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Explaining dissensus on the Bulgarian constitutional court

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ABSTRACT

Using original data, this study investigates the determinants of dissent on the Bulgarian Constitutional Court, which occurs frequently and is high by comparative standards. This analysis contributes to the debate on whether courts and judges are driven by policy motivations or legal doctrine by providing evidence from a constitutional court created after a democratic transition. Dissent is more likely when the court as a whole and individual judges decide controversial cases, and when the benefits of dissensus outweigh their costs. Additionally, judges' individual characteristics related to prior careers in politics and their party alignment with the governing coalition drive dissent. The effect of judges' alignment, however, is conditioned on the case outcome, suggesting that justices use dissent when it is politically expedient to do so.

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Specialised constitutional courts play a large and growing role in politics. These bodies, being separate from supreme courts, are sometimes thought of as a "fourth branch" of government specially constructed to review the constitutionality of legislation and ultimately regulating the constitutional boundaries of all political institutions. These courts are designed to provide a constitutional review mechanism to check powerful executives and to protect underrepresented minority interests (Ely 1980). In Eastern Europe, Latin America, and other regions, policymakers often create new constitutional courts after democratic transitions to work alongside existing supreme courts (Hammergren 2007). When properly constituted, these courts can act effectively as negative legislators (Stone Sweet 2000, 35), either by directly vetoing legislation or constraining legislative and executive behaviour. As such, they provide yet another independent layer of oversight over other branches of government. These bodies therefore have the potential to collectively represent interests distinct from the government of the day.

This study investigates the seemingly legislative role of the Bulgarian Constitutional Court (BCC) by focusing on judicial opinions which provide the public basis upon which this court's decisions will be interpreted. Judicial opinions indicate the provision of law being scrutinised by a court, the applicable constitutional provisions to be analysed, and the reasoning behind a court's decision. As such, the opinions explain why the court defers to the executive and legislature or checks these political actors by finding laws unconstitutional. In countries which allow it, judicial opinions also indicate whether

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the decision was unanimous and provide a record of individual judges' votes and reasoning. Dissenting opinions against the majority provide considerable legal and political context to judicial decisions and reflect divisions occurring both in society and the government as well as within the court itself. In many nations, internal arguments against the majority opinion are not publicised (See Laffranque 2003). Even in those countries where dissenting opinions are public, norms of consensus and collegiality may make formalisation of conflicting opinions infrequent.

Judicial dissensus is a politically important phenomenon both for courts as institutions, their members, other political actors, and society at large. There are, however, costs and benefits associated with dissent for both courts and judges. At the *court or case* level, the value of dissensus is not straightforward *a priori*. Dissent on a case may undermine the force and impact of a decision. Often, the public, lower courts, or other political actors view non-unanimous decisions as weaker and more difficult to enforce (Pritchett 1948; Danelski 1960; Baum 2006; Sadurski 2008; Kelemen 2013). Furthermore, if non-unanimous cases are regarded as weak, then lawmakers may more readily attempt to overrule unfavourable decisions with new legislation. By contrast, the lack of dissent on a case, could signal legal as opposed to political decision-making,[1] thus enhancing the court's legitimacy in the eyes of other courts and making intervention by other political bodies less feasible.

A non-unanimous case also may harm the court's reputation in certain circumstances. If dissent occurs along political cleavages, it might signal a politicised court rather than an independent one. Especially in new democracies (many of which are in Latin America and Eastern Europe), legitimacy is linked to whether judges are seen as acting independently from the political actors that appoint them (Staton 2010; Ríos-Figueroa 2011). Legitimacy could therefore be undermined if judges' dissent is driven by political incentives or polarisation within the court (Epstein, Landes, and Posner 2011).

For the court, however, revealing disagreement among judges might be normatively desirable. In transitional contexts that lack developed legal cultures, published dissenting opinions, enriching the legal debate, could contribute to the establishment and evolution of constitutional law. While a certain level of secrecy of a court's deliberations is necessary and perhaps desirable, published dissenting opinions could improve the transparency of decision-making, thus enhancing the credibility and legitimacy of the court (Kelemen 2013). Importantly, dissent not only reveals the conflict over a law's validity, but also provides a means for measuring the extent of a court's independence from the other two branches of government and among individual judges within a court. Conflict among judges over particular cases is thought to indicate the success of a court in institutionalising its role in the political system as autonomous and free from political threats (Laffranque 2003; see also, Schwartz 2000).

At the *individual* justice level, dissent also carries personal costs and benefits. Dissent by judges may signal sincere voting and decisional independence from other colleagues on the court and may make judges appear as independent thinkers or constitutional experts. Dissent also may be used to build political reputations, especially for those judges who seek political office after the court or need favours from political allies for future job prospects. Dissent used in this way, however, may harm judges' reputations if they use their votes in a self-interested manner to signal partisan loyalty over sophisticated legal reasoning.

Given these significant implications, we focus on what factors determine whether a court issues a non-unanimous decision as well as what factors drive individual judges to dissent on the BCC. Without assuming that dissent is a positive or negative development, we investigate the strategic incentives for the court and its judges that the Bulgarian institutional framework generates. The BCC is similar to many of the courts created or re-created after the wave of democratic transitions occurring in Eastern Europe in the late 1980s and early 1990s. It is a powerful court similar to those in Hungary and Poland, which have often been admired (See Schwartz 2000; Sadurski 2008). However, the BCC differs from these courts and is ripe to study as it has not been the victim of constitutional crises that have recently plagued these other two countries whose governments have curtailed their courts' powers (Scheppele 2014; BBC 2017). The BCC also provides an interesting arena for studying dissent behaviour. While the majority of the scholarly literature on dissent discusses how norms of consensus have given way to conflict among judges over time,[2] a significant number of BCC decisions have involved dissent from the Court's creation and many of the dissent coalitions are large.

Analysing patterns of dissent in the BCC since its creation until 2012, we find that certain controversial cases lead to more dissent, especially when the benefits of dissent outweigh the costs to courts and individual judges. As a result, dissensus is more likely to appear on cases when the majority of the court finds the underlying law unconstitutional, when the case is especially salient, and when the case involves contentious separation-of-powers issues. Additionally, non-unanimous decisions are also more likely as opposition parties grow in parliament, making it less feasible for the government to have enough legislative support to override a court's unfavourable decision or coordinate on ways to undermine the court's power. At the individual level, judges' prior political careers as well as their alignment with the current government influence their propensity to dissent. The effect of judges' political alignment, however, is conditioned on whether the majority on the Court finds the law reviewed unconstitutional. This interactive effect suggests that judges use dissent strategically to bolster their reputations as loyalists to their party or branch appointer.

Context for Conflict: The Bulgarian Constitutional Court

After the fall of the Berlin Wall in 1989, a wave of eastern European and former Soviet Republics attempted to transition from former authoritarian rule to democracy. Despite the aspirations for such transitions, countries have created or recreated effective political institutions with varying success. In many of these countries, the creation of constitutional tribunals was seen as a way to ensure that new constitutions in these countries were respected by powerful executives and legislatures. Bulgaria followed these general trends by becoming independent and democratic in 1990 ending years of Communist domination and by subsequently creating a constitutional court as a check on its unicameral parliament. The BCC shares many features, such as appointment method and powers, with many other courts in Europe and beyond.

Constitutional court creation and institutional rules

Bulgaria's 1991 Constitution created the BCC and the Constitutional Court Act established the Court's rules and procedures. The Constitutional Court serves as a fourth branch of

government being independent from the executive, legislative, and judicial branches. Like courts in many Latin American and European countries, the BCC is not considered part of the judicial branch which consists of two high courts and lower courts.

