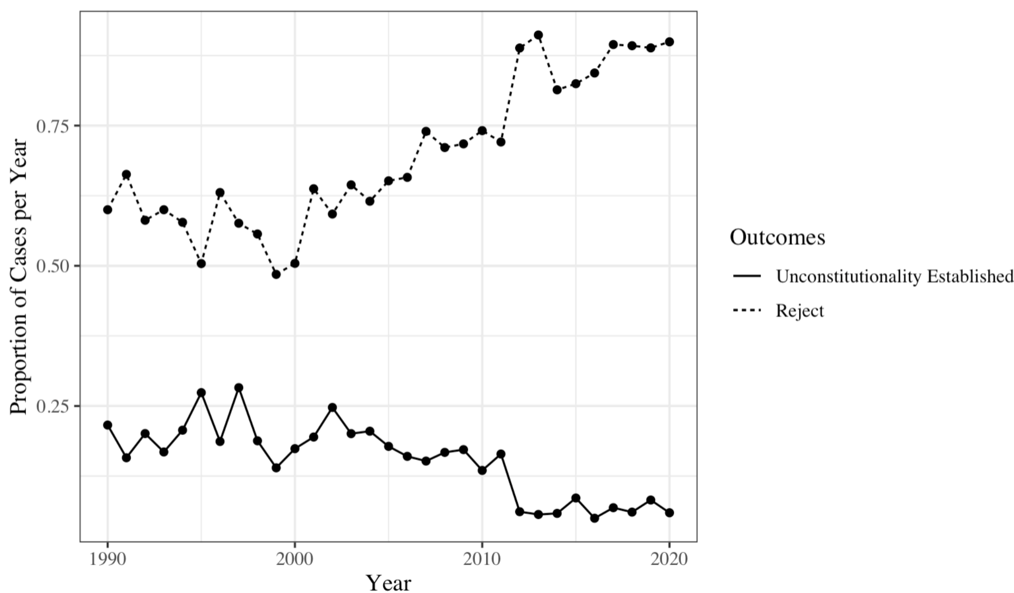


Figure 5.3. Proportion of Outcomes Over Time in the HCC



There are two important trends observable in the above graphs. Firstly, there are more cases being reviewed by the Constitutional Court on average than there were in the past. This could be a function of an increase in the number of laws. As more laws are passed and decrees are issued, there are more pieces of legislation to potentially be reviewed by the Court. The Comparative Agenda's Project tracks the amount of legislation adopted and decrees issued; it seems to generally

align with the heightened number of cases.[115] Secondly, the proportion of cases in which unconstitutionality is established is decreasing, while the proportion of cases in which the constitutional complaint is rejected are increasing.

5.2.1 Incorporating Government Preference

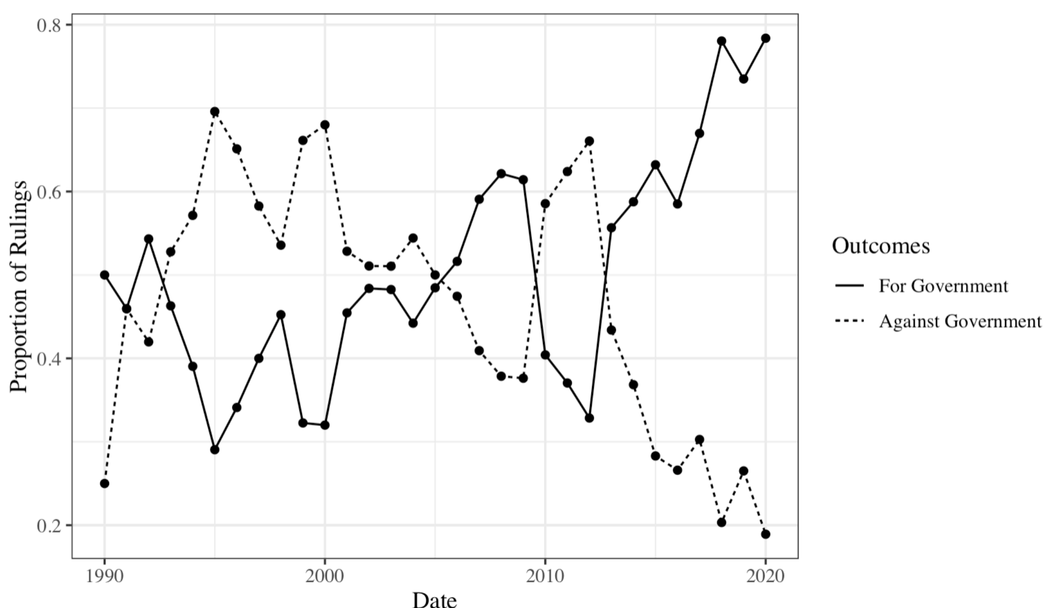
In the following analyses, the outcome of interest is not just whether a case was rejected or if unconstitutionality was established. This research is specifically interested in the likelihood of the Court to constrain the government in cases where the government has a reliable preference about the outcome of the case. To this end, two assumptions are made: firstly, that a government prefers its own laws to be upheld, and secondly, that a government prefers the laws passed by its political opponents to be struck down. The original data set is then subset to only include cases where the preference of the government at the time of the ruling can be established by these two assumptions. This also means that only cases reviewing laws or decrees passed by a national government are considered; government preference on a case reviewing the actions of a lower court, for example, would be more difficult to establish. This results in a full sample (*n = 4,947*) only dealing with laws and decrees where the preferences of the ruling government can be reasonably inferred. Outcome trends in the full sample are visualized in Figure 5.4.

Table 5.1. Outcome Totals in Original and Full Sample

	Original	**Full Sample**
Total number of cases	*10,303*	*4,947*
Year range	*1990 – 2020*	*1990 – 2020*
Complaint rejected	*7, 438*	*3,242*
Unconstitutionality established	*1,471*	*965*
Procedure terminated/suspended	*2,106*	*660*
None of the above	*232*	*80*
Against government preferences	*NA*	*2,441*
For government preferences	*NA*	*2,426*

[115] Boda, Sebők, and Pokornyi, "Hungarian Comparative Agendas Project (CAP)- Kormányrendeletek."

Figure 5.4. Proportion of Outcomes per Year in the Full Sample



5.3 Court Outcomes

5.3.1 Identifying Structural Breaks

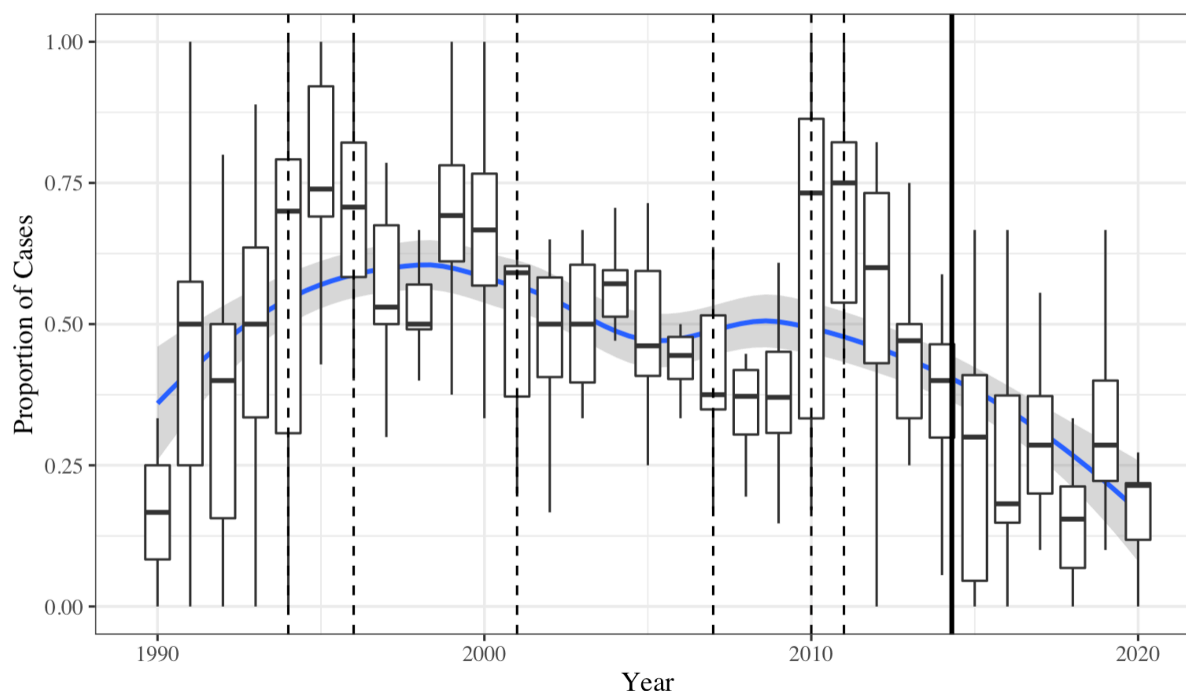
While the trend in outcomes shown above suggests that changes in the behavior of the HCC have taken place, it does not show exactly when that change occurred. A changepoint analysis can endogenously identify this point in the data.[116] The outcome of interest is whether the case was decided against the interests of the ruling government or not, and is measured such that one case constitutes one observation. The changepoint which maximizes the difference between samples and meets the test-statistic criteria is found to be 27 May 2014. When the same analyses are run on monthly and yearly proportions of cases decided against the preferences of the ruling government, the resulting changepoints are May 2014 and the year of 2013 respectively. This is, first and foremost, an interesting confirmation that the most significant change in judicial outcomes of the HCC began to occur after the institutional shocks of 2012.

What is even more interesting is comparing the point of greatest difference with the other changepoints identified in the data. 27 May 2014 is not the only significant variation in court outcomes over the last three decades. In a secondary analysis, the data is analyzed sequentially; as each observation is added, it is treated as a finite set and is tested for a changepoint.[117] The resulting points of significant variation in the cases which went against government preferences are reported below in Figure 5.5. Changes are identified in 1994, 1996, 2001, 2007, 2010, 2011, and 2014 respectively. This certainly gives a dynamic view of court outcomes. However, out of all these points of variation, the most drastic change occurred in mid-2014, where the frequency of the HCC ruling against Fidesz has decreased more abruptly than at any previous time in the Court's history. In Figure 5.5, a gradual strengthening of the Court can be seen from 1990 – 1995, followed by a

[116] Ross, "Parametric and Nonparametric Sequential Change Detection in R."
[117] Ross.

period of moderation from 1995 – 2009. Finally, the re-invigorated Court attempts to constrain the government from 2010 – 2012 but ultimately displays much weaker rulings until it is the least constraining it has ever been.

Figure 5.5. Changepoints in Monthly Proportions of Cases Against the Government



5.3.2 Modeling the Effects of Legal Changes

Now that a structural break in the data has been identified after the actual point of institutional change, it is time to model the impact of the institutional change itself. To estimate the effect of the legal changes to the HCC on whether or not a case was decided against the preferences of the ruling government, binomial logistic regressions are used. This allows for the inclusion of broader variables (that may vary over years) as well as case-specific controls. Four variations of logistic regressions are estimated from the data, looking at the impact of the cut-off point, composite, Type I, and Type II judicial independence scores on the likelihood of the Court ruling against the preferences of the government. Covariates for the competing factors of political competition, trust in the legal system, measures of democratic consolidation, the presence of EU law, and the presence of dissenting opinions are also included in the models, as well as control variables for complaint type, legal object (for example, a law or a decree), and sector of law being reviewed by the Court. The terms in the model are specified below.

$$Logit(JO_t) = \beta_0 + \beta_1(JI_t) + \beta_2(PC_t) + \beta_3(LEG_t) + \beta_4(DEM_t) + \beta_5(CN_t) + \epsilon$$

JO_t = The probability of the Hungarian Constitutional Court ruling against the preferences of the government.

JI_t = The judicial independence score (Cut-off, Composite, Type I, or Type II) at time t.

PC_t = The level of political competition at time t.

LEG_t = The average trust in the legal system at time t.

DEM_t= Democratic context measures from the V-Dem dataset, consisting of an election fairness measure, a civil society participation index, an index of the freedom of expression, and an index of the freedom of association, all at time t.

CN_t = Case-specific control variables for presence of European law, the presence of dissenting opinions, complaint type, legal object, and sector of law in the ruling.

The model (see Table 5.2 below) is estimated on the full sample of cases where government preference can be reasonably inferred. This includes all cases which deal with a law or decree which were passed by the ruling government, in which case the preferred outcome is that the law or decree is upheld, as well as cases which deal with a law or decree passed by a political opponent, in which case the preferred outcome is assumed to be that the law or decree is struck down. Average marginal effects of the independent variables of interest are also calculated and reported below.

Table 5.2. Modeling the Effects of Legal Changes on the Full Sample

	Case Outcomes			
	Aagainst Government			
	(1)	(2)	(3)	(4)
Cut-off	−0.656***			
	(0.154)			
JI Score		1.358***		
		(0.232)		
JI Type I			−0.065	
			(0.108)	
JI Type II				0.231***
				(0.060)
Political Competition	−2.280***	−2.834***	−2.153***	−2.527***
	(0.268)	(0.293)	(0.270)	(0.286)
European Law	0.024	0.029	0.026	0.023
	(0.105)	(0.105)	(0.104)	(0.104)
Trust in the Legal System	3.023***	4.565***	2.382***	3.496***
	(0.614)	(0.706)	(0.601)	(0.666)
Participation	−6.401***	−11.373***	−4.517***	−8.103***
	(1.336)	(1.734)	(1.300)	(1.586)
Clean Elections	4.184**	6.186***	4.250**	5.658***
	(1.638)	(1.688)	(1.663)	(1.691)
Association	1.375	−1.570	0.946	−0.536
	(2.084)	(2.140)	(2.088)	(2.113)
Expression	5.941***	7.006***	6.383***	7.049***
	(1.741)	(1.752)	(1.748)	(1.751)
Dissent	0.320***	0.345***	0.299***	0.318***
	(0.116)	(0.116)	(0.116)	(0.116)
Constant	−5.169***	−13.926***	−5.924***	−6.872***
	(0.918)	(1.543)	(1.257)	(0.870)
Complaint Type	Yes	Yes	Yes	Yes
Plaintiff Type	Yes	Yes	Yes	Yes
Observations	4,947	4,947	4,947	4,947
Log Likelihood	−3,200.065	−3,191.736	−3,209.019	−3,201.656
Akaike Inf. Crit.	6,440.131	6,423.471	6,458.038	6,443.312
Note:		*p<0.1; **p<0.05; ***p<0.01		

Table 5.3. Average Marginal Effects of the Independent Variables of Interest in Table 5.2.

