Constitutional Review[•]

Nuno Garoupa

Texas A&M University School of Law

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I. INTRODUCTION

Constitutional courts have attracted considerable attention from theoretical perspectives in political science and economics. There is a consensus among political scientists and lawyers that the appropriate design of constitutional review plays an important role in assessing and analyzing institutional frameworks.[1] Constitutional adjudication is also a central element in determining the various dimensions of political and legal reform. Long-run interests usually conflict with political short-run opportunism. Therefore, the precise mechanism by which constitutional adjudication responds to these conflicting goals determines political and economic stability with implications for growth and general welfare. In fact, macro empirical economic analysis seems to show that independent courts and constitutional review are factors that should be taken into account not only if the goal is to guarantee political freedom, but also to protect economic liberties and foster economic growth.[2]

We cannot understand the role of a given constitutional court without paying attention to the political process underlying the production of a constitution itself.[3] In that respect, generalizations and uniform solutions are likely to be incorrect because the design of judicial review corresponds to specific trade-offs as projected or anticipated by the constitutional legislators.[4]

The literature suggests four different reasons for why constitutional review exists (that is, for why politicians delegate to judicial institutions the refereeing of possible political conflicts).[5] They are philosophical (importance of political and social rights, rule of law), political insurance and other forms of commitment[6] (long-term strategic considerations justify constitutional protection in

[1] A good introduction is provided by Ginsburg (2002), Shapiro (2003) and Vanberg (2015).
[2] See, among others, La Porta et al (2004) and Feld and Voigt (2005), although one of their findings is that constitutional review powers vested in the highest judicial instance reduce economic growth.
[3] See Cooter (1992), Lutz (1994), Ramos (2006), Elkins et al. (2009) and Ginsburg et al. (2009).
[4] See Fernandes de Andrade (2001), Hirschl (2009) and Dyevre (2010) for a general discussion.
[5] See Voigt and Salzberger (2002) and, for a general overview, Ginsburg and Versteeg (2014).
[6] See, among others, Ginsburg (2003), Finkel (2008) and Tridimas (2010). The extent to which constitutional review is countermajoritarian is still a debatable matter. For a general overview, see Law (2009a).

face of uncertain electoral dynamics), federal and other potential governance questions (possible conflicts across states or diverse religious groups demand some sort of mediation or arbitration), and global diffusion (for example, due to conformity or compliance with international trends).[7] Recent empirical evidence suggests that the introduction and development of constitutional review is primarily explained by political insurance rather than global diffusion.[8]

There are mainly two arguments against constitutional review. Constitutional rights are not necessarily better protected by judicial review than by democratic legislature control. Constitutional review lacks democratic legitimacy.[9]

Different theories have been developed to explain how constitutional review is exercised, first, in the U.S. Supreme Court, and later, by the federal judiciary. Formalists take the view that constitutional judges simply interpret and apply constitutional law in a conformist view of precedents.[10] In a completely different perspective, the endorsers of the attitudinal model suggest judicial preferences, with special emphasis on ideology, are the main explanatory variable. Finally, agency theorists recognize the importance of judicial preferences but argue that they are implemented taking into account political and varying institutional realities.[11]

Realistically judicial decision-making in a constitutional court, as in any court, reflects a complex set of different determinants, including personal attributes, attitudes (policy or ideological preferences being relevant), peer pressure, intra-court interaction (a natural pressure for consensus and court reputation; a common objective to achieve supremacy of the constitutional court), and party politics (loyalty to the appointer) within a given constitutional and doctrinal environment.[12]

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[7] See Dixon and Posner (2011), Law and Chang (2011), and Law and Versteeg (2011, 2012). For example, cross-citation patterns in constitutional review have regained attention lately, see Gelter and Siems (2014) and references therein.

[8] See empirical results presented by Ginsburg and Versteeg (2014).

[9] See general discussion by Waldron (2006). The latter argument has been particularly contentious in the context of the increasing interaction between national courts and supranational courts (European Court of Human Rights, European Court of Justice, International Court of Human Rights). Among others, see de Visser (2014).

[10] See discussion by Solum (2006).

[11] See, among others, Epstein and Knight (1998), Segal and Spaeth (2002), Hansford and Springgs (2006), Spiller and Gely (2007) and Epstein et al. (2013).