The BCC has 12 judges who serve nine-year non-renewable terms and may have few career options after their term ends (Schwartz 2000). One third of the Court is replaced every three years and thus the terms of judges are staggered. Constitutional Court judges are largely self-disciplined. To lift a judge's immunity from prosecution or to establish a judge's incapacity, two thirds of the Court's own judges must agree by secret vote. Judges are appointed by a mixed-appointment method which allows different political actors to choose a certain number of judges. In this regard, three main political actors choose four judges a piece. These political actors include the unitary National Assembly, the President, and a group composed of all justices of both the Supreme Court of Cassation (SCC) and the Supreme Administrative Court (SAC), the country's top appellate civil and administrative courts. The National Assembly and a group of judges from the SCC and SAC[3] choose judges by majority vote. The President selects judges unilaterally without confirmation by other branches of the government. Ganev (2003) claims that the BCC's rules of appointment "made it virtually impossible for a single political force to colonize the Court" (607). However, Sadurski (2008) counters that one general danger with mixed appointment systems "is that each of the bodies will elect 'their own' judges who will then be under an obligation to be loyal to their appointing body" (17).

As with many constitutional courts in new democracies, the Bulgarian Constitution specifically provides the Court with constitutional review among other powers. In this regard, the Court may find enacted laws unconstitutional, but the Court does not have broader powers to find laws unconstitutional prior to their enactment except in the case where a proposed law may be incompatible with international laws or treaties. For many, the Court was "to be a substitute for a second legislative chamber to play a role similar to the Senate" (Schwartz 2000, 169).[4] The BCC's constitutional review cases overwhelmingly involve the review of laws passed by the parliament in power at the time of the review.

Unlike the US Supreme Court, the BCC does not review cases and controversies brought by individuals, nor does the BCC have discretionary review to choose not to hear a case, which is properly brought before it by specific political actors including the following: the President, no less than one fifth of all members of the National Assembly, the Council of Ministers, the Supreme Court of Cassation (SCC), the Supreme Administrative Court (SAC), the Prosecutor General, and the Ombudsman since 2006 (Bulgarian Constitution Article 150, para. 1; Constitutional Court Act, Article 16). While most of the cases are initiated by the National Assembly, the Court is allowed to consider the positions of all "interested parties," who file briefs with the Court. Interested parties include political actors such as those allowed to initiate cases mentioned above, as well as specific ministries and non-governmental organisations.

The Court makes decisions using a majority voting rule requiring more than half of all judges to agree (Bulgarian Constitution, Article 151(1). Evidence from author interviews indicates that judges preliminarily reveal their positions prior to voting on the constitutionality of a law.[5] The Constitutional Court Act requires that at least two thirds of the entire court or eight of the judges must be present to make a valid decision. If the Court does not have the required quorum, it cannot invalidate a law. Even when the court does have a

quorum of at least eight judges, it still requires seven judges for a majority decision.[6] The decisions of the Court come into force three days after promulgation which occurs when the opinion appears in the State Gazette within fifteen days of being issued (Constitution article 151). Therefore, unlike many high courts, whose decisions become effective on the date of issuance, BCC decisions have a lagged effect. Some of the literature on dissent shows that dissent on a court emerges over time. Despite this literature, since its creation almost half of the constitutional review cases decided by the BCC have been non-unanimous and dissenting coalitions tend to include many judges.

What drives dissent on the BCC?

Courts' issuance of non-unanimous decisions and judges' willingness to dissent depend on whether the case is especially controversial and whether the benefits to courts as a whole and individual judges exceed the numerous costs of behaving in a non-collegial, non-consensual manner (See, Epstein, Landes, and Posner 2011). Judges individually will overcome dissent aversion and reveal their singular viewpoints to enhance their own reputations, which are valuable commodities for judges who serve relatively short terms on the bench. Therefore, the behaviour of individual judges is based on their own particular characteristics and the case context.

Controversial cases are those in which the majority of the court finds the laws reviewed unconstitutional, those that involve important or salient issues, and those that involve separation-of-powers issues. As to cases in which the majority of judges find a law unconstitutional, these are especially controversial and more likely to draw dissenting opinions for several reasons. First, when a court strikes down a law as unconstitutional, it signals a move away from the *status quo* and subverts the will of elected lawmakers who enacted the law. Peress (2009), Goff (2005), and Solum (2005) argue that judges will disagree not only due to differences in their own ideology, but also because they diverge in their opinions regarding "deference to legislative bodies" (Peress, 11). Judges selected under a mixed-appointment system, such as the judges on the BCC, may sharply diverge over issues of parliamentary deference, because some judges are chosen by elected politicians and some by courts. Those chosen by politicians may see their role on the court as more active and may not hesitate to voice their viewpoint in the same manner that elected politicians do. In contrast, judges chosen by courts in a wide array of countries in Europe have been trained and socialised in the civil law tradition and value deference to legislative bodies and a more passive role in constitutional review as noted by Merryman and Pérez-Perdomo (2007).

While judges with different appointers are likely to disagree about whether a court should be deferential or more active in reviewing the constitutionality of laws, judges are also more likely to disagree when the court is composed of judges with different policy preferences or party affiliations (See, Nagel 1964; Schmidhauser 1962; Brace and Hall 1993, 913). Again, courts are likely to be composed of judges with diverse and opposing party loyalties because they are appointed by different political branches that represent diverse interests. As a result, a court is more likely to reveal dissent due to ideological polarisation on the court (Epstein, Landes, and Posner 2011)[7] which should be especially stark when the outcome itself is controversial such as when a court seeks to undermine the elected branches by finding their laws unconstitutional.

While the above discussion shows why unconstitutional cases may be especially controversial, it does not explain why courts are willing to issue non-unanimous decisions alongside this outcome, upsetting collegiality and arguably weakening the impact of the decision. Courts such as the BCC are motivated to reveal dissensus on these cases because doing so does not undermine the court's reputation and may even promote its institutional legitimacy. Dissensus on cases that strike down laws passed by elected officials signals that the court is seriously considering such controversial outcomes and is indeed deliberating about them. This in turn bolsters the stature of the court as a strong independent decision-making body. The revelation of dissent on a case which strikes down a law also has an additional benefit. It indicates that the court has institutionalised its legislative role in the policymaking process, such that it does not fear being undermined by other actors who may perceive internal disagreement as a signal of weakness (Laffranque 2003; Schwartz 2000).

H1. Dissensus is more likely when the court finds the law reviewed unconstitutional.

Cases that involve issues related to separation of powers are especially controversial and should lead to more disagreement among judges as they have the potential to change the power of courts in relation to other branches. Judges appointed by different branches of government, such as on the BCC, will be more likely to disagree when the powers of their appointing branches are in dispute. The benefits of disagreement on separation of powers cases will often exceed the costs because judges may use their votes to signal their loyalty to their appointing branch, which may prove useful when seeking post bench appointment. For example, judges appointed by the supreme courts are more likely to object than judges appointed by elected actors when the laws they review attempt to curtail the powers of the judicial branch. Likewise, legislative appointees, may disagree with appointees of other branches when the law reviewed attempts to curtail the power of the National Assembly in relation to the other branches. Laws that deal with separation of powers issues involve the expansion and contraction of one branch of government's powers in relation to another branch's powers. As judges on mixed-appointment courts represent and are loyal to one of three branches, it is likely that these types of cases will generate disputes among judges.

Dissent also preserves arguments for expanding or contracting a branch's power for a later day. In the case of the BCC, many reforms altering the power of the branches, such as the 2001 Judicial Power Act, have been extremely controversial and have even drawn criticism from the European Union (Popova 2010). At a later time or under a different political context, arguments presented in the dissent may become the prevailing view[8] and authors of such opinions will be revered.

H2. Courts are more likely to issue non-unanimous decisions when the case implicates issues related to the separation of powers.

H3. Individual judges are more likely to dissent when the case implicates issues related to the separation of powers.

Not only do cases involving separation of powers lead to dissensus, but cases that are more salient or important to society should also result in more disagreement. First, on salient cases, Uhah and Hancock (2006) argue that justices "are more attuned to their

inner values" and more motivated to reveal them (298). Salient cases emphasize judges' ideological differences and make them acutely aware of the need to reveal these differences to justify the reasons for their appointments. Second, in most countries, including Bulgaria, in which dissents are revealed, media outlets often report on the most salient cases as well as on how every justice voted. Judges' votes are closely scrutinised after highly controversial decisions which also tend to divide society. Because it is highly likely that judges' disagreements will mirror those of society on salient issues, it is expected that some judges are more likely to dissent on these highly important cases. Judges also may be more willing to reveal their disagreement on such cases to publicly solidify their reputations.