Factor	AME	SE	Z	P	Lower	Upper
Cut-off	*-0.1495****	*0.0349*	*-4.2880*	*0.0000*	*-0.2178*	*-0.0812*
JI Score	*0.3084****	*0.0520*	*5.9309*	*0.0000*	*0.2065*	*0.4103*
JI Type I	*-0.0149*	*0.0246*	*-0.6051*	*0.5451*	*-0.0631*	*0.0333*
JI Type II	*0.0527****	*0.0135*	*3.9038*	*0.0001*	*0.0262*	*0.0792*

Firstly, there is a significant relationship between the cut-off point and judicial outcomes in the HCC. Cases are, on average, 15% less likely to be decided against the preferences of the ruling government after 1 January 2012. This supports the expectation that a decrease in the de jure judicial independence of the HCC leads to the Court being less likely to rule against the government. A similar relationship is found with the composite de jure judicial independence

score. When scaled from zero to ten, a one-unit increase in the composite score is associated with an average increase of 30% in the likelihood that the HCC rules against the government. Type I changes, which theoretically incentivize or intimidate judges, do not seem to be related to judicial outcomes in Hungary. This makes sense, given the relatively minor changes regarding incentive mechanisms. Structural changes, by contrast, are significantly related to judicial outcomes. A one-unit increase in the Type II de jure independence score is associated with an average 5.3% increase in the likelihood that the HCC rules against the government. In terms of covariates, it is interesting that a higher level of political competition does not seem to be associated with a higher propensity of the HCC to rule against the government, nor does the level of political participation. However, the other covariates seem to exhibit the expected relationships, where higher levels of trust in the legal system, freedom of expression, and clean elections are all associated with a higher propensity of the HCC to rule against the government. Overall, the results suggest that the significant change in court behavior is at least partially linked to the change in formal rules surrounding the structure and composition of the Hungarian Constitutional Court.

These results contradict much of the previous research on judicial independence in the region, which has found a tenuous to non-existent relationship between institutional protections and the exercise of judicial review.[118] Key to reconciling the results found here with past research is emphasizing that those studies have taken time-invariant measures of de jure independence, rather than evaluating instances of change. It is possible that the impact of de jure independence varies across contexts, and that institutional frameworks matter more in times of change and uncertainty than in times of stability. Moreover, many of the previous studies have looked solely at the exercise of judicial review, rather than identifying cases where different governments may have diverging preferences on the outcome of a case.

The above results are the combination of two samples: 1) cases dealing with laws or decrees passed by the same government in power at the time the case is decided, and 2) cases dealing with laws or decrees passed by the political opponents of the government in power at the time of the ruling. It would be interesting to know if the results were being driven more by the Court being less inclined to strike down laws passed by Fidesz over the last decade, or by being more inclined to strike down laws passed by MSZP. The logistic regressions can be estimated on a reduced sample to better understand how the institutional change has affected court behavior. The reduced sample contains only cases reviewing laws or decrees passed by the same government that is in power at the time of the ruling.

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[118] Smithey and Ishiyama, “Judicial Activism in Post-Communist Politics”; Herron and Randazzo, “The Relationship Between Independence and Judicial Review in Post-Communist Courts.”

Table 5.4. Modeling the Effect of the Legal Changes on the Reduced Sample

	Case Outcomes			
	Aagainst Government			
	(1)	(2)	(3)	(4)
Cut-off	−0.947***			
	(0.321)			
JI Score		0.441		
		(0.409)		
JI Type I			−0.547**	
			(0.247)	
JI Type II				0.247**
				(0.117)
Political Competition	0.251	0.316	0.355	0.065
	(0.430)	(0.509)	(0.429)	(0.491)
European Law	0.134	0.120	0.127	0.129
	(0.145)	(0.144)	(0.144)	(0.144)
Trust in the Legal System	1.799**	1.617	1.433*	2.021**
	(0.858)	(0.991)	(0.834)	(0.944)
Participation	−0.944	−0.311	0.110	−1.750
	(2.093)	(2.652)	(2.004)	(2.487)
Clean Elections	−2.155	−1.712	−1.009	−1.037
	(2.495)	(2.481)	(2.480)	(2.505)
Association	2.298	1.659	1.238	1.163
	(2.896)	(2.885)	(2.879)	(2.887)
Expression	3.443	3.898	4.415*	4.221*
	(2.531)	(2.515)	(2.510)	(2.502)
Dissent	1.277***	1.248***	1.251***	1.260***
	(0.148)	(0.147)	(0.147)	(0.147)
Constant	−3.627***	−8.227***	−0.965	−6.149***
	(1.361)	(2.531)	(2.472)	(1.151)
Complaint Type	Yes	Yes	Yes	Yes
Plaintiff Type	Yes	Yes	Yes	Yes
Observations	3,090	3,090	3,090	3,090
Log Likelihood	−1,692.217	−1,696.054	−1,693.987	−1,694.372
Akaike Inf. Crit.	3,424.433	3,432.108	3,427.973	3,428.744
Note:				*p<0.1; **p<0.05; ***p<0.01

Table 5.5. Average Marginal Effects of the Independent Variables of Interest in Table 5.4.

Factor	AME	SE	Z	P	Lower	Upper
Cut-off	*-0.1749****	*0.0591*	*-2.9572*	*0.0031*	*-0.2908*	*-0.0590*
JI Score	*0.0817*	*0.0756*	*1.0798*	*0.2802*	*-0.0666*	*0.2299*
JI Type I	*-0.1012***	*0.0456*	*-2.2189*	*0.0265*	*-0.1905*	*-0.0118*
JI Type II	*0.0457***	*0.0216*	*2.1141*	*0.0345*	*0.0033*	*0.0881*

There is still an observable relationship between formal rules change and court behavior in the reduced sample. The HCC is, on average, 17.5% less likely to strike down a law or decree passed by Fidesz after 1 January 2012. There is also positive, though insignificant, relationship between the composite judicial independence score and the likelihood of striking down a law or decree

passed by the government in power. Type II changes again are positively related to the likelihood that the Court strikes down a law or decree passed by the government– a one-unit increase in the scaled Type II score is related to a 4.6% average increase in the likelihood of the Court striking down the law or decree in question. This time Type I changes have the opposite effect, where an increase in the Type I score is associated with a slight decrease in the likelihood of the HCC ruling against the government. As before, in this case, it appears that the structural changes are doing the heavy lifting in terms of affecting judicial outcomes, and as these changes occur, the likelihood of the government getting its way increases.

Some preliminary normative implications of these results are of note. If the Court is designed to be a check on the executive and legislative branches, it may be problematic from a constitutional perspective that the Fidesz government is receiving favorable rulings at an all-time high. This is specifically seen in cases dealing with laws and decrees passed or issued by Fidesz. However, the data does not give any indication that the behavioral independence of individual judges has been compromised– firstly because the legal changes altering the incentive structure of judicial decision-making have actually changed in favor of judicial independence, and secondly because it seems as though structural changes are more influential in the statistical models.

5.4 Judicial Appointments and Individual Judge Behavior

Having established that overall court outcomes have changed as a result of the many legal changes to the HCC, the effect of one specific legal change is more rigorously investigated. This section focuses on how changes to the judicial appointment process influences judge behavior, and asks whether a more politicized appointment process leads to a court composed of judges who more likely to rule in favor of the government which appointed them. This question is analyzed first through a visual depiction of judge behavior, followed by a panel regression analysis with fixed effects included at the case level. The appointment process is an interesting mechanism to test. Despite the prevalence of differently politicized processes in constitutional democracies across the globe, we do not yet know at what level of political influence in the appointment process judicial independence actually becomes threatened. Moreover, in the context of the previous results which indicate that structural factors had a greater impact on the behavior of the HCC than changes to judicial incentives, a deeper analysis of one such structural factor is warranted. With the available data, this allows for an almost direct observation of one of the potential causal mechanisms.

5.4.1 Network Analysis

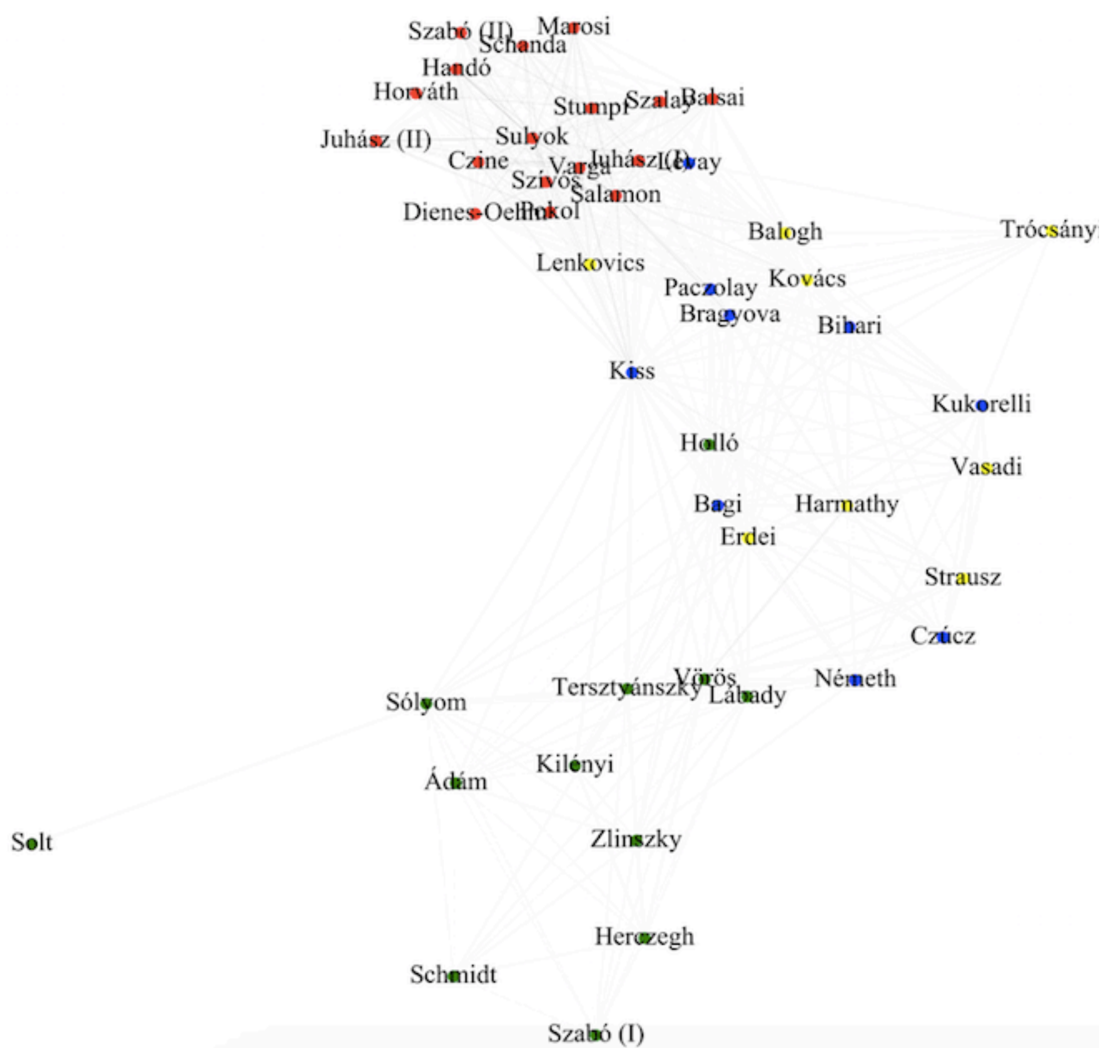
Judge behavior can be visualized with a network analysis indicating which groups of judges vote most similarly. The network is composed of nodes of judges connected by edges. The distance between two nodes is related to the proportion of times the judges voted the same way on a case. This means that the closer the two judges appear in the network plot, the greater the proportion of times the judges voted the same way out of all instances they appeared on the bench together. Judges nominated by distinct political groups are labeled with different colors in the plot. Regarding the political nomination groupings in Table 5.6, it is important to remember that while the parity selection process ensured that opposition political parties had a voice in judicial appointments, this often resulted in a system of negotiation where, for example, if two seats were

open, one left-wing and one right-wing judge would be selected, allowing for their categorization by political party.[119]

Table 5.6. Hungarian Judges by Party Nominations

First Court (green)	Left-Wing (blue)	Fidesz before 2010 (yellow)	Fidesz after 2010 (red)
Sólyom, Lábady, Tersztyánszky, Ádám, Vörös, Schmidt, Kilényi, Zlinszky, Szabó (I), Holló, Herczegh, Solt	Németh, Lévay, Kiss, Bragyova, Bihari, Kukorelli, Bagi, Paczolay, Czúcz	Erdei, Harmathy, Strausz, Kovács, Trócsányi, Balogh, Vasadi, Lenkovics	Szalay, Varga, Dienes-Oehm, Balsai, Juhász (I) and (II), Salamon, Pokol, Sulyok, Stumpf, Czine, Handó, Horváth, Marosi, Szabó (II), Schanda, Szívós

Figure 5.6. Network of Judge Voting Coalitions in the HCC



[119] Pócza, Dobos, and Gyulai, "The Hungarian Constitutional Court : A Constructive Partner in Constitutional Dialogue."