[12] For example, see the models developed by George and Epstein (1992), Martin and Quinn (2002), and Lax and Cameron (2007). More generally, see Posner (2008).

Around the world, constitutional judges are appointed by heavily politicized bodies. Inevitably they could be influenced by political parties when these actors play an active role in the selection and appointment process. At the extreme, judicial independence might be an issue. However, judges are also somehow interested in maintaining a certain *status quo* that does not hurt the prestige of the court, thereby, keeping some distance from active party politics.[13]

The process of recruitment and the appointment of judges are necessarily major considerations in the design of the constitutional courts. Overly party-oriented mechanisms are especially bad for neutral judicial review, but are quite likely to smooth conflicts with the other bodies of governance. Cooperative mechanisms that require a supermajority deliver consensual constitutional courts, which are more deliberative than active lawmakers.[14] Representative mechanisms can create *de facto* party quotas, depending on the stability of the party system.

Observed conformity between constitutional judges and party interests can be explained by two different phenomena. First, given the political choice of constitutional judges, they exhibit the same preferences as the party that selects them (i.e., there is an ideological consensus ex ante as explained by the attitudinal model). Second, when the constitutional judges do not have lifetime appointments or have an eye in potential future gains (regardless of whether the terms are renewable or not), they might want to keep a good relation with the party that selected them for future appointments to the court or elsewhere (i.e., there is party alignment ex post as explained by the strategic or agency models). In both models, judges have a politically bias incentive, but the underlying reasons are significantly different.

The extent to which constitutional judges respond to party interests is a matter for empirical work. Mere occasional alignment of judicial and parliamentary votes, for example, does not convey strong evidence lack of independence by constitutional judges. Similarly, voting in favor or against the constitutionality of legislation does not provide any clear inference about judicial intentions.

We probably know more about the U.S. Supreme Court that any other court in the world. Empirical studies about courts outside of the United States are growing but still limited. The slow

[13] See general discussion by Garoupa and Ginsburg (2015).
[14] See Ginsburg (2002).

start of empirical scholarship about courts outside of the United States, and particularly constitutional courts, can be explained by the difficulty in accessing data. However, most constitutional courts now report their decisions online. Many courts have invested seriously in new information technologies and allow online access to decisions back to the early 1980s. Technology has made access to information easier, therefore reducing the costs of producing serious empirical studies in constitutional review. Consequently, we have observed the slow growth in such studies in recent years, described later in this chapter.

There are still significant language barriers, mainly due to the fact that decisions are in the native language. A short summary in English is usually inappropriate and incomplete for purposes of coding and statistical testing. In addition, courts vary in the depth of their opinions, even in the native language. Not surprisingly, the development of empirical constitutional law studies follows closely the influence of econometrics on local legal communities. Unfortunately empirical legal studies have been received harshly by traditional formalist legal scholarship. Consequently, the production of empirical studies in constitutional review has been much slower than we would desire and almost entirely the work of political scientists.

The article goes as follows. We summarize theoretical considerations about comparative constitutional review in the following section. Empirical work is discussed in section III. Section IV concludes.

II. CONSTITUTIONAL REVIEW: THEORY

The design of most constitutional courts in the Western world has been influenced by the original ideas and legal theories of Hans Kelsen.[15] Under this legal theory, ordinary judges are mandated to apply law as legislated or decided by the parliament (the legislative branch of government). Consequently there is subordination of the ordinary judges to the legislator. However, due to a strict hierarchy of laws, judicial review is incompatible with the work of an ordinary court. Hence, only an extrajudicial organ can effectively restrain the legislature and act as the guarantor of the will of the constitutional legislator. The Kelsenian model proposes a centralized body outside of the structure of the conventional judiciary to exercise constitutional

[15] For a general discussion, see Stone Sweet (2000). Also see Kelsen (1942).

review. This body, conventionally called the constitutional court, operates as a negative legislator because it has the power to reject legislation (but not propose legislation).[16]

In fact, the centralization of constitutional review in a body outside of the conventional judiciary has been important to secure independence and the commitment to democratization after a period of an authoritarian government in many countries. The judiciary is usually suspected of allegiance to the former regime, and hence, a new court is expected to be more responsive to the democratic ideals contemplated in the new constitution.[17]