H4. Courts are more likely to issue non-unanimous decisions when the case is salient.

H5. Individual judges' propensity to dissent increases with case salience.

While certain cases may result in more underlying disagreement on the Court and among its judges, the political context in which the court and judges operate should significantly affect their strategic calculations when deciding to reveal dissensus. In the American context, judges and courts are said to act more independently under divided government (McCubbins, Noll and Weingast 1995, 2006; Eskridge 1991; Gely and Spiller 1990; Bergara, Richman, and Spiller 2003). Ferejohn (2002) generalises that the more political fragmentation exists among political actors in presidential regimes, the less likely that those actors can coordinate to punish courts and the more likely judges will be willing to assert themselves (see also, Vondoepp 2006; Iaryczower, Spiller, and Tommasi 2002). Epperly (2017) also finds that political competition, defined as the number of veto points in the policy-making process, leads to more *de facto* judicial independence in a range of non-democratic systems.[9] While the above theories regarding independence have only been tested using a dependent variable of voting against the government as a proxy for judicial independence, the same logic could equally be applied to dissents.

Courts and judges will weigh the costs and benefits of issuing dissent based on the strength of the government in power. Judges know that in general non-unanimous decisions are perceived as weaker by other political actors and the public and that weaker decisions are more likely to invite override by the enactment of new legislation. The likelihood of override grows with the legislative strength or support of the government in parliament. Legislative support is crucial for governments in parliamentary systems due to the cabinet's legislative representation and desire to avoid votes of no confidence. Furthermore, legislative support provides the government with a conflict resolution mechanism. Judges will fear override less and thus are more willing to release a divided opinion when the government has weak support in parliament. In contrast, judges will fear override more when the government has strong legislative support. In this latter situation, they will be less likely to issue an opinion with dissent. In short, judges who work within Bulgaria's multi-party context are likely to weigh the costs and benefits of dissenting based on the strength of the government in parliament.

H6. Courts are more likely to issue non-unanimous decisions when the government is weakly supported in parliament.

H7. Judges are more likely to dissent when the government is weakly supported in parliament.

Judges' individual incentives to dissent also depend on strategic calculations related to forging their own reputations as well as bolstering the court's reputation and role in society. While judges may disagree as to the actual outcome of a case, they generally have an aversion to dissent (Epstein, Landes, and Posner 2011). To overcome such dissent aversion, judges must see substantial individual benefits to themselves in writing dissents. Benefits may include the appearance of judges' independence and improvement of their reputations for loyalty to certain political actors, parties, constitutional expertise, or ideas regarding the role of courts in the legislative process. Costs include the extra time to write a dissent and the fact that non-unanimous opinions may lessen the impact of the decision or its enforcement. Dissents also preclude a judge's ability to shape the majority opinion. Furthermore, dissent on political grounds may weaken a judge's reputation for impartiality. Judges' prior careers as well as their political affiliations should further inform their cost-benefit analysis regarding the value of dissenting.

A judge's prior career should affect their propensity to dissent. In several studies, judicial scholars have found that judges' social backgrounds prior to being appointed to a high court affected their decision-making (George 2008; Ulmer 1973; Pardow and Verdugo 2013). Prior experiences as elected officials, academics, or judges inform judges' decisions and the conception of their own role in the decision-making process. Judges on the BCC were previously members of academia, judges on regular or supreme courts, or were involved in politics. As such, justices on the BCC can be divided into two main groups – those socialized in law schools and the legal sphere and those socialised in politics.

Differences in judges' prior backgrounds should have varied effects on their propensity to dissent. First, judges coming from politics might be more motivated by political concerns. In contrast, former professional judges and law professors are more likely to have internalized the norm of judicial independence (Sternberg, Shikano, and Sieberer 2016). They are also more likely to have insulated themselves from "popular sentiments" (Sisk, Heise, and Morriss 1998, 1477). Second, judges' prior careers in a legal environment encourage "organisational loyalty" of judges toward constitutional courts as institutions, which may make them view dissent as "irresponsible" as it undermines judicial ethics (Ulmer 1970, 582). Compared to judges socialised in law schools or the legal sphere, judges with prior political careers are more likely to be concerned with the views of and strategic interactions with important political actors (Sternberg, Shikano, and Sieberer 2016). Third, judges with prior political careers are more experienced in acting in political contexts where the revelation of independent opinions is valued. Dissenting opinions provide political opportunities for judges whose prior political careers emphasized the need to voice separate opinions in order to survive politically. As judges with prior political careers may return to politics after their service on the court, voicing separate opinions helps emphasise their ability to take an active role in the policymaking process.

Finally, judges' prior experiences inform their conceptions about their role as a constitutional court judge. Role conceptions have been defined by George (2008) as "beliefs about the authority of the individual judge in the legal system, the proper functioning of a judicial body, and the appropriate way to operate in a collegial setting" (George 2008, at 1355; Gibson 1978). According to George (2008), judges' prior experiences inform their "perspective" on the role of the judge in a judicial decision (1357) and thus affect their propensity to dissent. For George, there are two types of judges and these

types inform judges' propensity to dissent. First, there are those judges that are "institutionally-oriented" and regard themselves as members of a group or team. These types of judges are unlikely to dissent or act independently from the group. Second, there are judges who see themselves as "independent actor[s], responsible for honestly relaying [their] views on cases" (1357). For George, this latter group is more likely to dissent than the other type of judges, despite the costs of voicing disagreement. In the case of the BCC, judges with prior political backgrounds, rather than those who previously worked in academics or courts, are more likely to see themselves as independent and "individualistic." Likewise, judges with former political careers will tend to see their role on the court as one that is more activist, similar to the role conceived for an elected politician or government official. This conception, of a judge as an active policymaker, makes it more likely that judges with prior political backgrounds will dissent.

H8. Judges with prior political backgrounds are more likely to dissent.

Judges' desire to build their reputations as well as their realistic ability to shape the majority position also will inform their decision to dissent. As a result, dissent will be conditioned on both judges' own policy preferences and the outcome of the case. Dissent may be used strategically to enhance a judge's reputation and improve future career prospects (See Garoupa and Ginsburg 2015). Unlike the US Supreme Court, which has life time appointments, most other constitutional courts, including the BCC, limit the term of their judges and many do not allow for re-appointment (see Moreno, Crisp, and Shugart 2003). Judges may use dissent to show their loyalty to parties or other prestigious politicians to secure jobs after their tenure ends. For those who seek political office after the court, showing that they are able to act like "legislators" and disagree with those with whom they oppose politically has reputational advantages, which are both verifiable and transparent (Garoupa and Ginsburg 2015, 31).

Individual dissent is driven both by reputational concerns and by divergent policy preferences among judges. As such, individual dissents are conditioned on the policy position taken by the majority on the case and the judges' own political preferences. As previously mentioned, BCC judges appear to know the positions of other judges with whom they are deciding prior to the final vote on a case. In this way, the court majority's decision provides the context for the dissent. First, when a court upholds the law of the current legislature, judges aligned with the government in power are less likely to dissent to support their own preferences and to show loyalty to the government with whom they agree. In contrast, these aligned judges are more likely to dissent when the law passed is stricken down as this is against their policy preferences and those of the enacting legislature. Additionally, judges may also reveal dissent when the court strikes down a law as they are aware that their own political preferences make it highly unlikely that they will be able to shape the majority, even if they agreed to suppress their dissent. The foregoing arguments support the view that individual dissent is based on judges' policy preferences and political alignment, but conditioned on the case outcome.