The network contains all judicial decisions from 1990 – 2020 on cases in the full sample where government preference could be reasonably inferred. To simplify the plot, the edges connecting judges are deliberately faded to make judge names and node colors more easily identifiable. Four groups are identified by node color in Figure 5.6: the original Sólyom court (green), the judges appointed by MSZP (blue), the judges nominated by Fidesz before legal changes (yellow) and the judges selected unilaterally by Fidesz after legal changes from 2010 to present (red). The network analysis supports previous findings that politicized courts existed before the legal changes, evidenced by the various groupings of left-wing and right-wing coalitions of judges.[120] However, it also shows the relative integration, variation, and isolation of the different groups. The judges selected by Fidesz after 2010 (red) comprise a much more tightly knit group than any of the previous judge groupings, indicating that they vote cohesively proportionally more often. Previous groups of judges, by contrast, appear to be relatively more flexible and more integrated with judges appointed by different political groups (for example, Bragyova, Paczolay and Bihari in relation to Balogh and Kovács). This would suggest that the previous judges were more flexible in their rulings, exhibiting some degree of political bias but also creating ad-hoc coalitions centered on specific issues or topics (for example, Erdei, Bagi, and Holló). It is possible that the judges unilaterally chosen by Fidesz vote more cohesively than previous groups of judges because they are more highly partisan.

5.4.2 Dissent Analysis

The apparent relationship between a more politicized appointment process and more cohesive voting behavior of those judges, seen above, can be tested through a panel regression analysis. From 2010 – 2016, judges of two distinct groups sit on the bench: those selected through parity vote procedure, which encouraged consensus and moderation in judge selection; and those selected via majority vote exclusively by Fidesz. A linear panel regression with case-specific fixed effects can estimate the effect of the new appointment process (the independent variable) on the propensity of a judge to vote against the preferences of the government (the dependent variable) within the same cases. Because both groups of judges operate in the same contexts when reviewing the case, the model naturally controls for factors such as the level of political competition or the type of constitutional complaint. Most importantly, by only capturing the variation between the behavior of the two types of judges within the very same case, the contents of that case are also controlled for. Only cases which required a full bench of judges are analyzed. This removes the potential bias of politicized case allocation, while also limiting the analysis to more salient cases. Cases preceding 1998 are not considered, due to the lack of political consolidation of the political parties which nominated and selected those judges.

In a true experimental setting, the assumption of random treatment assignment would need to be met. Clearly, judge nominations are not random– they are conditioned by the political leanings of the government in power and the perceived political leanings of the judges themselves.[121] This, however, is exactly how the appointment process is theorized to operate: governments desire judges which, after meeting some minimum qualifications, are likely to have similar political, legal, and policy philosophies as the government which selected them. The difference now is that the legal changes to the appointment process better facilitate this mechanism, allowing the

[120] Pócza, Dobos, and Gyulai.
[121] Pócza, Dobos, and Gyulai; Harris and Sen, "Bias and Judging."

government to select more highly partisan judges more easily than before. If changes to the selection procedure make it easier for a single government to select judges, and compromise with other political parties or actors is less necessary, it is expected they will select judges with more similar political leanings. Other potential factors which could influence judge behavior include demographic differences such as educational experience and attainment, legal experience, birthplace, or age. Upon examination, these do not seem to be likely confounders. All the judges are Hungarian, and many come from the same educational institutions, are members of the Hungarian Academy of Sciences, and have had similar professional experiences practicing and teaching law for many years.[122]

Table 5.7 presents the estimated effect of the different appointment procedures on judge voting behavior within cases where government preference can be reasonably inferred and where a full panel of judges was present. Judges selected via majority vote in the National Assembly were significantly less likely to vote against the government than judges nominated via parity vote when deciding on the same cases. When a control variable for political nomination group (either MSZP or Fidesz) is introduced, the effect of appointment process grows weaker and is not statistically significant. This suggests that the observed difference in voting is indeed political– Fidesz has been able to appoint judges to the HCC who are significantly less likely to vote against Fidesz's interests.

Table 5.7. Effects of Appointment Procedure on Judge Behavior in the HCC

	Individual Judge Votes	
	Against Government	
	(1)	(2)
New Appointment Process	−0.060**	−0.037
	(0.025)	(0.033)
Right-Wing		−0.038
		(0.036)
Years	2010-2016	2010-2016
Fixed Effects	Case	Case
Observations	734	734
R^2	0.009	0.010
Adjusted R^2	−0.062	−0.062
F Statistic	5.911** (df = 1; 684)	3.540** (df = 2; 683)
Note:		*p<0.1; **p<0.05; ***p<0.01

We might wonder to what degree this is simply a normal difference between judges selected by right-wing versus left-wing governments, rather than an amplification of political biases of judges selected through a more politicized appointment process. How differently did judges appointed by left-wing and right-wing governments behave before the laws regarding the appointment process were changed? Two other panel regression models are estimated with case-specific fixed effects,

[122] "Alkotmánybíróság | A Tanácsok Összetétele És Az Egyesbírók"; "Alkotmánybíróság | Jelenlegi Tagok."

where the only predictor for voting behavior is the political nomination group of the judge. Two time periods are analyzed: 1998 – 2002, when a Fidesz-coalition government was in power, and 2002 – 2010, when MSZP was in power. Generally, we might expect to see right-wing judges less likely to vote against the Fidesz coalition government, and more likely to vote against the MSZP government. However, there is no discernible effect of political nomination group during either of these time periods (Table 5.8). Judges selected by Fidesz are not less likely to vote against Fidesz from 1998 – 2002, nor are they more likely to vote against MSZP from 2002 – 2010. This suggests that the parity vote appointment process, which gave all political parties represented in the National Assembly a veto on judicial appointments, did in fact moderate the political biases of the judges that were selected. The more politicized appointment procedures, by contrast, seem to have resulted in more highly partisan judges who are significantly more biased toward the government which selected them.

Table 5.8. Effects of Political Nomination Group on Voting Behavior in the HCC

	Individual Judge Votes	
	Against Government	
	(1)	(2)
Right-Wing	0.017	0.031
	(0.050)	(0.031)
Years	1998-2002	2002-2010
Fixed Effects	Case	Case
Government in Power	Fidesz	MSZP
Observations	311	595
R^2	0.0004	0.002
Adjusted R^2	−0.099	−0.098
F Statistic	0.120 (df = 1; 282)	0.958 (df = 1; 540)
Note:		*p<0.1; **p<0.05; ***p<0.01

These findings show, firstly, that the judges Fidesz has recently selected are more likely to rule in Fidesz's favor than the other judges on the bench during this time, even when accounting for the legal merits of a case. The difference in behavior between right-wing and left-wing judges is greater from the period of 2010 – 2016 than in any of the past courts. This suggests that the polarization of the HCC has been heightened, and that the judges selected unilaterally by Fidesz are more highly partisan than the other judges on the Court. When comparing the results of these analyses with those from the rest of the chapter, the data suggests that the increase in the proportion of cases being decided by the HCC in favor of Fidesz could be partially driven by the more partisan behavior of judges selected through the new appointment procedures.

5.5 Discussion: Findings in Context

In 1990, many existing laws in Hungary were created under the communist regime. Specific laws governing the HCC had not been passed by the new parliament, so the Court was operating

in a low-rule, high-uncertainty context. The Sólyom court (1990–1998) is known for having been an activist court, and the precedent for a strong, independent constitutional court was set from its inception.[123] The Sólyom court frequently utilized constitutional requirements or constitutional interpretation in its initial rulings. From the period of 1990 – 1994, the Sólyom court delivered a smaller number of unconstitutional rulings, but these rulings were substantive, relying heavily on constitutional interpretations which constrained the future actions of the legislature and executive branch.[124] By contrast, from 1994 – 1998, the number of unconstitutional findings increased but exhibited more nuance, utilizing ruling types such as partial annulment or constitutional requirements. Thus, while the Sólyom court clearly set the precedent for a strong court with the potential to significantly constrain governments, its rulings became less severe as time went on. This would seem to be an encouraging trend: an independent but increasingly constructive court interacting with legislative and executive branches respecting the court's decisions and learning how to work within the new system of constitutional case law being created.

In 1998, a number of changes took place. In November, László Sólyom's second term as court president expired and János Németh took his place. It is also important to note the governments in power over this time period. The MDF governed from 1990 – 1994, after which the MSZP governed from 1994 – 1998. While Sólyom presided over a unified and relatively strong court, neither he nor his initial court has been characterized as leaning ideologically left or right.[125] However, during the MSZP's government, new judges had been nominated. By the time Fidesz first came to power in 1998 (in coalition with the MDF and the Independent Smallholders' Party), a left-leaning majority had been established in the court. Although the nomination process had informally developed the standard of nominating one right-wing and one left-wing candidate through the parity vote created in the ad-hoc committee, the actual election of judges was still a "highly politicized process, since it was the unicameral parliament which elected them with a two-thirds majority."[126] This is an important factor to keep in mind; the nomination system was not depoliticized or void of politics before the changes in 2010. However, it constrained politicization by giving opposition parties a veto, which forced compromise and encouraged moderation in the ideology of the nominees. This favored an ideological balance on the court, so long as alternations of power between right and left governments regularly occurred and different parties were represented in the National Assembly.

The period of 1998 – 2002 was the first clear ideological clash between a left-leaning court and a right-wing governing coalition. As both the data analyzed here and previous work show,[127] since many laws being reviewed by the HCC in 1999 and 2000 were passed by the previous MSZP government, there was an absolute decrease in the number of cases which found unconstitutionality. However, as evidenced in Figure 5.4, there is an increase in the proportion of rulings that go against the preferences of the Fidesz government during this period. This is a result of both the many rejections of constitutional complaints which concerned laws passed by the MSZP government, but also an increase in the proportion of unconstitutional findings regarding laws passed by the Fidesz coalition. By contrast, from 2002 – 2010, the proportion of cases decided in favor of the government continually increased. This is the first period in which clear networks

[123] Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*; Sadurski, *Rights before Courts*.
[124] Pócza, Dobos, and Gyulai, "The Hungarian Constitutional Court : A Constructive Partner in Constitutional Dialogue."
[125] Pócza, Dobos, and Gyulai.
[126] Pócza, Dobos, and Gyulai.
[127] Pócza, Dobos, and Gyulai.

of judges nominated by a specific party presents itself, seen with the MSZP-nominated judges (for example, Paczolay, Bragyova, Bihari). While the Fidesz government dealt with a left-leaning court from 1998 – 2002, MSZP continued to receive favorable rulings and was able to maintain a left-wing majority on the Court from 2002 – 2010. It is important to keep in mind, however, that in both of these instances, the majorities were barely majorities, as consensus was still required to nominate judges. Moreover, voting coalitions were not always on a left-right basis (for example, Erdei and Bagi, or Kukorelli and Vasadi).

In 2010, a short-lived spike in the proportion of cases decided against the government (2010 – 2012) can be seen. Having experienced an opposition court once before, it would appear the Fidesz leadership were keen not to repeat it. First, changes to the nomination and selection process for judges were made. Next, amendments were made to the constitution which included the expansion of the Court from 11 to 15 judges, the power for parliament (rather than the judges themselves) to elect a court president, the restriction of judicial review over constitutional amendments, and a modified constitutional complaint procedure. As mentioned before, not all changes were negative– renewable terms were abolished for judges. In the context of some of the longest-serving judges on the HCC and their record of voting in favor of the governments that re-elected them (for example, Kiss), this is an important improvement in the institutional set-up– though it does not appear to compensate for other changes.

It is interesting that the first judge nominated by Fidesz after the legal changes, István Stumpf, initially voted strongly against Fidesz. More interestingly is that four judges selected in 2016 (Horváth, Marosi, Szabó (II), and Schanda) were selected with the support of a Hungarian Green party, *Lehet Más a Politika* (LMP, Politics Could be Different) as a result of Fidesz losing seats in several by-elections in 2015.[128] These judges, however, do not vote significantly differently from the others nominated since mid-2010. By May 2013, the HCC was composed of a majority of judges selected via the new nomination procedures, which many experts argue (and as the data investigated here supports) was the turning point for the court.[129] From 2013 – 2020, the proportion of cases decided against Fidesz's interests dramatically decreases to levels previously unexperienced. The newly centralized judicial appointment process appears to be one factor driving this decrease, resulting in a more highly partisan court than in previous years. This suggests that when minority institutions are only protected from majoritarian capture through the assumption of a regular alternation of power and the supposition that no government will maintain high levels of popular support for long, the vulnerability of those institutions may be taken advantage of in the rare occurrence of an extremely strong democratic mandate. Moreover, the results here seem to support what Epperly (2019) suggests: that the mechanisms responsible for these changes have not been blatantly coercive; rather, part of the story in explaining why the HCC is now a less constraining force is because Fidesz has been able to select judges whose decisions more often align with the preferences of the government.[130]

5.6 Conclusions

The results of the empirical analyses presented here contradict the consensus in the judicial politics literature that formal rules do not serve to protect judicial independence in practice. The findings here show that the current Hungarian government is significantly less constrained by the

[128] Pócza, Dobos, and Gyulai.
[129] Pócza, Dobos, and Gyulai.
[130] Epperly, *The Political Foundations of Judicial Independence in Dictatorship and Democracy*.

Constitutional Court than any of Hungary's past democratic governments have been. That being said, the decrease in de facto judicial independence does not seem to have come as a result of judges being intimidated or incentivized to rule in favor of the government. Rather, the most influential legal changes in terms of 'un-leveling' the playing field appear to have been structural, altering the composition of the Court and the types of cases which are reviewed there. The results of the panel data analysis suggest that this change is at least partially driven by judges unilaterally selected by Fidesz who exhibit greater political bias than judges selected through consensus-based procedures. This makes a normative judgement of these outcomes less straightforward, since to a certain degree, installing judges whose beliefs align with the ruling government can be viewed as a democratizing force in an otherwise undemocratic institution such as the judiciary. The results found here do not support a certain normative interpretation of these events. They do, however, showcase the power of laws in altering judicial outcomes, and specifically show the resulting influence of politicized appointment processes in helping governments to achieve more favorable court rulings. Whether this is democratic or illiberal, representative or tyrannical, fundamentally good or fundamentally bad is up to the reader (and the political theorists).