The application of the Kelsenian model in each country has conformed to local conditions, and therefore, the competences and organization of constitutional courts are usually much broader than a simple "negative legislator." Ex ante review of legislation (i.e., before promulgation) has been extended to ex post review (i.e., after promulgation) in many countries. Abstract review (such as traditionally in France) has been conjugated with concrete review (such as in Germany or in Spain). Most constitutional courts have expanded ancillary powers in different, but important, areas such as verifying elections, regulating political parties (illegalizing them or auditing their accounts), and other relevant political and administrative functions, such as performing as judicial council as seen in Taiwan.[18]

The Kelsenian-type courts for constitutional review predominates now around the world. It exists in most countries of the EU of civil law tradition, with the Netherlands and the Scandinavian countries being the most striking exceptions. Also most former communist Central and Eastern countries have now developed a similar institutional structure. France has embraced a much narrower judicial review of legislation in accordance with their traditions, but now expanded to include a form of concrete review.[19] Around the world, South Africa, South Korea, Taiwan and Turkey follow the Kelsenian model with local adjustments.

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[16] The notion of a "negative legislator" is based on the idea that the court expels legislation from the system and therefore shares limited legislative power with the legislative branch.

[17] See Ginsburg (2003) on Taiwan, Mongolia and Korea.

[18] See Ginsburg (2002) for discussion of ancillary powers of constitutional courts in Asia. Also, more generally, see Ginsburg (2005).

[19] See Stone Sweet (1992, 2007), Pasquino (1998), Ferejohn and Pasquino (2004, 2012) and de Visser (2014). The introduction of concrete review after the 2008 constitutional reform increased the similarities between the French *Conseil Constitutionnel* and the other Kelsenian courts in Europe.

The ideas of Hans Kelsen were influenced by the distinct American experience which he thought inappropriate for a civil law system. Still, in the Americas, the U.S. model has been the major trend with a few countries following the Kelsenian type in the last decades such as Chile, Colombia, Ecuador and Peru. Brazil transplanted the American model in 1891 but, more recently, has created a different court for infraconstitutional matters. Mexico and Argentina have kept the American model with different nuances. In other parts of the world, influenced by American presence, Japan and the Philippines have adopted the U.S. model.

Most common law jurisdictions such as Canada, Australia, New Zealand, Israel and India have a structure similar to the U.S. arrangement due to the peculiar British constitutional traditions (mainly the legacy of parliamentary sovereignty) while making advances in constitutional evolution.[20] The British judiciary has powers to judicially review in two fundamental areas, human rights and European law, but formally there is no constitutional review.

Even in the realm of Kelsenian courts, concrete review blurs the separation between the constitutional court and the rest of the judiciary either in the form of incidental referrals or of direct constitutional complaints. It induces the constitutional court to interfere with judicial decisions and participate in the resolution of individual cases, which was not prescribed by the original Kelsenian model. The consequence is a less transparent delimitation of jurisdictions, and consequently the emergence of conflicts of competence between the constitutional court and other higher courts.[21] Preventive review by its very nature provides a weak position for a constitutional court to try to condition other courts because there is no obvious relation between the review of legislation in abstract and concrete adjudication. However, given the importance of the constitutional court, creative techniques can be developed to achieve such goals. For example, the French's idea of "conforming interpretation," although dependent on the voluntary compliance by other courts, is still conceptually influential.[22] Yet, where abstract review is very limited (such as in Italy or in South Korea), the ability to shape legislative outcomes is reduced and constrains the political influence of the court.[23]

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[20] See, for a general discussion, Gardbaum (2001, 2013).
[21] See Garoupa and Ginsburg (2015).
[22] See Stone Sweet (1992, 2007).
[23]. See Garoupa and Ginsburg (2015).