H9 Judges' dissents are conditioned on the case outcome and their party alignment with the government in power such that judges aligned with the government in power are less likely to dissent if the majority of justices on the court finds the government's laws constitutional and more likely to dissent if the majority finds the government's laws unconstitutional.

Case-level data and results

To analyse what factors influence a court to issue a non-unanimous case, we analyse 254 constitutional review cases from 1991 to 2012. The binary dependent variable is whether the case has at least one dissent on it. The independent variables include three variables which define attributes of cases which are particularly controversial, including the outcome of the entire case (constitutional or not), whether the case is salient, and whether the case involves an issue of separation of powers. *Unconstitutional case* is a binary variable coded 1 if the case decision found the law unconstitutional and 0 otherwise. *Salience* is determined by the number of briefs that were submitted to the court on the case. The number of briefs signals the number of actors (governmental and non-governmental) that believe the case is of sufficient interest to file a brief. Maltzman and Wahlbeck (1996) use this same measure for salience. *Separation of powers* is a variable which indicates whether the case involves the review of a law which defines the powers and rules of the three main branches of government as well as how they interact.

As stated previously, much of the extant literature discusses government strength as an important factor in courts' and judges' decisions to find laws unconstitutional. In parliamentary systems in which the prime minister's survival depends on allies in parliament and often more than two parties are represented in government, prime ministers often form broad coalitions with diverse parties. While rationales for inclusion of a variable for government strength in parliament may be valid, the traditional binary variables used to measure it (usually in studies about two party presidential regimes) appear inadequate when studying the work of high courts in multiparty parliamentary regimes. To capture both the strength of the government to retaliate against a high court and the community of interests necessary to pass a law, we use two alternative measures. First, the analysis includes *Percentage of seats of governing coalition in legislature*. This measure captures the prime minister's support in Bulgaria's unicameral parliament which is important for effectuating policy. Second, because Bulgaria is a multiparty democracy which has seen the importance of several parties abruptly enter and exit the political landscape in the period analysed, an alternative measure for government strength, *Percentage of seats of largest opposition party,* measures the percent of seats held by the largest opposition party in Parliament. In the analysis, two models are analysed which differ in the fragmentation variables described above.[10]

The results of the case level analysis are presented in Table 1. For each variable, the Table includes the coefficient, standard errors, and predicted probabilities. In the two regressions, both the outcome of the case and whether the case involved a separation of powers issue are significant. Cases in which the court majority finds a law unconstitutional, thus subverting the will of the enacting legislature, are 13–14% more likely to be non-unanimous. The court is 18–20% more likely to issue a non-unanimous decision on cases that involve separation of powers issues. Case salience is only significant in the second model. In this model, moving from a less salient case (with the least number of briefs filed) to a very salient case (with the most briefs filed) makes it 37% more likely that the case will involve dissent.

Government support in parliament, measured as the percent of seats in the governing coalition, is not significant in the regression appearing in column 1. The percentage of seats held by the largest opposition party, however, is a better predictor of the BCC

Table 1. Case-level determinants of dissent.

Variables	Coefficient (standard errors) predicted probabilities	
	(1)	(2)
Unconstitutional case	0.549**	0.574**
	(0.269)	(0.268)
	13%	**14%**
Separation of powers issue	0.857**	0.800**
	(0.387)	(0.393)
	20%	**18%**
Salience	0.0586	0.0895**
	(0.0422)	(0.0448)
	27%	**37%**
Percentage of seats of governing coalition	0.814	
	(1.571)	
	4%	
Percentage of seats of largest opposition party		3.787**
		(1.548)
		26%
Constant	−0.903	−1.527***
	(0.892)	(0.527)
Observations	254	254

Note: Standard errors in parentheses; ***$p < 0.01$, **$p < 0.05$, *$p < 0.10$. The predicted probabilities are presented as percentages. For the binary variables (*Unconstitutional case* and *Separation of powers issue*), predicted probabilities are based on moving the independent variable from 0 to 1. For the continuous variables (*salience and the two fragmentation variables)*, predicted probabilities are calculated by moving the variable from its minimum to its maximum. Percentages in boldface represent coefficients that are significant.

issuing a non-unanimous decision, as shown in column 2. In this column, as the percentage of seats held by the largest opposition party goes from the minimum to the maximum, it is 26% more likely that the case is non-unanimous. The percentage of the largest opposition party may have a greater effect on the court's revelation of dissent than the other government strength variable due to the multiparty nature of Bulgaria's parliament. Although the percentage of seats held by the governing coalition may signal whether parliament can coordinate a legislative override when the Court finds a law unconstitutional, this measure may not realistically capture the government cohesion that is needed to coordinate activities to subvert the court. Government coalitions in Bulgaria often involve compromises among diverse parties and it may be difficult to reach the same compromises that were reached by the enacting coalition (See Shapiro 2004). As a result, judges might find that the number of seats held by the largest opposition party is a more reliable predictor of government strength or weakness.

Vote-level data and analysis

Judges' incentives to dissent depend on both individual and broader considerations about their own and the court's reputation and role in society. Therefore, the vote level analysis looks at both judges' individual attributes and contextual determinants of dissent on the BCC. For this part of the analysis, each judge's individual vote is the unit of observation. The data consist of 2,835 individual judges' votes across the constitutional review cases. Prior to the analysis, two potential sources of dependency between the case and the judge need to be addressed. It is likely that justices' votes will correlate more within cases than between cases. Ignoring the hierarchical nature of the data (votes being nested within cases and justices) would lead to inaccurate standard errors (Hox 2010),

while ignoring the cross-classified structure of the data (the same justices voting on different cases) would bias the between-group variance components (Beretvas, Meyers, and Rodriguez 2005). We estimate the two dependencies in our data through the intra-class correlation – a measure of the homogeneity of observed responses within a group. The within-judge dependency is weak (intra-class correlation coefficient of 0.02), while the within-case dependency is fairly significant (intra-class correlation coefficient of 0.57) suggesting that we can ignore within-justice dependency, but not within-case dependency. Therefore, we employ a two-level model with justices' votes nested within cases. Failure to cluster the data can result in incorrect estimates and inferences (See Barcikowski 1981; Blair et al. 1983; Steenbergen and Jones 2002). As indicated from interviews with justices on the BCC, judges listen to arguments from other judges and have a preliminary idea of their positions prior to casting their final votes.[11]

The regressions consist of a dependent variable that captures the justices' individual vote to dissent or not, explanatory variables at both the case and judge levels, and a random effect for each case. Since our dependent variable is dichotomous, we use a model with a logit link and the binomial Bernoulli distribution. Independent variables include case characteristics and judges' attributes.[12] As with our case-level analysis, we include contextual variables. The variables *Unconstitutional, Separation of powers issues* and *Salience* are binary variables which capture these case types. The judge-level analysis also includes alternative variables for government strength in parliament, *Percentage of seats of governing coalition* and *Percentage of seats of largest opposition party*. It is expected that judges' decisions to dissent will vary with the strength of the government in power.

There are four judge-level variables. The first judge-level variable, *Aligned*, indicates whether the judge is politically aligned with the governing coalition at the time of the BCC's decision. As stated above, many studies have shown that judges' decisions are largely based on their own political or policy preferences (See Segal and Spaeth 2002). According to this theory, judges' decisions to strike down laws are highly related to their political stance regarding that law. In Bulgaria, BCC judges are appointed by the three branches of government in a multiparty system which has exhibited significant shifts in the composition of the governing coalition. It is thought that judges will favour the governing coalition if a judge's own political preferences are aligned with those of the government.[13] To create this variable, we determine each judge's political affiliation and then whether this political affiliation was the same as any of the parties of the governing coalition at the time of constitutional review. For each judge, we use the party of the judge's appointer as a proxy for the judge's political preference as has been done in numerous studies (Cross and Tiller 1998; Stidham 1996). Judges appointed by the president were assigned his or her party and judges appointed by the National Assembly were assigned the party of the quota choosing the judge. Judges chosen by the SCA and SCC were coded as non-aligned. To verify this objective method of coding, we also independently researched the background of each judge from newspaper articles, the BCC's own website, and scholarly articles. This background coding confirmed the objective method we used to do the initial judge coding.