Chapter 6: Poland – the Story of a Captured Court

This chapter analyzes data from the Polish Constitutional Tribunal (PCT) to evaluate the impact of legal changes on judicial outcomes. It follows the same structure as the previous chapter. First, the political context and the legal changes made to the Polish Constitutional Tribunal are described in detail, followed by a discussion of the data. Next, structural breaks in the outcome of interest are identified and investigated. This is followed by statistical modeling of the effect of legal changes on the likelihood of the PCT ruling against the government's interests. Then, the specific mechanism of how changes to the judicial appointment process affect judge behavior is investigated. A network analysis visualizes judge voting patterns, and linear panel regressions estimate the effect of appointment process on the propensity of a judge to vote against the government. The findings are discussed in political context and summarized.

6.1 Post-communist Polish Politics

The recent history of democratization in Poland is a rich one. The impact of Solidarity (*Solidarnośc*), both as a social movement as well as a labor union, is often cited as a driving force not only of the democratic transition which manifested in fully free Polish elections in May of 1990, but also of democratization in the region as a whole. The representative democratic system is semi-presidential, with a popularly elected President as the head of state, and the Prime Minister as head of government. The legislature is bicameral, composed of a lower (Sejm) and upper house (Senate). After the first free parliamentary elections, in which more than one hundred different parties participated, a variety of coalitions governed, as lustration laws and other post-communist political scandals affected governments and politicians of all sides. The system gradually consolidated, and since 2005, has been characterized by bipolar competition between the right-wing Law and Justice party (*Prawo i Sprawiedliwość* or PiS) and the centrist Civic Platform (*Platforma Obywatelska*, or PO).[131] PiS first led the government from 2005 to 2007. Lech Kaczyński won the presidential election in 2005, solidifying PiS's electoral victory. To form a government, however, two fringe nationalist-conservative parties were added to the coalition. This shifted moderate voters away from the party, as did political scandals surrounding two ministers in the government, which resulted in early legislative elections. In 2007, Civic Platform had a significant victory in the legislative elections; during this time, a PiS-president and PO-government cohabitated.

This was dramatically ended by the Smolensk air disaster, in which a plane containing 96 people, including President Lech Kaczyński, crashed on the tenth of April in 2010, killing all passengers. The Marshal of the Sejm at the time, PO-member Bronisław Komorowski, took over duties as president and, on the fourth of July, won the presidential election. Civic Platform continued winning elections (parliamentary, local, and European) until the presidential election in the summer of 2015, which Andrzej Duda (PiS) won. This was followed by a legislative landslide by PiS, which won absolute majorities in both the Senate and the Sejm.

[131] Fałkowski and Lewkowicz, "Are Adjudication Panels Strategically Selected?"

6.1.1 Legal Changes and the Polish Constitutional Tribunal

The Polish Constitutional Tribunal was established in 1985 by the Communist government as a response to the increasing pressure from Solidarity and other opposition forces. As a result, the institutional powers of the Tribunal were extremely limited, most obviously by a provision that a decision by the PCT could be overridden by a two-thirds vote in the Sejm.[132] Of the twenty post-communist courts reviewed by Smithey and Ishiyama (2000), the PCT as it was established in 1985 was the weakest in terms of their judicial power score.[133] Also of note were the appointment procedure for judges of the Tribunal: they were, and still are, nominated by political parties and selected by a simple majority in the Sejm, making it a fairly politicized process.

Despite the institutional limitations, the Tribunal "moved far beyond what the legislature had intended or anticipated," constraining executive administrative power even during the last years of Communist control, as well as exercising judicial review on many statutes after 1989 (especially relating to 'shock therapy' economic policies) and delivering rulings which established and protected unwritten *rechtsstaat* principles.[134] In 1997, a new Polish Constitution was approved via referendum which further empowered the Tribunal. Beginning in 1999, the Tribunal's decisions could no longer be overturned by a two-thirds vote in the Sejm (though this tool was only utilized 8 times, it surely played into the strategic decision-making of the Tribunal).[135] Moreover, access to the Tribunal was expanded via the individual complaint, and international law became a legitimate source of law for the Tribunal to draw on in its decisions. After its initial decade of operation, which by most accounts is considered a significant success story, the Tribunal returned to the background and, while generally considered an effective check on the executive and legislative branches in times of crisis, became "a low-profile part of the obligatory institutional package of democracy."[136]

All of this changed in June of 2015 when the Civic Platform government, a few months before the next parliamentary elections, amended the Act on the Constitutional Tribunal in an attempt to select judges for all seats which were to open in 2015. Five judges were selected, though two of those seats would not be vacant until after the parliamentary elections in October of 2015.[137] The Law and Justice party (PiS) won a legislative majority in both the Senate and the Sejm, as well as the Presidency in the presidential elections in May of 2015. The new government refused to seat all five judges elected by the previous parliament and, with yet another amendment to the Act on the Constitutional Tribunal, proceeded to elect five new judges instead. The Tribunal itself was called upon to rule on the constitutionality of the legislature's actions. On 3 December 2015, the PCT found (correctly, according to most legal scholars) that the three judges elected by Civic Platform whose seats were open before the parliamentary elections took place were legitimately elected, but that the remaining two seats were to be filled by the new PiS government.[138] President Duda, however, refused to swear in the three PO-elected judges and instead swore in all five PiS-elected judges. Tribunal President Andrzej Rzepliński then refused to seat the three

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[132] Schwartz, "Eastern Europe's Constitutional Courts. (Excerpt from 'The Self-Restraining State."
[133] Smithey and Ishiyama, "Judicious Choices."
[134] Schwartz, "Eastern Europe's Constitutional Courts. (Excerpt from 'The Self-Restraining State."
[135] Schwartz.
[136] Wołek and Kender-Jeziorska, "The Polish Constitutional Tribunal : Deference beyond the Veil of Activism."
[137] Kovács and Scheppele, "The Fragility of an Independent Judiciary."
[138] Sadurski, *Poland's Constitutional Breakdown*.

unconstitutionally selected judges. A standoff between the Tribunal and the government thus ensued.[139]

Throughout 2016, a variety of legal changes to the PCT were instituted. Many of these laws limited the PCT's capacity to exercise judicial review and control over internal procedure.[140] First, while the Polish Constitution only requires a majority decision by the judges on the PCT to nullify a law, new legislation passed in 2016 requires a two-thirds majority. Another law specified that any group of three judges on the Tribunal could request a full bench for deciding a case. In conjunction with a similar mechanism whereby any case being decided by a full bench can only proceed if the Prosecutor General (a political appointee) is present, any case can be indefinitely postponed with coordination between three judges and the Prosecutor General. The order of cases was also constrained: whereas cases were previously decided partly in order of importance, they are now decided in strict order of receipt, meaning that cases concerning recent government actions are pushed to the back of the line. Another change prevents a law from being reviewed until it has been in effect for at least six months, eliminating the preliminary norm control procedure entirely and ensuring that any law passed by the government takes effect for at least a short time. The Sejm can also more easily preemptively terminate a judge's mandate.[141] On top of this, the government has also simply refused to publish multiple decisions by the PCT.[142]

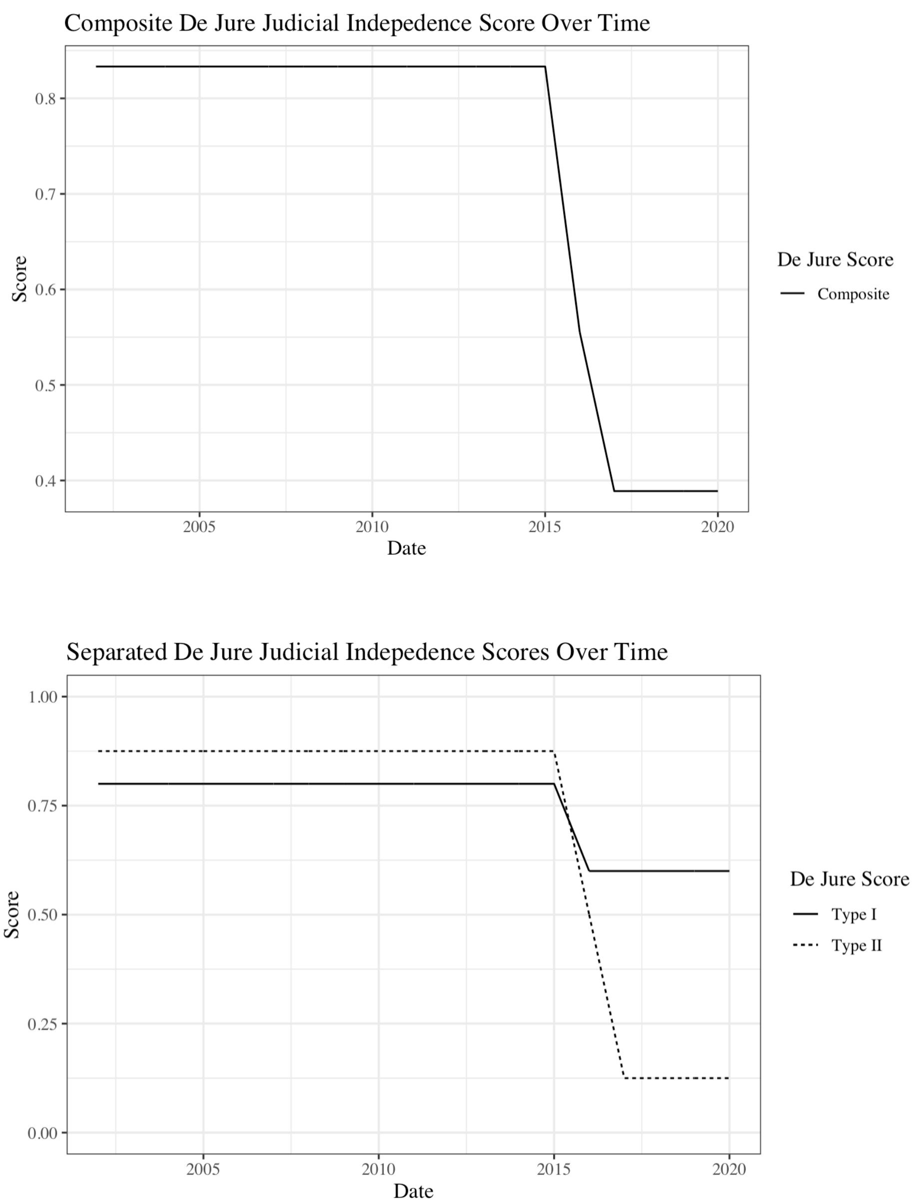
Another significant legal change was the creation of the position of Interim Tribunal President at the end of Rzepliński's term, given to Julia Przylebska. Previously, the Vice President of the Tribunal would have acted as President until the judges elected a new president, but this was changed via statute. Przylebska quickly admitted the three unconstitutionally elected judges just in time for them to vote for her as Tribunal President (while also operating outside standard court procedure).[143] A final significant legal change during this time concerned judge exposure to disciplinary proceedings. The Minister of Justice, also a political appointee, can now initiate disciplinary proceedings against a judge at their discretion. These proceedings are conducted by a special disciplinary officer, also a political appointee. They allow the use of evidence which would be inadmissible in normal court cases, judges can be tried in absentia, and there are no deadlines by which these procedures must be completed, meaning charges may be held against judges for an indefinite period of time.[144] Perhaps unsurprisingly, no further legal changes were enacted once the PiS-elected judges began to constitute a majority on the Tribunal in mid-2017– "at which time all these innovations were miraculously forgotten because they had become unnecessary."[145] These legal changes have resulted in interventions by European authorities such as the Commission and the European Court of Justice.[146]

In the context of these legal changes, it is important to note that most provisions of judicial independence in Poland are not enshrined in the constitution (as in the Hungarian case) but are changed through ordinary statute. The parliament has always had broad powers over the procedure of the Tribunal: "The organization of the Constitutional Tribunal, as well as the mode of

[139] Kovács and Scheppele, "The Fragility of an Independent Judiciary."
[140] Kovács and Scheppele.
[141] Bugarič and Ginsburg, "The Assault on Postcommunist Courts."
[142] Kovács and Scheppele, "The Fragility of an Independent Judiciary."
[143] Kovács and Scheppele.
[144] Kovács and Scheppele.
[145] Sadurski, "How Democracy Dies (in Poland)."
[146] "2020 Rule of Law Report."

proceedings before it, shall be specified by statute" (Article 197, 1997 Polish Constitution). However, as noted by Wołek and Kender-Jeziorska, the recent controversies surrounding the Tribunal should signal that it has "not been as unproblematic an institution as it seemed to legal scholars."[147] Many of these legal changes occurred all at once and can be conceived of as a cut-off point, identified as 22 December 2015. While this is not the first instance of a change in statute surrounding the PCT, this was the first amendment to the Act on the Constitutional Tribunal that began the barrage of restrictive legal changes against the Tribunal.[148]

Figure 6.1. Variation in the Independent Variable

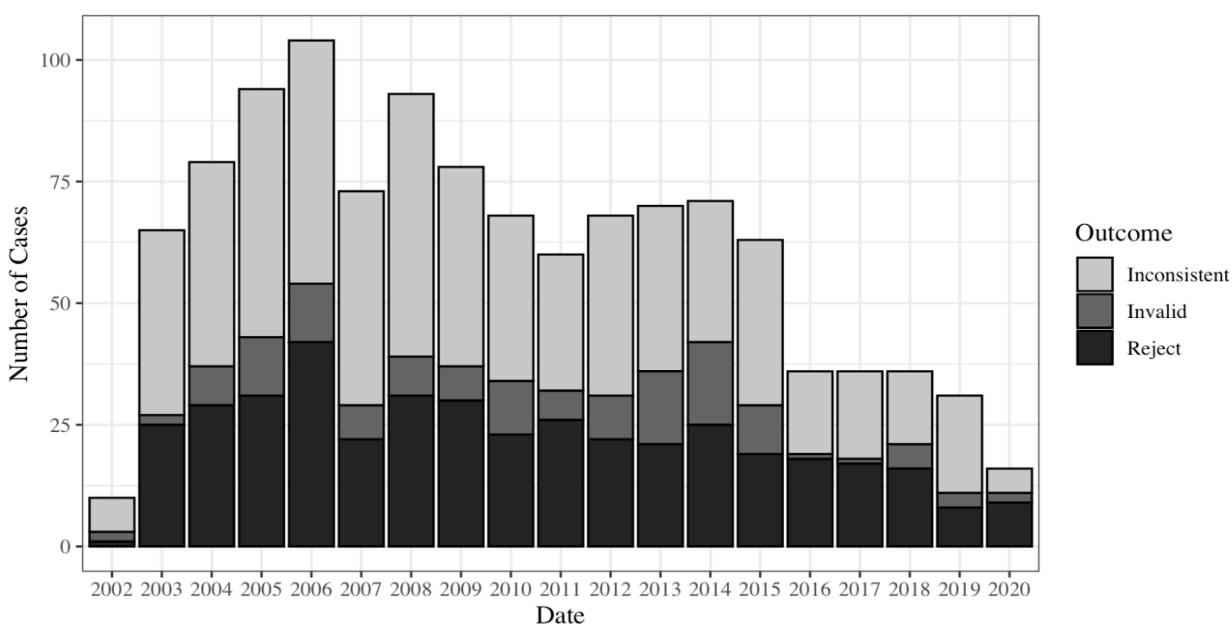


[147] Wołek and Kender-Jeziorska, "The Polish Constitutional Tribunal : Deference beyond the Veil of Activism."
[148] Sadurski, "How Democracy Dies (in Poland)."