The possibility of a conflict between the major courts has substantive legal and political implications.[24] First, it puts pressure on constitutional judges to achieve a coherent and prestigious body of constitutional jurisprudence or doctrines.[25] Therefore, it transforms the nature and scope of constitutional review by empowering the court and putting pressure for a façade of apolitical decision-making. Second, it increases the political value of constitutional review because these conflicts might provide an indirect mechanism for influencing the judiciary. The natural inclination for the constitutional court is to expand competences (the progressive constitutionalization of private law in several jurisdictions is just an example) that make it politically more relevant. Third, the balance of power is shaped by the constitution itself, that is, the extent to which a constitutional court is not conceived as a negative legislator, but as a positive legislator with formidable powers of statutory interpretation.[26] However, once a positive legislator, a constitutional court can act either as a counterweight against the parliamentary majority or as a substitute if no stable parliamentary majority exists.

Whereas, concrete review "judicializes" constitutional courts, preventive review has the opposite effect. Mere preventive review makes a constitutional court less judicial and more political or legislative in nature. Inevitably constitutional courts as idealized by Kelsen are political.

Having established that a constitutional court is political, we should recognize that being political in nature is not the same as being politicized. We can expect partisan politics to exert some influence, either by common ideological goals (filtered through the appointment mechanism) or by direct pressure. However, politics inside the court could differ from straight partisan agendas. The difference between partisan politics and judicial politics can be explained by the court exposure to diverse audiences.[27] For example, differences in the professional background are usually presented as an explanation for the different propensities to judicial activism.[28] Certainly the particular nature of the institution and the political process determine the extent to which partisan agendas prevail.

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[24] See Garoupa and Ginsburg (2015).
[25] In the limit, developing a court-made consistent and coherent constitution that supplements or even replaces the original text.
[26] Consider the Spanish case, for example, in Turano (2006).
[27] See Garoupa and Ginsburg (2015).
[28] See Garoupa and Ginsburg (2015).

The double role as a political and a judicial institution (not supported by the original "negative legislator" model but now pursued by all existing constitutional courts in Europe) creates an inevitable "judicialization" of politics for three reasons. First, as a consequence of the particular position of the constitutional court, the goal of self-expanding institutional power affects the delicate balance between the judicial and the political structures (at the expense of the higher courts and the other powers of government). Second, naturally most of the expansion of institutional power and influence generates conflict. Third, political diffusion makes the role of a constitutional court more important. The constitutional court provides the institutional body for the judiciary to interplay with the politics. The inevitable "judicialization" of politics necessarily politicizes the court. Hence, politics inside the constitutional court becomes unavoidably contaminated by party politics and ideological agendas. The stakes are simply too relevant and important for political parties not to interfere.

We can conclude that each constitutional court will therefore exhibit two important political dimensions: judicial politics (in an effort to expand competences, enhance prestige, and achieve supremacy over the higher courts) and partisan politics (in the sense of advancing ideological goals). In democratic regimes, judicial politics necessarily creates peer-pressure within the court to comply with an apolitical façade and provide a coherent body of case law. Advancing ideological goals divides the court, and politicizes the court's decisions. Hence, the tension between judicial and partisan politics is inevitable.[29]

Judicial activism in constitutional review can be regarded as a court strategy from several perspectives. The most immediate and standard interpretation of judicial activism is to give content to particular ideological agendas.[30] However, judicial activism could also be a response of the court to unwelcomed intromissions by the other powers of government, thus providing the needed legal doctrines. Finally, judicial activism can also help the court in establishing or enhancing prestige with the higher courts if focused on promoting coherent case law. As a consequence, judicial activism is consistent with different degrees of politicization.[31]

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[29] See Garoupa and Ginsburg (2015), also making the point that, in authoritarian regimes, unanimity in the court could be perceived as lack of independence from the government.

[30] For a general discussion see Barry Friedman (2005) and McCubbins and Rodriguez (2006).

[31] For a discussion of judicial activism by the German constitutional court, see Kommers (1994) and Landfried (1985, 1992, 1994). There is also evidence of judicial activism by the French constitutional court since the early 1980s. See, for example, discussion by Davis (1986, 1987) and Bell (1988). As to Italy, see Furlong (1988) and Nardini (1999). For a more general discussion about Europe, see Stone Sweet (2000) and de Visser (2014); for Asian courts, see West and Yoon (1992), Tate (1994), Harding

The interaction between judicial politics and partisan politics explains the proliferation of "soft" as well as "hard" constitutional review arrangements, also known as dialogic constitutional review. It includes the different ways the legislature gets a reply to the court (for example, in the form of an override, or a decision whether to implement the ruling) as well as the court might in turn get another reply to the legislature. These responsive turns transform constitutional review into a game with multiple rounds. We can find these arrangements increasingly widespread in the Commonwealth jurisdictions[32], including a fair number of common law Asian countries[33], but also in a few European jurisdictions.[34] They offer a dynamic solution to extremes of legislative supremacy versus judicial supremacy.