To determine whether a judge's affiliation was aligned with the government, we determined the parties of the governing coalition for National Assemblies 36 through 41, which constituted the six governments which existed during the time period of our study. We did not determine judges' alignment for cases that occurred during several interim

governments when prime ministers lost votes of confidence. These interim governments generally served very short time periods during which few if any cases were even heard by the BCC. We use Judge Hadzhistoychev to illustrate our coding. This judge was coded as aligned with the Union of Democratic Forces (UDF) as he was chosen by President Zhelev associated with the UDF. At the time of the decision if the UDF constituted one of the parties in the governing coalition (which occurred during National Assemblies 36, 38, and 39), then this judge was coded as 1 or aligned with the government. For all other National Assemblies, he was coded as a 0, or not aligned with the government.

As stated in the hypothesis section, the effect of judges' alignment on the propensity to dissent should be conditioned on the case outcome. To capture this conditional relationship, a second variable, *Aligned X Unconstitutional case,* is created. This interaction term combines judges' alignment with the Court's majority position on the constitutionality of the law. The third individual variable indicates whether a judge had a political background prior to taking a position on the BCC. For our analysis, *Prior political background* is based on whether judges previously ran for elected office or had served as members of the Presidential Judicial Council, an advisory body whose members are selected by the president.[14]

The fourth judge-level variable is *Tenure,* which is the number of years a judge has served on the BCC at the time of the decision. This variable provides some indication of whether the judge is aligned with the current government in power (Iaryczower, Spiller, and Tommasi 2002) and whether the judge's time and experience on the Court has emboldened him or her. Judges who have been on the Court only a short time are more likely to have been chosen by the sitting president or National Assembly and be less outspoken. Those who have been on the Court longer are unlikely to be as closely connected to the current government. Furthermore, judges who have been on the Court longer may face different incentives than newer judges. Judges who are nearing the end of their term on the bench (with no possibility of re-election) may be concerned about their career prospects after their Court service. Magaloni (2003) indicates that such concerns may affect judges who may be keen on pleasing others who can aid them in securing future jobs.

The results shown in Table 2 support most of the judge-level hypotheses and are generally consistent with the case-level results. Judges aligned with the government in power are 6% less likely to dissent than other judges. While individual judges do not dissent more on unconstitutional cases, the interaction is positive and significant indicating that when the majority finds a law unconstitutional, judges aligned with the government in power are more likely to dissent. In other words, judges' dissent has substantive meaning and is consistent with their party affiliation.

Figure 1, shows the predicted probabilities for the interaction term, indicating the likelihood that judges will dissent given certain parameters. Figure 1 shows the difference in the effect on dissent of changing judges' alignment and case outcomes. On cases in which the majority finds the law constitutional, aligned judges are less likely to dissent than nonaligned judges and on unconstitutional decisions they are more likely to dissent. The predicted probabilities show the likelihood of certain decisions based on categories created by the interaction. For example, nonaligned judges will dissent 17% of the time on constitutional outcomes and 13% on unconstitutional outcomes. Aligned judges will dissent 8% of the time on constitutional cases, but 22% of the time on unconstitutional outcomes.

Table 2. Individual level determinants of dissent.

	Coefficient (standard errors) predicted probabilities	
Variables	(1)	(2)
Aligned judge	−1.211***	−1.175***
	(0.199)	(0.199)
	−6%	**−6%**
Unconstitutional case	−0.433*	−0.372
	(0.263)	(0.255)
	−3%	−3%
Aligned X Unconstitutional	1.993***	1.970***
	(0.281)	(0.280)
	14%	**14%**
Prior political background	0.358**	0.313**
	(0.154)	(0.155)
	3%	**2%**
Tenure	0.0234	0.0347
	(0.0278)	(0.0283)
	1%	2%
Separation of powers issue	0.982***	0.873***
	(0.313)	(0.311)
	11%	**15%**
Salience	0.0393	0.0575
	(0.0371)	(0.0373)
	3%	4%
Percentage of seats of governing coalition	−0.600	
	(1.451)	
	1%	
Percentage of seats of largest opposition party		3.163**
		(1.294)
		7%
Level 2 variance	0.375***	0.355***
	(0.0942)	(0.0952)
Constant	−2.345***	−3.573***
	(0.824)	(0.492)
Observations	2,835	2,835
Number of groups	252	252

Note: Standard errors in parentheses; ***$p < 0.01$, **$p < 0.05$, *$p < 0.10$. The predicted probabilities are presented as percentages. For the binary variables (*Unconstitutional case* and *Separation of powers issue*), predicted probabilities are based on moving the independent variable by 0 to 1. For the continuous variables (*salience and the two fragmentation variables)*, predicted probabilities are calculated by moving the variable from its minimum to its maximum. Percentages in boldface represent coefficients that are significant.

As to the other judge-level variables, judges with prior political backgrounds are 2–3% more likely to dissent than other judges depending on the regression. These results support hypotheses that judges with prior political backgrounds see themselves as more independent and individualistic than judges with other backgrounds and thus are more willing to dissent. The control variable for tenure is not statistically significant nor substantively meaningful.

As far as whether controversial topics lead judges to dissent more, the results show that cases involving the separation of powers lead judges to dissent more. Judges are 11–15% more likely to dissent when they are adjudicating these types of cases. While this issue area leads to more individual dissent, whether a case is salient or not does not appear to affect judges' individual calculus to dissent in either of the regressions.

Finally, government strength measured as the percent of seats in parliament held by the largest opposition party, explains judges' calculations regarding the revelation of

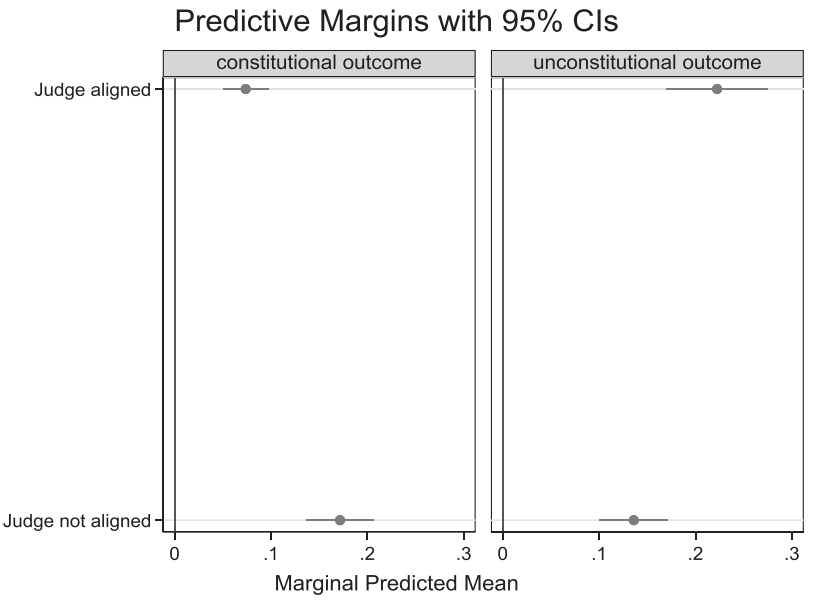

Figure 1. Predicted probabilities generated from the interaction term.

dissent.[15] As the percent of the seats of the largest opposition party increases in parliament, judges are more likely to dissent. Changing *Percentage of largest opposition party seat shares* from one and a half standard deviations below the mean to one and a half standard deviations above the mean results in a 7% increase in individual judges' decisions to dissent. Measuring government strength by percentage of seats held by the governing coalition is not significant.