6.2 Data Overview

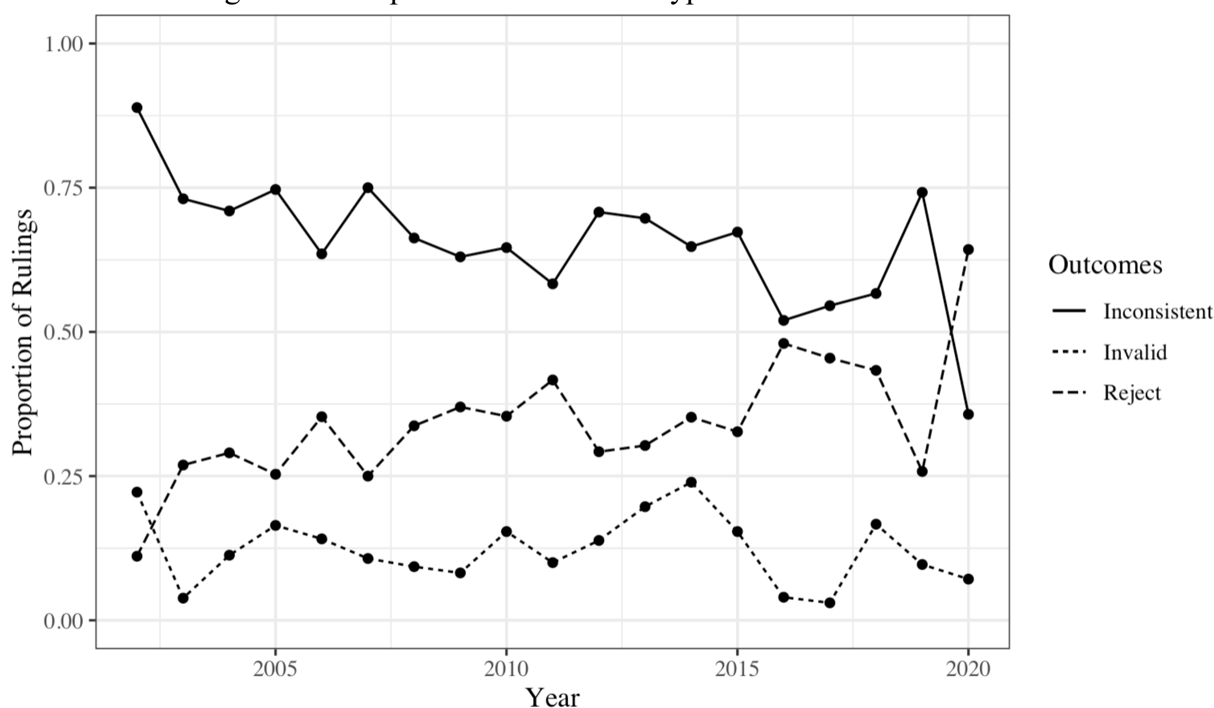
Constitutional Tribunal cases are collected directly from the Tribunal's website.[149] An original dataset is constructed where each case constitutes one observation. The PCT's caseload is significantly less than many other constitutional courts in the region; this is partly the result of a more stringent screening process.[150] Two distinct types of unconstitutional rulings are identified: a finding that a law, action, or judgement is inconsistent with the constitution, or the invalidation of part of or the entirety of the law, action, or decision directly. Though these are qualitatively different, they are both functionally substantive findings of unconstitutionality, and are considered together.[151] Cases in which no unconstitutionality is established are considered to be rejected. These trends are visualized below, both in absolute as well as proportional terms. It is clear that the number of cases being reviewed by the Tribunal significantly decreased in 2016. In 2002, the only cases available on the Tribunal's website took place in either November or December. The proportions of different case outcomes do not seem to change drastically over the observed time period, though the proportion of rejections has slowly increased over the years.

Figure 6.2. PCT Case Outcome Types Over Time



[149] "Trybunał Konstytucyjny: Trybunał Konstytucyjny."
[150] Wołek and Kender-Jeziorska, "The Polish Constitutional Tribunal : Deference beyond the Veil of Activism."
[151] Wołek and Kender-Jeziorska.

Figure 6.3. Proportion of Outcome Types Over Time in the PCT



6.2.1 Incorporating Government Preference

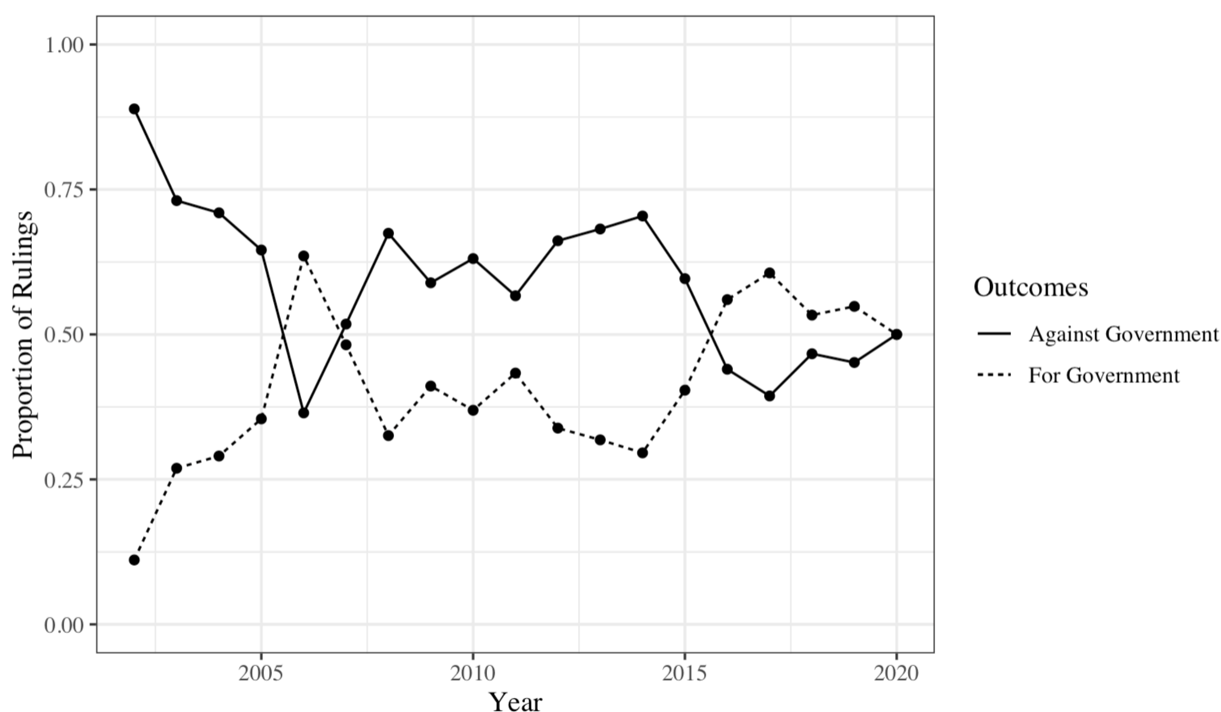
The outcome of interest is whether the Tribunal decided a case in line with or against the preferences of the government in power at the time of the case. Government preference is identified by assuming firstly that if a case applies to a law that was issued by the government, the government will prefer the law be upheld.[152] Secondly, it is assumed that if the case applies to a law passed by the political opponents of the government, the government will prefer the law be struck down. There are 1,014 cases in which government preference can be identified from these assumptions. A summary of the original data and the resulting full sample are provided below. Figure 6.4 visualizes the trends for the full sample, and shows that in 2016, the proportion of cases decided in the government's favor begins to exceed the proportion of cases decided against the government's favor.

[152] Helmke, "The Logic of Strategic Defection"; Carrubba, Gabel, and Hankla, "Judicial Behavior under Political Constraints."

Table 6.1. Outcome Totals in Original Data and Full Sample

	Original	**Full Sample**
Total number of cases	*1,151*	*1,014*
Year range	*2002 – 2020*	*2002 – 2020*
Complaint rejected	*415*	*339*
Inconsistent with Constitution	*598*	*545*
Law invalidated	*138*	*130*
Against government preferences	*NA*	*605*
For government preferences	*NA*	*309*

Figure 6.4. Proportion of Outcomes per Year in the Full Sample



6.3 Court Outcomes

6.3.1 Identifying Structural Breaks

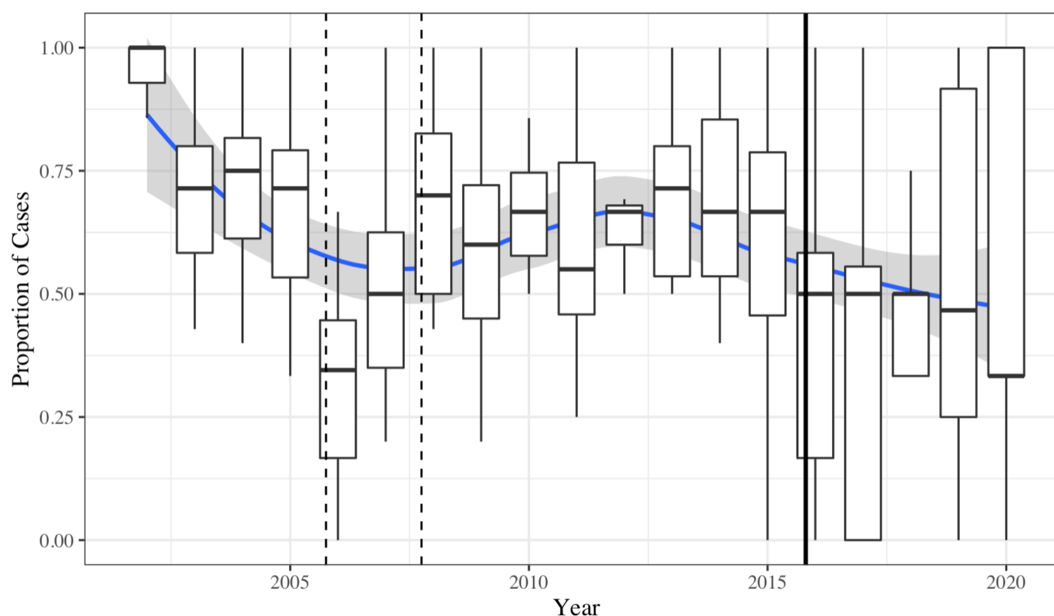
The trends in outcomes displayed above is less clear-cut than the trends of the Hungarian Constitutional Court. However, they do show some interesting variation, which will be analyzed through a changepoint analysis. The changepoint analysis is useful because it identifies a structural break from within the data itself, which can then be compared to the actual point of institutional change, 22 December 2015.

First, the point of greatest change is calculated from the outcome data. Every possible split in the data is tested for the maximization of the difference between the two samples– and, having satisfied the Mann-Whitney test statistic threshold, the changepoint of greatest difference is calculated to be 27 October 2015. While this is before specific legal change to the Tribunal began

to occur (by less than two months), this is still after the Tribunal was blatantly dragged back into politics, with the attempted court-packing by PO having already taken place, and just two days after the parliamentary elections were won in a landslide by PiS. The changepoint of greatest difference in the monthly and yearly proportions mirror this, as expected. These results cautiously suggest that a significant change in Tribunal behavior occurred nearly as the first legal changes surrounding the Tribunal were being installed, but certainly after the controversy surrounding various Tribunal appointments in 2015.

To calculate multiple changepoints, the data is analyzed sequentially such that as each observation is added, it is treated as a finite set and tested for a changepoint. If the thresholds of the test statistics are met and a changepoint is identified, the point is noted, and the next observation is then added and followed by another hypothesis test.[153] Only two other points are calculated: September of 2005 and 2007 respectively. This is particularly fascinating, since this was the time period in which PiS governed for the first time. It also establishes that behavior of the PCT varies less than one might expect, though it is possible that more variation would be visible if data for the years 1990 – 2001 had also been available. Yet the most significant change in outcomes to date has occurred near the end of 2015; since then, the Tribunal has less often ruled against the interests of the government. Though not entirely clear, given the slightly early changepoint estimate, these findings generally align with the theoretical expectation that a change would be detectable near the end of 2015.