From an empirical perspective, the relevant question is the extent to which the behavior of constitutional judges can be systematically explained by ideology or partisan alignment.[35] There is plenty of anecdotal evidence of politicization on constitutional courts.[36] The media and other sources of information provide abundant accounts of particular decisions or significant controversies. The advantage of a serious empirical study is to detect if there is a consistent pattern explaining judicial behavior, or if the anecdotal evidence is just that, merely anecdotal.

At the same time, as easily derived from our discussion, even the most ideologically driven judges will occasionally engage in commitment or consensus building given the multiplicity of goals. Observing patterns of unanimity versus fragmentation is not enough to prove or disprove the influence of ideology in judicial behavior. Only empirical work that controls for all the appropriate variables and recognizes the particular determinants in a specific jurisdiction can provide some serious evidence in this respect.

III. CONSTITUTIONAL REVIEW: EMPIRICAL EVIDENCE

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and Leyland (2009), Dressel (2010, 2014) and Law (2009b, 2011, 2013); for Latin American courts, see Kapiszewski and Taylor (2008), Iclán Oseguera (2009), Ríos Figueroa (2010), Kapiszewski (2010); for Australia, see Foley (2007).

[32] See, for a general discussion, Gardbaum (2001, 2013).

[33] See, for example, Yap (2015).

[34] See, among others, de Visser (2014).

[35] Measuring judicial ideology is still an open question, see Fischman and Law (2009).

[36] See Garoupa (2011) for a general survey.

Diversity of institutional arrangements compromises easy generalizations from empirical work based solely on data from one particular country. However, the empirical evidence shows that constitutional courts are politicized in the sense that some appropriate measure of party alignment does predict the behavior of judges. At the same time, the empirical work points out that many other contextual variables also matter. Consistent with previous theoretical discussion, ideology or party alignment is not the only relevant explanatory variable of judicial behavior. Finally, the politicization of the court usually follows a more complex framework than a simple left-right division. Such complexity reflects the political importance of constitutional adjudication (for example, federalism, religion, linguistic or cultural divisions), but also the influence of diverse interests in shaping both the composition and the workload of the court. Finally, most empirical studies are based on the most salient cases (those that are likely to be more politicized), and therefore the importance of party alignment is likely to be over-estimated. Many other relevant variables exist to predict judicial behavior. Unlike traditional legalists, we should not downplay party alignment as a relevant determinant to explain judicial behavior around the world. However, we should not incur in the opposite mistake, and conclude that only party alignment explains judicial behavior.

Empirical studies about constitutional review in the U.S. abound and support different understandings about determinants of judicial behavior in constitutional review.[37] Recently a few studies have emerged about Canada[38], Australia[39] and Britain.[40] Table one summarizes the current state of the art in relation to other countries around the word.

TABLE ONE
STUDIES ABOUT CONSTITUTIONAL AND SUPREME COURTS WITH QUANTITATIVE ELEMENTS

COUNTRY	
GERMANY	Vanberg (2005); Hönnige (2009)

[37] See, among many others, Edwards and Livermore (2009), Lindquist and Cross (2009), Bailey and Maltzman (2011), Epstein et al. (2011, 2013), Edelman et al. (2012).
[38] See Tate and Sittiwong (1989), Wetstein and Ostberg (1999), Hausegger and Haynie (2003), Ostberg et al. (2002), Ostberg and Wetstein (2007), Alarie and Green (2007, 2008), Songer and Johnson (2007), Songer (2008), Green and Alarie (2009), Wetstein et al. (2009), Songer et al. (2011), Songer et al. (2012), Johnson (2012), Massie et al. (2014).
[39] See Robertson (1982, 1998, 2010), Tate (1992), Salzberger and Fenn (1999), Blanes i Vidal and Leaver (2011, 2013, 2015), Hanretty (2012b, 2015), Iaryczower and Katz (2016), Amaral Garcia and Garoupa (2016).
[40] See Narayan and Smyth (2004, 2007).