Implications and conclusion

We systematically accumulate evidence on the costs and benefits of dissent to the BCC as a whole and its judges, investigating the effects of case attributes and political context as well as judges' individual attributes. Our research is relevant to the debate in the American public law literature on whether judges follow legal doctrine or their own policy preferences (Hagle and Spaeth 1993; Segal and Spaeth 2002; Bailey and Maltzman 2011; Pacelle, Curry, and Marshall 2011). While similar debates exist in other countries,[16] these are not based on systematic and rigorous analysis of judicial behaviour, to some extent due to the lack of a publicly available record of judges' decisions. We contribute to this debate by providing evidence from a constitutional court in a young democracy. We argue that courts are motivated to reveal a decision with dissent when cases are controversial due to the majority decision to strike a law down, the case salience or the reference to separation of powers issues. For courts and judges, the political context also informs dissensus, such that the court and individual judges reveal dissent when the largest opposition party in the parliament gains seats. Judges dissent more on separation of powers cases and are highly influenced by their prior political backgrounds and their political alignment. The latter is conditioned on whether the majority finds a law passed by elected politicians in power unconstitutional.

The analysis suggests areas of future research as well. While this analysis focused on case outcomes striking down laws and judges' individual votes, it does not analyse judges' reasoning in reaching their decisions or the importance of pre-existing legal doctrine on decision-making.

While the importance of political and strategic considerations that we identify is not inconsistent with the importance of legal doctrine, future research might include more information about the judges' reasons for striking down or upholding laws. Although additional research may be warranted, this study is an important first step in analysing the behaviour of constitutional courts in young democracies and raises interesting questions that could be addressed in future research should the necessary data become available.

Notes

1. This assumes that multiple divergent opinions indicate that the underlying question is more likely to be political rather than legal.
2. The emergence of dissent on the US Supreme Court is well studied (Pritchett 1948; Schmidhauser 1962; Ulmer 1970; Danelski 1960, 1986; Walker, Epstein, and Dixon 1988; Epstein and Knight 1998; Epstein, Segal, and Spaeth 2001; Epstein, Posner, and Landes 2011) and there are additional studies outside of the U.S. (Smyth and Nayayan 2004, 2006) (Australia); Songer and Siripurapu (2009) (Canada); Garoupa and Ginsburg (2012) (various countries); and, Bentsen (2018) (Norway).
3. Judges of the SCC and SAC are themselves appointed, demoted, and removed by the Supreme Judicial Council, a body of 25 members who are practicing attorneys with high professional and moral attributes and at least 15 years of experience. Eleven of the 25 members are elected by the National Assembly and 11 by the elected bodies of the judiciary. The remaining three members of the Supreme Judicial Council are the Chairmen of the SCC and the SAC and the Prosecutor General. These members sit *ex officio* (See Constitution article 130).
4. The Court also has other powers including those of constitutional interpretation.
5. Author interviews with constitutional justices in Sofia in 2016 indicated that judges have some indication about their colleagues' positions prior to the final vote, although these preliminary positions may be changed.
6. A qualified majority of two thirds is required for decisions that remove the immunity of constitutional judges or end prematurely their mandate due to physical inability to perform duties for over a year.
7. These arguments have been applied both to the Supreme Court (Pritchett 1948; Segal and Spaeth 1993, 2002) and to courts of appeals (Van Winkle 1997; Cross and Tiller 1998; Hettinger, Lindquist, and Martinek 2004). When cases of dissent are common, the voting differences themselves are often used as proxies for ideology (Segal and Cover 1989; Segal and Spaeth 2002; Martin and Quinn 2002; Giles, Hettinger, and Peppers 2001).
8. The usefulness of dissents for future policymaking was well noted by former US Supreme Court Chief Justice Hughes who indicated that "[a] dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed" (Douglas 1948, 153).
9. But see, Hilbink (2012), Herron and Randazzo (2003), and Vanberg (2015) who are more sceptical about the impact of government fragmentation on judicial independence.
10. Appendix A1 provides the case level summary statistics. Appendix A2 provides background information about the government strength variables.
11. Author interviews with constitutional justices, Sofia, 2016.
12. Appendix A3 provides the summary statistics for the judge-level analysis.

13. Many studies show that judges' decisions are largely based on their own political or policy preferences (See Segal and Spaeth 2002). However, most of these focus on the US Supreme Court. Judges also have appeared to follow their political preferences on the Canadian Supreme Court (Ostberg and Wetstein 2007), the Malawi Supreme Court (VonDoepp 2006), the Italian Constitutional Court (Pellegrina and Garoupa 2013), the Portuguese Supreme Court (Amaral-Garcia, Garoupa, and Grembi 2009), and the Spanish Constitutional Court (Garoupa and Ginsburg 2012).
14. Appendix Table A4 provides information on how a judge's prior political background was coded as well as their appointing branch and party affiliation.
15. We also analysed the effect of the seats held by the governing coalition in parliament. As with the case level results, this was not a significant determinant of individual dissent.
16. See, Ossenbuhl 1998; Van Ooyen and Mollers 2015; and Landfried 1994.

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No potential conflict of interest was reported by the authors.

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References

Amaral-Garcia, Sofia, Nuno Garoupa, and Veronica Grembi. 2009. "Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal." *Journal of Empirical Legal Studies* 6 (2): 381–404.

Bailey, Michael A., and Forrest Maltzman. 2011. *The Constrained Court: Law, Politics, and the Decisions Justices Make*. Princeton, NJ: Princeton University Press.

Barcikowski, Robert. 1981. "Statistical Power with Group Mean as the Unit of Analysis." *Journal of Educational Statistics* 6 (3): 267–285.

Baum, Lawrence. 2006. *Judges and Their Audiences*. Princeton, NJ: Princeton University Press.

BBC. 2017. "Poland Court Bill: Parliament Votes for Judicial Reforms." (20 July 2017). http://www.bbc.com/news/world-europe-40670790.

Bentsen, Henrik. 2018. "Court Leadership, Agenda Transformation, and Judicial Dissent." *Journal of Law and Courts* 6 (1): 189–213.

Beretvas, S., J. Meyers, and R. Rodriguez. 2005. "The Cross-Classified Measurement Model: An Explanation and Demonstration." *Journal of Applied Measurement* 6 (3): 322–341.

Bergara, Mario, Barak Richman, and Pablo T. Spiller. 2003. "Modeling Supreme Court Strategic Decision Making: The Congressional Constraint." *Legislative Studies Quarterly* 28 (2): 247–280.

Blair, Clifford, J. Higgins, M. Topping, and Allan Mortimer. 1983. "An Investigation of the Robustness of the t Test to Unit of Analysis Violations." *Educational and Psychological Measurement* 43: 69–80.

Brace, Paul Brace, and Melinda Gann Hall. 1993. "Integrated Models of Judicial Dissent." *The Journal of Politics* 55 (4): 914–935.