Figure 6.5. Changepoints in Monthly Proportions of Cases Decided Against the Government



6.3.2 Modeling the Effects of Legal Changes

Having established that a significant change in court outcomes is present in the data very near the time of legal changes, the next step in identifying a possible causal relationship is to statistically

[153] Ross, "Parametric and Nonparametric Sequential Change Detection in R."

model the effect on outcomes. A binomial logistic regression is used, and the model specifications are reproduced below. Measures for potential competing factors have also been included in the model, as have case-specific characteristics to mitigate the problem of omitted variable bias. Four variations of the model are estimated: one estimating the effect of the cut-off point, one with the composite judicial independence score, and one with each of the separated judicial independence scores.

$$Logit(JO_t) = \beta_0 + \beta_1(JI_t) + \beta_2(PC_t) + \beta_3(LEG_t) + \beta_4(DEM_t) + \beta_5(CN_t) + \epsilon$$

JO_t = The likelihood, reported in log-odds ratios, of the Polish Constitutional Tribunal ruling against the preferences of the ruling government.

JI_t = The judicial independence score (Cut-off, Composite, Type I, or Type II) at time t.

PC_t = The level of political competition at time t.

LEG_t = The average trust in the legal system at time t.

DEM_t= The democratic context indexes from the V-Dem dataset, consisting of an election fairness measure, a civil society participation index, an index of the freedom of expression, and an index of the freedom of association, all at time t.

CN_t = Case-specific control variables for presence of European law, the presence of dissenting opinions, complaint type, and plaintiff type.

The results of the full sample estimation are displayed below in Table 6.2. The majority of the results support the theoretical expectations. Firstly, while there appears to be a possible decrease in the likelihood of a case being decided against the government's preferences after 22 December 2015, the effect is not statistically significant and is thus unclear. However, all three measures of de jure judicial independence are positively associated with the likelihood of the Tribunal ruling against the government's preferences in line with theoretical expectations, and all of these relationships are statistically significant at the $p < 0.05$ level. It is interesting that both Type I and Type II changes produce significant effects. It is shocking that such significant changes regarding Type I mechanisms, which essentially operate through judge intimidation, have occurred in a constitutional democracy like Poland. These seem to have had a chilling effect on the ability of the Tribunal to act as a check on the ruling government.

Table 6.2. Modeling the Effects of Legal Changes on the Full Sample

	Case Outcomes			
	Against Government			
	(1)	(2)	(3)	(4)
Cut-off	−0.489 (0.581)			
JI Score		0.387** (0.168)		
JI Type I			0.498** (0.245)	
JI Type II				0.280** (0.121)
Political Competition	−3.489*** (0.778)	−3.701*** (0.761)	−3.696*** (0.766)	−3.673*** (0.758)
Expression	−0.168 (1.906)	−3.662 (2.474)	−0.322 (1.911)	−5.744* (3.118)
Clean Elections	−18.528*** (6.841)	−17.466** (6.838)	−17.559** (6.850)	−17.545** (6.829)
Participation	0.550 (2.392)	−0.567 (2.294)	−0.525 (2.341)	−0.441 (2.266)
Association	12.936 (8.915)	10.202 (8.062)	9.143 (8.403)	11.426 (7.893)
Trust in the Legal System	2.695 (2.208)	3.377 (2.124)	3.350 (2.138)	3.298 (2.116)
European Law	0.092 (0.246)	0.086 (0.246)	0.088 (0.246)	0.086 (0.246)
Constant	8.684 (8.685)	11.179 (7.906)	8.200 (7.539)	12.833 (8.222)
Complaint Type	Yes	Yes	Yes	Yes
Plaintiff Type	Yes	Yes	Yes	Yes
Observations	1,014	1,014	1,014	1,014
Log Likelihood	−1,007.504	−1,005.191	−1,006.217	−1,004.698
Akaike Inf. Crit.	2,061.007	2,056.381	2,058.434	2,055.396

Note: *p<0.1; **p<0.05; ***p<0.01

Table 6.3. Average Marginal Effects of the Independent Variables of Interest in Table 6.2.

Factor	AME	SE	Z	P	Lower	Upper
Cut-off	*-0.1105*	*0.1314*	*-0.8413*	*0.4002*	*-0.3681*	*0.1470*
JI Score	*0.0874***	*0.0380*	*2.2967*	*0.0216*	*0.0128*	*0.1619*
JI Type I	*0.1126***	*0.0554*	*2.0334*	*0.0420*	*0.0041*	*0.2210*
JI Type II	*0.0633***	*0.0274*	*2.3092*	*0.0209*	*0.0096*	*0.1169*

To put these results in context, the average marginal effect of each independent variable of interest is also calcuated. In order to better interpret the average marginal effects of the three judicial independence scores (composite, Type I, and Type II), they are transformed to a 0 – 10 scale. The average marginal effect of a one-unit increase of the composite judicial independence score is an 8.7% increase in the likelihood that the PCT rules against the government's preference. This is complemented by an 11.3% average marginal effect of a one-unit increase of the Type I score, and a 6.3% average marginal effect of the Type II score. These results suggest that Type I

legal changes may be just as influential as Type II changes, if not more so, in explaining the observed change in judicial outcomes in Poland.

As a robustness check, the same models are estimated on the reduced sample, where only cases which consider laws passed by the same government in power at the time of the ruling are considered. The results, if anything, are stronger for the reduced sample. All three de jure scores are positively related to the likelihood of the Tribunal ruling against the government and are significant at the $p < 0.05$ level. A one-unit increase in the composite judicial independence score (on a scale of 0 – 10) increases the likelihood of the Tribunal ruling against the government by an average of 14.3%. A one-unit increase in the Type I score results in an increased average likelihood of this outcome by 19%, compared with 10.5% for a one-unit increase in the Type II score.

Table 6.4. Modeling the Effects of Legal Changes on the Reduced Sample

	Case Outcomes			
	Against Government			
	(1)	(2)	(3)	(4)
Cut-off	−1.301 (0.950)			
JI Score		0.710** (0.289)		
JI Type I			0.944** (0.382)	
JI Type II				0.524** (0.223)
Political Competition	0.745 (1.042)	0.779 (1.037)	0.707 (1.037)	0.833 (1.036)
Expression	−2.876 (3.366)	−9.533** (4.709)	−3.864 (3.302)	−13.199** (6.104)
Clean Elections	7.137 (9.246)	9.550 (9.267)	8.893 (9.223)	9.805 (9.304)
Participation	2.363 (3.071)	1.582 (2.984)	1.537 (2.997)	1.701 (2.975)
Association	−5.828 (12.007)	−7.860 (11.432)	−8.587 (11.439)	−7.070 (11.423)
Trust in the Legal System	−6.508** (3.013)	−6.375** (2.966)	−6.320** (2.949)	−6.436** (2.975)
European Law	−0.251 (0.296)	−0.243 (0.297)	−0.241 (0.296)	−0.245 (0.297)
Constant	3.121 (10.372)	3.784 (9.505)	−1.981 (8.797)	7.575 (10.398)
Complaint Type	Yes	Yes	Yes	Yes
Plaintiff Type	Yes	Yes	Yes	Yes
Observations	728	728	728	728
Log Likelihood	−666.155	−662.476	−663.583	−662.073
Akaike Inf. Crit.	1,376.309	1,368.953	1,371.166	1,368.146

Note: *p<0.1; **p<0.05; ***p<0.01

Table 6.5. Average Marginal Effects of the Independent Variables of Interest in Table 6.4.

Factor	AME	SE	Z	P	Lower	Upper
Cut-off	*-0.2624*	*0.1915*	*-1.3702*	*0.1706*	*-0.6377*	*0.1129*
JI Score	*0.1427***	*0.0580*	*2.4593*	*0.0139*	*0.0290*	*0.2564*
JI Type I	*0.1901***	*0.0768*	*2.4746*	*0.0133*	*0.0395*	*0.3407*
JI Type II	*0.1053***	*0.0447*	*2.3580*	*0.0184*	*0.0178*	*0.1929*

Overall, these results tentatively support the theoretical expectations outlined in Chapter III. Though the decrease in the likelihood of a case being decided against the government's preference after the cut-off point is not statistically significant, the de jure scores all have a significant positive relationship with the likelihood that the Tribunal rules against the preferences of the government. Interestingly, in comparing these results to those in the Hungarian case, Type I changes are possibly a stronger explanatory factor than Type II changes, though both are clearly influential. This is potentially worrisome, because Type I changes operate through direct incentivization and intimidation of judges by government actors. Not only have these changes increased the avenues by which the government could hypothetically reward or punish judges on the PCT, but the results suggest they may have partially led to a decrease in the constraining role of the Tribunal. These results are specifically driven by the Tribunal being less likely to strike down laws passed by PiS since December 2015. It is also interesting that no reliable effects of other included covariates appear in the models, contrasting with the relative reliability of the impact of legal changes.

6.4 Judicial Appointments and Individual Judge Behavior

While this research cannot test all the theorized causal mechanisms of each legal change individually, one mechanism– that of changes to the appointment process– can be more rigorously investigated. In theory, a more politicized appointment process should allow the government to more easily install judges who are more politically aligned with the government, and who will thus rule in favor of the government more often. This section is dedicated to investigating whether this is indeed the case. While the analysis up to this point has used Tribunal outcomes as the unit of observation, an analysis of individual judge votes allows for a deeper investigation of how new practices in judicial appointments affect judge behavior. This data can be leveraged so as to gain more clarity on how at least one of the legal changes specifically operates to affect judge behavior and court outcomes.

An important clarification on this point is that the core appointment process itself did not change in Poland; judges are still selected by a simple majority in the Sejm. The difference is rather that new statutes which contradict existing law and constitutional provisions have been passed and are utilized in the appointment of new judges. Most clearly, the selection of three of the initial five judges selected by PiS in December 2015 were ruled unconstitutional, but their places on the Tribunal were declared legal by statute.[154] After Julia Przylebska became President of the Tribunal, she facilitated the early opening of seats for more PiS-sympathetic judges to be installed, preliminarily terminating the tenure of other judges.[155] Judges Piotrowicz and Pawlowicz were selected in December 2019 despite their being older than the mandatory retirement age in what

[154] Sadurski, "How Democracy Dies (in Poland)."
[155] Kovács and Scheppele, "The Fragility of an Independent Judiciary."

Polish Ombudsman Adam Bodnar called a "clear breach of the statutory provision."[156] Thus, while the analyses do not directly compare a change in selection process, they essentially estimate the effects of new laws and practices which contradict previous legislation or constitutional provisions.

6.4.1 Network Analysis

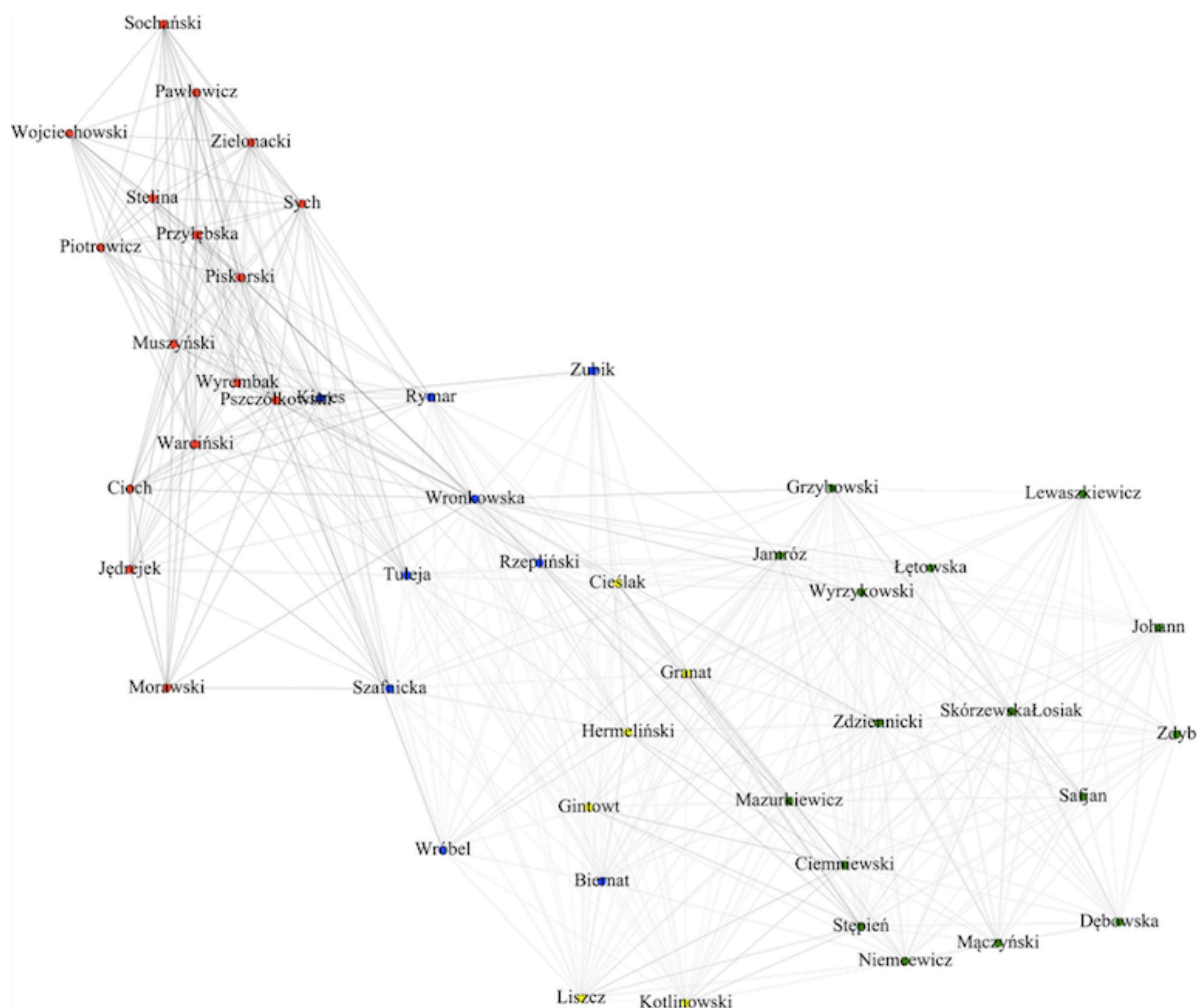
An interesting way to visualize this data is through a network analysis where each judge is a node connected to others by edges. The network analysis includes all cases between 2002 and 2020 where government preference can be reasonably inferred. Judges are grouped by political nomination group, as outlined below in Table 6.6. The greater the proportion of identical votes between two judges out of the total number of instances they were both on the bench for a particular case, the closer those two judges appear in the network plot. For the reduction of noise in the networks and to facilitate the identification of judges by name and node color, the edges connecting judges have been deliberately faded.