FRANCE	Brouard (2009, 2010); Franck (2009, 2010); Espinosa (2016)
ITALY	Volcansek (2000, 2001); Breton and Fraschini (2003); Santoni and Zucchini (2003); Fiorino et al. (2007); Padovano (2009); Dalla Pellegrina and Garoupa (2013); Fiorino et al. (2015); Garoupa and Grembi (2015)
SPAIN	del Castillo Vera (1987); Magalhães (2002); Sala (2009); Garoupa et al. (2012); Garoupa et al. (2013); Hanretty (2012a)
PORTUGAL	Araújo (1997); Magalhães and Araújo (1998); Araújo and Magalhães (2000); Magalhães (2002); Amaral Garcia et al. (2009); Santos (2011); Hanretty (2012a)
BELGIUM	Dalla Pellegrina et al. (2016)
POLAND	Kantorowicz and Garoupa (2016)
BULGARIA	Hanretty (2014)
NORWAY	Grendstad et al. (2015)
TURKEY	Varol et al. (2016)
JAPAN	Ramseyer and Rasmusen (2003, 2006)
SOUTH KOREA	Ginsburg (2003, 2010)
PHILIPPINES	Tate and Haynie (1993, 1994); Gatmaytan and Magno (2011); Escresa and Garoupa (2012, 2013); Dalla Pellegrina et al. (2014)
THAILAND	Ginsburg (2003, 2009); Pruksacholavit and Garoupa (2016)
TAIWAN	Ginsburg (2003); Garoupa et al. (2011); Dalla Pellegrina et al. (2012)
MONGOLIA	Ginsburg (2003)
MEXICO	Staton (2004, 2010); Ríos Figueroa and Taylor (2006); Sanchez et al. (2010)
ARGENTINA	Iaryczower et al. (2002, 2006); Bill Chávez (2004); Helmke (2002, 2004); Helmke and Sanders (2006); Scribner (2010a); Kapiszewski (2012); González Bertomeu et al. (2016)
ECUADOR	Basabe-Serrano (2012)
PERU	Tiede and Ponce (2011, 2014)
COLOMBIA	Rodríguez Raga (2010)
BRAZIL	Taylor (2005, 2008); Ríos Figueroa and Taylor (2006); Taylor and Da Ros (2008); Jaloretto and Mueller (2011); Kapiszewski (2011, 2012); Sundfeld and Souza (2012); Llanos and Lemos (2013); Arlota and Garoupa (2014, 2016)
CHILE	Hilbinke (2007); Scribner (2010a, 2010b); Carroll and Tiede (2011, 2012); Tiede (2016)
ISRAEL	Shachar et al. (1997); Salzberger (2001); Weinshall-Margel (2011); Eisenberg et al. (2011, 2012a, 2012b, 2013)
RUSSIA & UKRAINE	Epstein et al. (2001); Popova (2012)
SOUTH AFRICA	Hausegger and Haynie (2003)
MALAWI & ZAMBIA	Vondoepp (2006)
INDIA	Robinson (2013)

V. SOME CONCLUSIONS

Constitutional review is politicized by nature. Some degree of alignment between constitutional judges and the appointers is to be expected. Not surprisingly ideology plays an important role in constitutional interpretation. However, constitutional judges face a multiplicity of additional goals that dilute party alignment. The goal of achieving supremacy and expanding influence introduces peer-pressure for coordination and conformity inside the constitutional court. The

production of a coherent body of constitutional case law is significantly important in this respect. Inevitably judicial politics operate as a constraint to partisan politics.

Current consistent empirical work seems to confirm such a theory. The empirical evidence shows that constitutional courts are politicized in the sense that some appropriate measure of ideology does predict the behavior of judges. At the same time, the empirical work points out that many other contextual variables also matter. Finally, the politicization of courts usually follows a more complex framework than a simple left-right division. Such complexity reflects the political importance of constitutional adjudication (for example, federalism, religion, linguistic or cultural divisions), but also the influence of diverse interests in shaping both the composition and the workload of constitutional courts.

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