Cross, Frank, and Emerson Tiller. 1998. "Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeal." *The Yale Law Journal* 107 (7): 2155–2176.
Danelski, David. 1960. "*"The Influence of the Chief Justice in the Decisional Process of the Supreme Court*." Presented at the annual meeting of the political science association, New York.
Danelski, David. 1986. "Causes and Consequences of Conflict and its Resolution in the Supreme Court." In *Judicial Conflict and Consensus: Behavioral Studies of American Appellate Courts*, edited by Sheldon Goldman, and Charles Lamb, 21–49. Lexington, KY: University Press of Kentucky.
Douglas, William. 1948. "Address to the American Bar Association." In *Judges on Judging: Views from the Bench*, edited by D. O'Brien. Washington, DC: CQ Press.
Ely, John Hart. 1980. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, MA: Harvard University Press.
Epperly, Brad. 2017. "Political Competition and De Facto Judicial Independence in Non-Democracies." *European Journal of Political Research* 56 (2): 279–300.
Epstein and Knight. 1998. *The Choices Justices Make*. Washington, DC: CQ Press.
Epstein, Lee, William Landes, and Richard Posner. 2011. "Why (and When) Judges Dissent: A Theoretical and Empirical Analysis." *Journal of Legal Analysis* 3 (1): 101–137.
Epstein, Lee, Jeffrey Segal, and Harold Spaeth. 2001. "The Norm of Consensus on the U.S. Supreme Court." *American Journal of Political Science* 45 (2): 362–377.
Eskridge Jr., William N. 1991. "Overriding Supreme Court Statutory Interpretation Decisions." *The Yale Law Journal* 101 (November): 331–417.
Ferejohn, John. 2002. "Judicializing Politics, Politicizing Law." *Law and Contemporary Problems* 65 (3): 41–68.
Ganev, Venelin. 2003. "The Bulgarian Constitutional Court, 1991–1997: A Success Story in Context." *Europe-Asia Studies* 55 (4): 597–611.
Garoupa, Nuno, and Tom Ginsburg. 2012. "Building Reputation in Constitutional Courts: Party and Judicial Politics." *Arizona Journal of International and Comparative Law* 28 (3): 539–568.
Garoupa, Nuno, and Tom Ginsburg. 2015. *Judicial Reputation*. Chicago: University of Chicago Press.
Gely, Rafael, and Pablo T. Spiller. 1990. "A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the *State Farm* and Grove City Cases." *Journal of Law, Economics, and Organization* 6 (2): 263–300.
George, Tracey E. 2008. "From Judge to Justice: Social Background Theory and the Supreme Court." *North Carolina Law Review* 86: 1333–67.
Gibson, James. 1978. "Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model." *American Political Science Review* 72 (3): 911–924.
Giles, Michael W., Virginia A. Hettinger, and Todd Peppers. 2001. "Picking Federal Judges: A Note on Policy and Partisan Selection Agendas." *Political Research Quarterly* 54 (3): 623–641.
Goff, B. 2005. "Supreme Court Consensus and Dissent: Estimating the Role of Selection Screen." *Public Choice* 122: 483–499.
Hagle, Tim M, and Harold J Spaeth. 1993. "Ideological Patterns in the Justices Voting in the Burger Courts Business Cases." *The Journal of Politics* 55 (2): 492–505.
Hammergren, Linn. 2007. *Envisioning Reform: Improving Judicial Performance in Latin America*. University Park, PA: Pennsylvania State University Press.
Herron, Erik, and Kirk Randazzo. 2003. "The Relationship Between Independence and Judicial Review in Post-Communist Courts." *The Journal of Politics* 65 (2): 422–38.
Hettinger, Virginia A., Stefanie A. Lindquist, and Wendy L. Martinek. 2004. "Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals." *American Journal of Political Science* 48 (1): 123–137.
Hilbink, Lisa. 2012. "The Origins of Positive Judicial Independence." *World Politics* 64 (4): 587–621.
Hox, Joop. 2010. *Multilevel Analysis: Techniques and Applications*. New York: Routledge.
Iaryczower, Matias, Pablo Spiller, and Mariano Tommasi. 2002. "Judicial Independence in Unstable Environments, Argentina 1935–1998." *American Journal of Political Science* 46 (4): 699–716.
Kelemen, Katalin. 2013. "Dissenting Opinions on Constitutional Courts." *German Law Journal* 14 (8): 1345–1372.

Laffranque, Julia. 2003. "Dissenting Opinion and Judicial Independence." *Juridica International* 8: 162–172.
Landfried, Christine. 1994. "The Judicialization of Politics in Germany." *International Political Science Review* 15 (2): 113–124.
Magaloni, Beatriz. 2003. "Authoritarianism, Democracy and the Supreme Court: Horizontal Exchange and the Rule of Law in Mexico." In *Democratic Accountability in Latin America*, edited by Scott Mainwaring, and Christopher Welna, 79–131. Cambridge: University of Cambridge Press.
Maltzman, Forest, and Paul Wahlbeck. 1996. "May It Please the Chief? Opinion Assignment in the Rehnquist Court." *American Journal of Political Science* 40 (2): 421–43.
Martin, Andrew D., and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999." *Political Analysis* 10 (2): 134–53.
McCubbins, Matthew, Roger Noll, and Barry Weingast. 1995. "Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law." *Southern California Law Review* 68: 1631–1681.
McCubbins, Matthew, Roger Noll, and Barry Weingast. 2006. "Conditions for Judicial Independence." *Journal of Contemporary Legal Issues* 15: 9–50.
Merryman, John Henry, and Rogelio Pérez-Perdomo. 2007. *The Civil Law Tradition*. Stanford, CA: Stanford University Press.
Moreno, Erica, Brian Crisp, and Matthew Shugart. 2003. "The Accountability Deficit in Latin America." In *Democratic Accountability in Latin America*, edited by S. Mainwaring, and C. Welna, 79–131. Cambridge: Cambridge University Press.
Nagel, Stuart. 1964. "Court Curbing Periods in American History." *Vanderbilt Law Review* 18: 925–944.
Ossenbuhl, Fritz. 1998. "Constitutional Jurisdiction and Legislation." In *Constitutional Jurisdiction and Legislation. Symposium on the Occasion of the 70th Birthday of Peter Lerche*, edited by Peter Badura, Peter Scholz, and Rupert Scholz, 23–44. Munich: CH Beck. https://scholar.google.com/scholar_lookup?hl=en&publication_year=1992&pages=8-7&author=Fritz+Ossenb%C3%BChl&title=%E2%80 98Probleme+der+Verfassungsreform+in+der+Bundesrepublik+Deutschland%E2%80%99
Ostberg, C. L., and Matthew Wetstein. 2007. *Attitudinal Decision Making in the Supreme Court of Canada*. Vancouver: UBC Press.
Pacelle, Richard L, Brett W Curry, and Bryan W Marshall. 2011. *Decision Making by the Modern Supreme Court*. Cambridge: Cambridge University Press.
Pardow, Diego G., and Sergio Verdugo. 2013. "The Chilean Constitutional Court and the 2005 Reform: A Castling Between Career Judges and Academics." *SSRN Electronic Journal*. doi:10.2139/ssrn.2305426.
Pellegrina, Lucia Dalla, and Nuno Garoupa. 2013. "Choosing between the Government and the Regions: an Empirical Analysis of the Italian Constitutional Court Decisions." *European Journal of Political Research* 52 (4): 431–480.
Peress, Michael. 2009. "Small Chamber Ideal Point Estimation." *Political Analysis* 17 (3): 276–290.
Popova, Maria. 2010. "Be Careful What You Wish for: A Cautionary Tale of Post-Communist Judicial Empowerment." *Demokratizatsiya: The Journal of Post-Soviet Democratization* 18 (1): 56–73.
Pritchett, C. Herman. 1948. *The Roosevelt Court*. New York: Macmillan.
Ríos-Figueroa, Julio. 2011. "Institutions for Constitutional Justice in Latin America." In *Courts in Latin America*, edited by G. Helmke, and J. Ríos Figueroa. New York: Cambridge University Press.
Sadurski, Wojciech. 2008. *Rights Before Courts, A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*. Dordrecht: Springer.
Scheppele, Kim Lane. 2014. "Hungary and the End of Politics." *The Nation*, May 6. http://www.thenation.com/article/179710/hungary-and-end-politics.
Schmidhauser, John. 1962. "Stare Decisis, Dissent and the Background of the Justices of the Supreme Court of the United States." *The University of Toronto Law Journal* 14 (2): 194–212.
Schwartz, Herman. 2000. *The Struggle for Constitutional Justice in Post-Communist Europe*. Chicago, IL: University of Chicago Press.
Segal, Jeff, and Albert Cover. 1989. "Ideological Values and the Votes of U.S. Supreme Court Justices." *American Political Science Review* 83 (2): 557–565.
Segal, Jeffrey, and Harold Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. New York, NY: Cambridge University Press.