Table 6.6. Polish Judges by Party Nominations

Previous Coalitions (green)	PO Coalition (blue)	PiS Coalition before 2015 (yellow)	PiS after 2015 (red)
Skórzewska-Łosiak, Dębowska-Romanowska, Safjan, Zdyb, Johann, Lewaszkiewicz-Petrykowska, Mączyński, Ciemniewski, Stępień, Niemcewicz (center-right); Grzybowski, Mazurkiewicz, Wyrzykowski, Zdziennicki, Łętowska, Jamróz (left)	Rzepliński, Biernat, Wronkowska-Jaśkiewicz, Rymar, Tuleja, Zubik, Pyziak-Szafnicka, Wróbel, Kieres	Gintowt-Jankowicz, Hermeliński, Kotlinowski, Cieślak, Liszcz, Bagińska, Granat	Muszyński, Pszczółkowski, Przyłębska, Jędrzejewski, Warciński, Zielonacki, Piskorski, Wyrembak, Sych, Pawłowicz, Piotrowicz, Stelina, Wojciechowski, Sochański

[156] Welle (www.dw.com), "Poland Elects Controversial Judges to Constitutional Court | DW | 22.11.2019."

Figure 6.6. Network of Judge Voting Coalitions in the PCT



Some clear networks can be seen. There is an observable mixture of networks between center-right and left-wing judges selected before 2005 by various coalitions. Some center-right judges (Johann, Zdyb, Skórzewska-Łosiak) are seen with significant connections to a more cohesive group of left-wing appointed judges (Grzybowski, Jamróz, Zdziennicki, and Łętowska). However, from the time PiS first came to power in 2005 until present, judge behavior appears to be fairly political, insofar as judge coalitions are more homogenous in their political nomination group. The judges selected by PiS in 2006 and 2007 constitute a clear grouping (Gintowt-Jankowicz, Liszcz, Cieślak, Hermeliński, Kotlinowski and Granat), as well as those selected by PO (Rzepliński, Wronkowska-Jaśkiewicz, Zubik, Rymar, Tuleja and Wróbel). The possible difference between the behavior of judges selected before and after changes to appointment practices seems to be more about cohesion than integration. While groupings appear to have been political for at least the decade preceding the legal changes, the new PiS-selected judges appear to comprise a significantly tighter cohort, voting more similarly than previous coalitions of judges.

6.4.2 Dissent Analysis

Having gained a sense of the general patterns of behavior of the judges on the PCT, we can specifically test to see how appointment process influences the propensity of a judge to vote against the government through panel regressions which include fixed effects at the case level. This is because there exist some cases in which judges who were nominated and selected by the new appointment procedures are sitting on the bench at the same time as judges selected previously. The benefit of observing variation in behavior only within cases where judges of both selection type are on the bench (2015 – 2020) is that many competing factors are naturally controlled for, the most important of which being the merits of each case. The most potentially-confounding factors are the characteristics of the judges themselves– their age, educational and professional experiences, etc. Historically, judges on the PCT have been a mix of legal professionals and academics, and this does not seem to have changed.[157] The clearest variation between judges on the Tribunal are their political leanings. It is assumed that the perceived political and legal ideologies of the judges are one of the primary reasons they are selected by a government. It is expected that new rules governing judge selection (even those which contradict existing legislation or provision) make it easier for the government to select judges who they believe will vote in their favor more often, based on that judge's political ideology. The variation in political leanings in the judges, then, is part of the causal story.

Because of the limited number of cases in the Polish dataset, there are too few cases to only look at instances of a full bench. Instead, all cases with at least five judges on the judging panel are included in the analysis. There is evidence that cases are allocated at the Tribunal President's discretion, despite procedural rules which are supposed to allocate cases by alphabetical order of judge names.[158] This could very well bias the results. However, there is reason to suspect that any observed difference in behavior of judge type is underestimated, at least since Julia Przylebska became Tribunal President in December 2016, if more political cases are actively withheld from judges more likely to rule against the interests of PiS.

To estimate the effect of the different appointment practices, all that is needed is to group the judges by appointment procedure (the independent variable) and model its effect on the likelihood of a judge to rule against the government (the dependent variable) over the period during which the two groups of judges are both present on the bench. Variation is only estimated within the confines of a single case; a control variable for political appointment is also included. The results of the first panel regression, showing a negative relationship between the new appointment processes and the propensity of a judge to vote against the government, is not significant. What is more interesting is a comparison of judge behavior during two separate periods of the PCT: the period before PiS had selected a majority of the judges on the Tribunal, and the period after. Before the PiS-selected judges comprised the majority on the Tribunal, there is a strong and significant negative effect of the new appointment process on the likelihood of a judge to vote against the government, even when controlling for political nomination group. After they hold the majority, however, there is a significant positive relationship between the new appointment procedures and the likelihood of a judge to rule against the government, which is also very interesting. It is

[157] Wołek and Kender-Jeziorska, "The Polish Constitutional Tribunal : Deference beyond the Veil of Activism."
[158] Fałkowski and Lewkowicz, "Are Adjudication Panels Strategically Selected?"

important to remember that by this time, only a few judges not selected by PiS remain on the PCT, while others have resigned in protest of the government's actions.[159]

Table 6.7. Effects of Appointment Process on Judge Behavior in the PCT

	Individual Judge Votes		
	Against Government		
	(1)	(2)	(3)
New Appointment Process	−0.054	−0.608***	0.196**
	(0.122)	(0.163)	(0.088)
Right-Wing	0.016	0.016	
	(0.094)	(0.089)	
Years	2015-2020	2015-2017	2018-2020
Government	PiS	PiS	PiS
Fixed Effects	Case	Case	Case
Observations	194	100	94
R^2	0.002	0.180	0.057
Adjusted R^2	−0.147	0.045	−0.069
F Statistic	0.127 (df = 2; 168)	9.323*** (df = 2; 85)	4.998** (df = 1; 82)
Note:			*p<0.1; **p<0.05; ***p<0.01

As in the previous chapter, these differences in behavior may not be as meaningful if previous judges were also significantly biased in favor of the government which nominated them. To interpret the results of Table 6.7 in context, the differences in behavior between judges nominated by different political groups before legal changes occurred are estimated as well. One would generally expect judges selected by Civic Platform to be less likely to rule against Civic Platform's interests, and judges selected by PiS (between 2005 and 2007) to be less likely to rule against PiS's interests. Table 6.8 shows the effect of political nomination group (independent variable) on the likelihood of a judge to rule against the government (dependent variable), once again including case-specific fixed effects. During the previous PiS government, there is no observable difference in behavior between judges appointed by different governments. Perhaps even more surprisingly, during the Civic Platform government, the judges selected by PiS were less likely to rule against the Civic Platform government. This is the opposite of what we would expect, and suggests that the political leanings of judges during this time were not strong factors in determining how a judge would vote.

[159] Sadurski, *Poland's Constitutional Breakdown*.

Table 6.8. Effect of Political Nomination Group on Judge Behavior in the PCT

	Individual Judge Votes	
	Against Government	
	(1)	(2)
Right-Wing	−0.062*	−0.141
	(0.034)	(0.157)
Years	2008-2014	2005-2007
Government	PO	PiS
Fixed Effects	Case	Case
Observations	474	89
R^2	0.008	0.010
Adjusted R^2	−0.104	−0.089
F Statistic	3.438* (df = 1; 425)	0.799 (df = 1; 80)
Note:		*p<0.1; **p<0.05; ***p<0.01

Taken together, a comparison of the results of Tables 6.7 and 6.8 suggests that the judges selected by PiS through the new appointment procedures are more highly partisan in their behavior than previous judges. This is most clear during the period in which PiS has selected new judges through a more blatantly political appointment process, but before those new judges hold a majority on the Tribunal. It is also potentially worrisome that the judges nominated by Civic Platform are significantly less likely to rule against the government's preferences after 2017. In conjunction with legal changes which ought to increase the incentives to vote in the government's interest, this is a potential indicator that the behavior of all judges sitting on the PCT has modestly, but significantly, changed in favor of the government.

6.5 Discussion: Findings in Context

Though not analyzed here, previous research shows that the story of the Polish Constitutional Tribunal from 1985 – 2000 is one of the establishment of the Tribunal as a check on the executive and legislative branches, even before the fall of the communist regime.[160] By the end of the century, the Tribunal had gained the reputation of being a neutral 'negative legislator' and an institution shielded from politics, both in conventional conceptions as well as in the majority of academic work.[161] Judges on the Tribunal made an effort to encourage this perception, citing in their decisions that "the Tribunal does not express opinions regarding general questions of a political, philosophical or medical character and must not be allowed to get entangled in those conflicts."[162] Perhaps, however, this has become less true than it once was. The appointment process for judges on the Constitutional Tribunal in Poland was always fairly politicized. Judges were generally either academics or practicing lawyers, but political experience was not uncommon either. The Tribunal's independence from government actors, then, seemed instead to depend upon

[160] Schwartz, "Eastern Europe's Constitutional Courts. (Excerpt from 'The Self-Restraining State"; Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*; Sadurski, *Rights before Courts*; Wołek and Kender-Jeziorska, "The Polish Constitutional Tribunal : Deference beyond the Veil of Activism."
[161] Wołek and Kender-Jeziorska, "The Polish Constitutional Tribunal : Deference beyond the Veil of Activism"; Sadurski, *Poland's Constitutional Breakdown*.
[162] Wołek and Kender-Jeziorska, "The Polish Constitutional Tribunal : Deference beyond the Veil of Activism."

the alternation of powers and the idea that once a judge was seated on the bench, they would 'leave politics in the cloakroom,' despite growing evidence that this was not, in fact, the case.[163] Even in 1994, it is noted that a group of coalition-friendly judges had a majority on the Tribunal, which coincides with a decreased number of constraining rulings.[164] It is possible that the appearance of a neutral or deferential Tribunal was rather the effect of a regular alternation of power.

This continued to be true into later years. At the beginning of the millennium, there was no clear majority group of judges on the Tribunal, so decisions were made more consensually, and dissents came from various issue-specific coalitions of judges.[165] This gradually changed as political parties consolidated and more unified governments selected their judges. A coalition government led by PiS ruled from 2005 – 2007, and by 2007 there was a clear split on the Tribunal. The judges selected by the PiS government (Gintowt-Jankowicz, Liszcz, Cieślak, Hermeliński, Kotlinowski and Granat) comprised a minority on the Tribunal, and regularly dissented together (see Figure 6.6). However, proportionally, the Tribunal did not behave particularly differently than in previous years (see Figures 6.2 and 6.3). This reinforces the trends seen before– the PCT is not overly activist or constraining, but political coalitions of judges can still be observed. The Tribunal, while not as neutral as supposed, still acted primarily as a negative legislator and was relatively deferential.

Evidence from the following period showcases the same trend. After 2008, seven new judges were selected by Civic Platform. During this time, the Tribunal Presidents seem to have allocated cases in such a way as to prevent the PiS-selected judges from ruling on cases which reviewed legislation passed by PiS.[166] Moreover, PO-selected judges were more likely to be allocated politically-salient cases from the period of 2010 – 2014 under Tribunal President Rzepliński.[167] This is interesting because internal procedure since 2006 stipulated that Tribunal Presidents allocate cases by alphabetical order, showing how informal practices clearly do play a part in the Tribunal's behavior. However, looking at Figures 6.4 and 6.5, this does not result in an observable crackdown against the PiS government– if anything, the Tribunal is slightly more deferential to the government during this time. Again, a pattern emerges: politics play a role in the behavior of the Tribunal, but not enough of a role to institutionalize a bias against one government or for another. In some cases, this may reflect the greater proportion of non-political cases brought to the Tribunal. In others, this may be due to a regularized alternation of power which keeps Tribunal majorities relatively narrow. Importantly, these analyses seem to highlight the potential for partisan influence in judicial decision-making on the PCT.[168] Up to 2015, however, these appear to have been curbed by the alternation of governments, the changing majorities on the Tribunal and the desire by politicians and judges themselves to present the Tribunal as an apolitical actor.

Given the shocks to the Tribunal since 2015, it is surprising that none of the studies of judicial behavior on the PCT cited here have analyzed judicial behavior after these shocks. However, previous studies are well set up to explain the empirical findings here. Partisan behavior was always present on the level of individual judges, at least insofar as their regular voting coalitions

[163] Wołek and Kender-Jeziorska.
[164] Wołek and Kender-Jeziorska.
[165] Wołek and Kender-Jeziorska.
[166] Wołek and Kender-Jeziorska; Fałkowski and Lewkowicz, "Are Adjudication Panels Strategically Selected?"
[167] Fałkowski and Lewkowicz, "Are Adjudication Panels Strategically Selected?"
[168] Wołek and Kender-Jeziorska, "The Polish Constitutional Tribunal : Deference beyond the Veil of Activism"; Fałkowski and Lewkowicz, "Are Adjudication Panels Strategically Selected?"

presented in the network analysis, but was reined in by circumstance and did not translate to a significant overall political bias toward the government which selected them. After the controversies of late 2015, however, the existing vulnerabilities of the Tribunal were taken advantage of by a government with a majority in both legislative chambers as well as the presidency. Where individual partisanship had previously been partially concealed as an undercurrent of a rather bureaucratic Tribunal, the blatant attempts by both political parties to pack the court made this illusion impossible to maintain. As such, it was no longer a political necessity to pretend that judicial appointments were somehow disconnected from politics. The package of legal changes which occurred throughout 2015 and 2016 systematically stacked the Tribunal in the government's favor while simultaneously disempowering the institution.[169] This not only resulted in an observable partisanship in the behavior of individual judges in 2016 and 2017, but has also manifested in a visible decrease in the Tribunal's capacity to constrain the government overall, in a way quite distinct from the time periods before it. Perhaps most worryingly, the evidence presented here suggests it is possible that the behavior of judges selected before PiS came to power in 2015 have also begun to rule more often in favor of PiS. It is one thing if a government is able to install a majority of genuinely sympathetic judges onto a court. It is quite another if the opposition judges remaining on the Tribunal (at least, the ones who have not resigned in protest) do not continue to rule against that government, even through dissenting opinions.