Shapiro, Martin. 2004. "Judicial Review in Developed Democracies." In *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies*, edited by Siri Gloppen, Roberto Gargarella, and Elihn Skaar, 7–26. Portland, OR: Frank Cass.
Sisk, Gregory C, Michael Heise, and Andrew P Morriss. 1998. "Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning." *New York University Law Review* 73 (5): 1376–1500.
Smyth, Russell, and Paresh Nayayan. 2004. "Hail to the Chief! Leadership and Structural Change in the Level of Consensus on the High Court of Australia." *Journal of Empirical Legal Studies* 1 (2): 399–427.
Smyth, Russell, and Paresh Nayayan. 2006. "Multiple Regime Shifts in Concurring and Dissenting Opinions on the U.S. Supreme Court." *Journal of Empirical Legal Studies* 3 (1): 79–98.
Solum, Larry. 2005. "Judicial Selection: Ideology Versus Character." *Cardozo Law Review* 26: 659–689.
Songer, Donald, and Julia Siripurapu. 2009. "The Unanimous Decisions of the Supreme Court of Canada as a Test of the Attitudinal Model." *Canadian Journal of Political Science* 42 (1): 65–92.
Staton, Jeffrey K. 2010. *Judicial Power and Strategic Communication in Mexico*. Cambridge: Cambridge University Press.
Steenbergen, Marco, and Bradford S. Jones. 2002. "Modeling Multilevel Data Structures." *American Journal of Political Science* 46 (1): 218-237.
Sternberg, Sebastian, Susumu Shikano, and Ulrich Sieberer. 2016. "*Ideology, Law and Professional Background. Explaining Dissenting Opinions in the German Federal Constitutional Court*." Paper submitted for presentation at the European Consortium for Political research 2016 General Conference, Prague.
Stidham, R. 1996. "The Voting Behavior of President Clinton's Judicial Appointees." *Judicature* 80 (1): 116–120.
Stone Sweet, Alec. 2000. *Governing with Judges: Constitutional Politics in Europe*. Oxford: Oxford University Press.
Uhah, Isaac, and Ange-Marie Hancock. 2006. "U.S. Supreme Court Decision Making, Case Salience and the Attitudinal Model." *Law and Policy* 28 (3): 295–320.
Ulmer, Sidney. 1970. "Dissent Behavior and the Social Background of Supreme Court Justices." *The Journal of Politics* 32 (3): 580–98.
Ulmer, Sidney. 1973. "Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases: 1947–1956 Terms." *American Journal of Political Science* 17 (3): 622–30.
Van Ooyen, Robert Chr, and Martin H. W. Mollers. 2015. *Handbook on the Federal Constitutional Court in the Political System*. Wiesbaden: Springer VS.
Van Winkle, Steven. 1997. ""*Dissent as a Signal: Evidence From the U.S.*" Court of appeals." presented at the annual meeting of the American political science association, Washington, DC.
Vanberg, Georg. 2015. "Constitutional Courts in Comparative Perspective: A Theoretical Assessment." *Annual Review of Political Science* 18 (1): 167–185.
vonDoepp, Peter. 2006. "Politics and Judicial Assertiveness in Emerging Democracies: High Court Behavior in Malawi and Zambia." *Political Research Quarterly* 59 (3): 389–399.
Walker, Thomas, Lee Epstein, and William Dixon. 1988. "On the Mysterious Demise of Consensual Norms in the United States Supreme Court." *The Journal of Politics* 50 (2): 361–389.

Appendices

Table A1. Summary statistics at the case level ($N = 254$).

Variable	Mean	Std. Dev.	Min	Max
DV: Dissent case	0.5511811	0.4983556	0	1
Unconstitutional case	0.4173228	0.4940907	0	1
Separation of powers issue	0.1574803	0.3649722	0	1
Salience	5.507874	3.284581	1	21
Percentage governing coalition	0.535213	0.0842349	0.435	0.7208
Percentage largest opposition party	0.2365157	0.0921218	0.0875	0.4583

Table A2. Information on coding the strength of the government's coalition in parliament.

National Assembly	Parties in Governing Coalition	Proportion of seats of governing coalition
NA 36	UDF + DPS	0.5583
NA 37	BSP	0.4350
NA 38	UDF	0.5230
NA 39	NDSV + UDF	0.7208
NA 40	BSP + NDSV + DPS	0.6370
NA 41	GERB	0.4833

Party abbreviations: UDF (Union of Democratic Forces); BSP (Bulgarian Socialist Party); NDSV (National Movement for Stability and Progress); GERB (Citizens for European Development of Bulgaria); DPS (Movement for Rights and Freedoms).

Table A3. Summary statistics at the judge level ($N = 2{,}835$).

Variable	Mean	Std. Dev.	Min	Max
DV: Dissent vote	0.1453263	0.3524917	0	1
Aligned judge	0.3816578	0.485879	0	1
Unconstitutional case	0.4169312	0.4931383	0	1
Aligned X Unconstitutional case	0.1410935	0.3481794	0	1
Prior political background	0.1996473	0.3998057	0	1
Tenure	4.038095	2.396767	0	10
Separation of powers issue	0.1555556	0.3624974	0	1
Salience	5.457496	3.276573	1	21
Percentage seats governing coalition	0.5348913	0.0846996	0.435	0.7208
Percentage seats largest opp. party	0.2382965	0.092203	0.0875	0.4583

Table A4. Information on judges' appointer, party affiliation, and political background.

Judge name	Institutional appointer and party	Prior political background	Year nominated
Milcho Nikolov Kostov	President Zhelev (UDF)	0	1990
Teodor Antonov Chipev	President Zhelev (UDF)	0	1990
Ivan Parvanov Pavlov	GNA (UDF choice)	1	1990
Nikolay Genchev Pavlov	President Zhelev (UDF	1	1990
Luben Andonov Kornezov	GNA (BSP choice)	1	1990
Pencho Stoqnov Penev	GNA (BSP choice)	1	1990
Milena Nikolova Zhabinska	Supreme Court	0	1990
Mladen Danailov Mitov	Supreme Court	0	1990
Neno Kolev Nenovski	GNA (UDF choice)	0	1990
Tsanko Hadzhistoychev	President Zhelev (UDF)	0	1991
Aleksandar Arabadzhiev	Supreme Court	0	1991
Assen Manov	Supreme Court	0	1991
Stanslav Dimitrov	National Assembly SDS (UDF)	1	1992
Dimitrar Gotchev	Parliament--SDS (UDF)	1	1994
Todor Todorov	Parliament--DAR	0	1994
Georgi Markov	President Zhelev (UDF)	1	1994
Ivan Grigorov	Supreme Court	0	1994
Nedelcho Beronov	Parliament--SDS (UDF)	0	1997
Stefanka Stoyanova	SCC & SAC	0	1997
Zhivko Stalev	President Stoyanov (UDF)	0	1997
Margarita Zlatareva	President Stoyanov (UDF)	0	1997
Rumen Yankov	SCC & SAC	0	2000
Hristo Danov	President Stoyanov (UDF)	1	2000
Snezhana Nacheva	President Parvanov (BSP)	0	2000
Lyudmil Neykov	SCC & SAC	0	2000
Zhivan Belchev	President Stoyanov (UDF)	0	2000
Vassil Gotsev	Parliament (UDF)	1	2000
Penka Tomcheva	SCC & SAC	0	2000
Evgeni Tanchev	President Parvanov (BSP)	0	2003
Emiliya Drumeva	National Assembly (NDSV)	0	2003
Lazar Gruev	President Parvanov (BSP)	1	2003
Vladislav Slavov	SCC & SAC	0	2003
Mariya Pavlova	National Assembly (NDSV)	0	2003
Dimitar Tokushev	President Parvanov (BSP)	0	2006
Plamen Kirov	President Parvanov (BSP)	0	2006
Blagovest Punev	SCC & SAC	0	2006
Krasen Stoychev	Parliament (BSP)	0	2006
Georgi Petkanov	Parliament (NDSV)	0	2008
Vanyushka Angusheva	President Parvanov (BSP)	0	2009
Tsanka Tsankova	National Assembly (GERB)	0	2009
Stefka Stoeva	SCC & SAC	0	2009
Roumen Nenkov	SCC & SAC	0	2009

Note: In the earliest years of the Court, the Grand National Assembly (GNA) selected judges rather than the National Assembly.

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