6.6 Conclusions

The evidence presented here seems to suggest that the behavior of the PCT, as well as the behavior of individual judges on the Tribunal, has changed as a result of the legal changes in 2015 and 2016. A structural break in judicial outcomes was identified at the tail-end of 2015. A relationship became clear between these legal changes and a decrease in the likelihood that the Tribunal rules against the government; this is especially true in cases which review laws passed by PiS. When analyzing individual behavior of Polish judges, two trends become clear. Firstly, when comparing the behavior of judges selected before and after December 2015 during the period in which they coinhabit the Tribunal, judges selected after December 2015 are significantly less likely to vote against the government, at least during the time in which they comprise a minority on the Tribunal. Secondly, when comparing this difference to previous judge behavior, there seems to be a significant amplification in the effect of partisanship through the more politicized judicial appointment process. The results also hint that more recently, the behavior of all judges on the tribunal – both left and right-wing – have changed in favor of the government. This aligns with the results of the logistic regressions regarding Type I mechanisms: laws which theoretically affect judge behavior through inducements or intimidation are also linked to the decrease in likelihood that the Tribunal rules against the government. Overall, the analyses here suggest that the role of politics in the PCT has been severely underestimated, as has the potential impact of formal institutional protections of judicial independence. In practical terms, this also suggests that there is a democratic crisis in Poland, as the judicial branch in its capacity to exercise judicial review has been systematically captured and disempowered.

[169] Sadurski, *Poland's Constitutional Breakdown*.

Chapter 7: Conclusion

This research project began with a simple question: do rules affect behavior, and if so, in what way? Part of the motivation for this research came from the rather unique cases of potential rule of law violations in Hungary and Poland. Changes made to the judiciaries in these countries have been deemed antithetical to the rule of law. The judicial independence of the constitutional court is a particularly important arena in which to analyze these effects because it is key to the separation of powers in constitutional democracies. Capturing the court, by contrast, is a typical move by government actors attempting to consolidate more authoritarian regimes.[170] It is interesting, then, that these changes occurred in two European democracies. The effect of these legal changes on court behavior is the primary concern of the research conducted here.

A contradiction between the political and scholarly consensuses, however, quickly became apparent. While EU officials have not been shy about noting the degree to which they believe these legal changes have jeopardized both the rule of law and democracy in these countries more generally, the majority of academic work on the topic would dismiss the impact of formal rules on judicial outcomes and look instead to public opinion or the level of political competition in the country. In fact, some scholars have argued that substantial insulation of the high court from other political actors is not a requirement for judicial independence, though they are in the minority.[171] Similarly, it is possible that a court which is too insulated may also act in a manner antithetical to the rule of law.[172] If judicial independence's value comes from its theoretical ability to allow judges to make sincere decisions and so that the judiciary may act as a check on the legislative and executive branches, it is important to determine which legal provisions actually help to achieve those outcomes, as this will dictate the policies which should be pursued. This is ultimately a question of whether formally insulated courts are necessarily more independent than more politicized, and perhaps more democratically accountable, courts.

Regarding the academic literature on the relationship between formal rules and judicial outcomes, there are clear research gaps deriving from a lack of conceptual work on which specific laws are necessary for securing the independence of the court. While this research does not presume to be able to identify the ideal bundle of laws which fully constitute de jure judicial independence, it does parse between some commonly used characteristics to identify two different mechanisms by which laws may affect de facto judicial independence. The first mechanism is that of incentives and disincentives (Type I), which should theoretically alter individual judge behavior. The second mechanism should not alter the sincerity of a judge's decision; instead, court 'inputs', like the types of judges and types of cases, are regulated such that court outcomes as a whole are effectively constrained or empowered as a result of these laws (Type II). For example, a law allowing a majority in parliament to dismiss a judge early from their post might induce a change in judicial behavior (Type I), whereas a law allowing a majority in parliament to select a judge should not change the behavior of the judge selected, but may increase the likelihood that the judicial outcome is favorable to the government. Separating laws into these mechanism types is also analytically useful because Type I mechanisms are generally regarded as more normatively

[170] Levitsky and Way, *Competitive Authoritarianism*.
[171] Parau, "The Role of Courts in a Democracy."
[172] Ganev, "The Rule of Law as an Institutionalized Wager."

severe, though empirically there is no reason to believe these would necessarily have a stronger impact on actual judicial outcomes.[173]

Two original datasets were created from all digitally available constitutional court cases in Hungary (1990 – 2020) and Poland (2002 – 2020). These country cases were particularly interesting because of their role in the growing controversy in the EU surrounding the rule of law. Governments in both countries enacted drastic changes to the laws governing their high courts, allowing for a temporal analysis of change in each case. Instead of simply evaluating patterns of judicial review, this research was specifically focused on the outcome of cases where the ruling government had a reliable preference. By analyzing cases dealing with laws and decrees passed by the same government in power at the time of the ruling, and cases dealing with laws passed by the political opponents of the government in power at the time of the ruling, government preferences on the outcome of a set of cases was inferred.

The identification strategy was driven by two overarching empirical questions. Firstly, how did the legal changes influence the overall likelihood of the high court deciding a case against the interests of the government in the two country cases? A changepoint analysis was first used to endogenously identify structural breaks in court outcomes. Then, logistic regressions estimated the effect of different types of legal changes while accounting for systems-level and case-specific competing factors. Secondly, how did the specific changes to the judicial appointment processes in these countries affect the behavior of individual judges? A network analysis helped visualize overall patterns of judge behavior, while panel regressions with case-level fixed effects more rigorously tested the impact of appointment process on the propensity of a judge to vote against the interests of the government. It was expected that laws which significantly decreased the level of de jure independence would decrease the likelihood of the court to rule against the government. While Type I changes were expected to be less likely to occur in constitutional democracies because they are viewed more severely by the electorate, it was unclear whether one type or the other would have a greater influence on outcomes. In terms of individual judge behavior, it was expected that judges who were selected through more politicized appointment processes would be less likely to rule against the preferences of the government, since they would be more politically aligned with the government which selected them.

The results from the Hungarian case were fairly clear: the Hungarian Constitutional Court is no longer as effective a check against the government as it used to be, and it is significantly less likely to rule against the preferences of the government after the legal changes in 2012, supporting the primary theoretical expectation. The greatest structural break in the data occurs in 2014, just after the legal changes occurred. Regarding mechanisms, there were very few legal changes to the incentive structure of the Court, and as such, there is no suggestion that Type I mechanisms are related to the decreasing proportion of cases decided against the government. The Court does, however, seem to be significantly constrained in its ability to strike down laws through structural changes (Type II). The analysis of individual judge behavior suggests that these trends are at least partially driven by more highly partisan judges. The judges selected unilaterally by Fidesz are significantly more likely to rule in favor of the government, even when controlling for the merits of the case. This is a level of partisanship that has never before been observed within the HCC. These findings could be generously interpreted as a shift in favor of democratic representation in the historically undemocratic institution of the judiciary. However, this may also suggest from a

[173] International Bar Association, *Minimum Standards of Judicial Independence*.

separation of powers perspective that the behavioral independence of judges is not sufficient for the protection of the court's ability to constrain the legislative and executive branches.

The data from Poland tell a similar, but distinct, story. Again, the Polish Constitutional Tribunal is a lesser constraining force on the government than it previously was, and is significantly less likely to rule against the preferences of the government as the de jure judicial independence scores decrease, in particular when reviewing laws passed by PiS. This supports the primary theoretical expectation of the paper. Unlike in Hungary, however, significant legal changes to both incentives and structural mechanisms (Type I and Type II) occur. This is surprising, given that Poland is a constitutional democracy. The logistic regression models hint that Type I changes have a marginally stronger impact on Tribunal outcomes than Type II. In the analysis on individual judge behavior and the judicial appointment process, there is partial evidence that the newly selected judges are significantly more partisan than their predecessors. This bias was most prominently observed during the period in which judges selected by PiS did not yet comprise a majority on the Tribunal. Perhaps more interestingly, the few remaining left-wing judges on the court were also significantly less likely to vote against the government during the last three years. In the context of significant Type I changes, which should theoretically alter judge behavior, these results could suggest that judges on the Tribunal are responding to legal changes to the incentives structure. This also hints that the events taking place in the constitutional courts of Hungary and Poland are normatively distinct; those concerned with the preservation of the behavioral independence of constitutional judges should be more worried about the Constitutional Tribunal judges in Poland than the Constitutional Court judges in Hungary. It is also interesting that the relatively higher levels of civil society mobilization in opposition to these legal changes and more viable opposition parties do not appear to have mitigated the negative effects of the legal changes to the judiciary in Poland.

Importantly, both empirical cases somewhat contradict the academic consensus that formal protections for judicial independence have minimal effects on judicial outcomes in practice. The overall outcomes of both high courts appear to have significantly shifted in favor of the government after the legal changes, and in both instances this is partly driven by more partisan judges being selected through more politicized appointment procedures. At the very least, the findings here suggest that change to institutional court set-ups can have significant consequences under certain conditions. This analysis does not attempt to say that a change in formal rules always matters more or less than other factors, such as the level of political competition or the levels of potential public backlash. It is obviously no coincidence that the legal changes in both Hungary and Poland occurred after governments won two-thirds and absolute majorities respectively– but this does not change the fact that the laws themselves also clearly had an impact, which should not be downplayed. Part of this story is also inextricable from a discussion about constitutional provisions and the ease at which laws governing the judiciary may be changed. In general, the greater the specificity of the constitutional provisions for the high court, the lower the chances of any legal change occurring, given the generally high bar for constitutional change. In Hungary, this bar was met by holding two-thirds of the seats of the National Assembly and the drafting of an entirely new constitution. In Poland, this was side-stepped with vague constitutional provisions and Article 197, empowering the legislative branch to change the "organization" and "mode of proceedings" of the Constitutional Tribunal by statute (Article 197, 1997 Polish Constitution).

It is also important to recognize what these results do not show. Firstly, the statistical models here are by no means highly predictive, all-encompassing models of tribunal decision-making.

Clearly, these legal changes are not the primary predictor in the resulting court outcomes– the goal here was simply to investigate whether the legal changes appear to have had any impact at all on court outcomes. It is also possible that the results here, which suggest that in both cases court outcomes have modestly but noticeably shifted in favor of the ruling governments after the legal changes, only appear under certain conditions which were present, and that these results are not more broadly generalizable. It is further possible that patterns of judicial decision-making within Hungary and Poland will return to previous average levels, and that the identifiable change in court behavior will diminish over time. Perhaps the effect of the legal change will 'wear off' as informal behavior normalizes new interactions between judges, governments, and citizens.

Secondly, these results do not show the accuracy or validity of the judicial independence scores produced, though the conceptual strengths of their construction have been outlined in Chapter 4. Only one of the actual legal changes – that of changes to the judicial appointment process – was specifically tested for an effect on judicial behavior. The conceptual distinction made between laws which alter incentives versus structure was also not fundamentally tested; the logistic regressions only shallowly capture the different variation between them, and suggest that there may be further utility in a conceptual separation of these different mechanisms.

Thirdly, the entire premise of this research rests on the idea that a significant decrease in the likelihood that a judge or a court rules against the government is an indicator of a decrease in de facto judicial independence. But what if societies decide that courts which are more aligned with a democratically-elected government are more desirable, so long as the judges on those courts are able to make sincere decisions as to the constitutionality and legal merits of the cases they review? Though the empirical results do show significant changes in the trends of court outcomes in these two countries, these may not necessarily be interpreted as signals of decreasing de facto judicial independence, especially if the value of democratic representation takes precedence over the value of a separation of powers or checks and balances in a system of democratic governance.

The analysis of the results found here, as well as the research gaps they highlight, provide many areas of potential research. That more conceptual work is needed to identify the characteristics of de jure independence could not be clearer. Are there combinations of characteristics which are necessary for de facto independence, or is a 'family resemblance' approach more appropriate?[174] Two separate mechanisms through which laws may affect judicial behavior were identified here; are there more, or sub-variations within these, which can help to further distinguish the exact mechanisms by which laws affect behavior? Relatedly, as seen in the case of Poland, there are clearly interactions between formal rules and informal behavior which are not yet easily understood. Is there a time period after legal changes are enacted in which they matter more? How might we more clearly identify and better understand the effects of individual laws on the behavior of courts and judges? While the findings presented here are intriguing, they are by no means final, and more rigorous empirical work on recent developments in other courts would undoubtedly be illuminating.

Finally, there are important normative questions brought to the surface here that constitutional societies must answer for themselves. What does the rule of law mean in societies built around an inherent tension between majority representation and minority protections? Once again echoing Kim Lane Scheppele, should constitutional courts be checks on democratic institutions, or

[174] Goertz, *Social Science Concepts*.

democratic institutions themselves?[175] To what extent do we want courts and judges to represent ourselves, and to what extent do we want them to appear to remain 'apolitical'? Is there a way in which overtly partisan courts can still remain legitimate, and behaviorally independent, courts? These are the kinds of questions which will not be answered by empirical analyses, and should be thoroughly debated. However, in order to have such normative debates about whether certain laws governing the judiciary are supportive or destructive for particular visions of constitutional democracy, we need to understand how exactly these laws impact the actors and societies they govern. It is the hope of this author that the research here has supported this endeavor, and that future debates on the role of constitutional courts may be informed by a better understanding of how these rules actually shape judicial behavior.

[175] Scheppele, "Declarations of Independence: Judicial Reactions to Political Pressure."

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