The Institutional Design of Judicial Review of Legislation:

A study of 128 Democratic Constitutions

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1 Introduction

In the beginning of the 21^{st} century, the judicial review of legislation is a widespread phenomenon.[1] Out of the 193 countries in the world in 2003, at least 85% of them have at some moment envisaged some form of review of parliamentary legislation by an independent body.[2] In 46% of those cases, a constitutional court was set up,

[1]The text refers to "judicial review" for simplicity, but it is usually pointed out that it is not a jurisdictional function, but rather a legislative function. See Kelsen [1928]. But then, why did Kelsen title his essay the *jurisdictional* guarantee? In general, judicial review will refer to the review of legislation by a body independent from the other powers of the state. Therefore, review of legislation by the legislature itself is excluded. Examples of this model can be found in Harutyunyan and Mavcic [1999]. They report as examples of this model Finland, Bahrain, Kuwait, Oman, Congo, Ethiopia, Guinea-Bissau, Sao Tome and Principe, Tunisia, Zimbabwe, Afghanistan, Brunei, Burma, China, Laos, North Korea, Pakistan, Turkmenistan, Vietnam and Cuba. Similarly, some rare cases in which the decisions of courts, constitutional or not, are subject to legislative review are also excluded. This was the case of the Tribunal de Garantías Constitucionales de Ecuador of the Constitutions of 1945, 1967, 1978 and until the reform in 1992. See Ecuador entry in Instituto de Derecho Público Comparado Manuel García Pelayo. Universidad Carlos III de Madrid [2002]. It is probably also the best way to characterize the United Kindgom's model after the Human Rights Act of 1998 incorporating the European Convention of Human Rights of 1950.

[2]Out of 193 independent states, 164 have known some form of judicial review and 25 have not. I do not have information on 4 of them (East Timor, Maldives, San Marino and Somalia). To get a clearer idea as to how to interpret those numbers, one should look at Section 4 where the data that has been gathered is described.

the rest entrusting the task to ordinary courts exclusively.[3] Since the early 1800s, when only a handful of modern states, among them the U.S., Uruguay, Argentina, Mexico and Colombia, had established practices of judicial review, the development of constitutionalism is the tale of the demise of the 17^{th} and 18^{th} centuries' idea of parliamentary supremacy. Four waves in this process that spans over 200 years are usually identified:[4] the first wave concerns the gestation of the idea of judicial review of legislation before World War I, in rather timid forms both on the European and American continents[5]; the second takes place during the inter-war period and is characterized by the appearance of Kelsenian constitutional courts as specific bodies entrusted with the powers of a negative legislator[6]; the third results from the reorganization of old and formation of new states after 1945, as well as the decolonization of the 60s and 70s[7]; the final wave comes with the fall of communism in 1989, which is followed by deep changes in the institutional structure of countries formerly in the Soviet sphere of influence.[8]

But the process of institutionalization of judicial review has taken very different forms across space and time. Theorists typically distinguish two basic models of judicial review: the American model, so called because of its prevalent use on the American continent, which attributes to all ordinary judges the power of review of legislation; and the European model, because of its adoption by most European countries, which assigns the exclusive power of review of legislation

[3]Out of the 164 countries that established the possibility of judicial review of legislation, 76 of them created also constitutional courts, while 90 did not. Brnneck [1988, 221] quotes Klaus Stern providing another similar estimate of a broader phenomenon: in 1981, there were 84 countries with "special norms of competence in the area of constitutional law". Using our data, a simple T-test shows that the sample proportion is not significantly different from .5 (p-value =0.3487). Therefore, putting aside relative longitudinal aspects, Ferejohn [2002-2003] is right in claiming that it is not really correct to say that the American model of judicial review is "spreading like wildfire".

[4]See Harutyunyan and Mavcic [1999, Chapter 1].

[5]Beyond the case of the U.S., scholars usually point to European countries for the roots of judicial review. See Beyme [1988]. However, it seems that, except for the case of Switzerland (1874), judicial review was consolidated earlier on the American continent with the independence of the South-American Spanish colonies such as Uruguay (1830), Argentina (1853), Mexico (1857), Venezuela (1858), Colombia (1858), etc.

[6]Constitutional courts were adopted in Austria (1920), Czechoslovakia (1920), Liechtenstein (1925), Greece (1927), Spain (1931) and Ireland (1937), among others.

[7]Among the old countries that adopted constitutional courts one counts Italy (1948), Germany (1949), and France (1958); among the new countries that established constitutional courts, one finds South Korea (1948), India (1949), Chad (1959), Algeria (1963), but there are many others.

[8]This is the case, for example, of Uzbekistan (1991), Slovenia (1991), Bulgaria (1991), Romania (1991), etc.

to a special constitutional court. Looking at the existence of constitutional courts as a salient feature distinguishing the two models, some interesting patterns arise. Longitudinally, all the experiences of the 19^{th} century follow the American model of Marbury vs. Madison.[9] The European model, conceived in its present format by Hans Kelsen, was first adopted by the Constitutions of the disappeared Czechoslovakia and Austria in 1920, and then by other countries all over the world.[10] Cross-sectionally, the regions of the world also differ widely: in Europe, out of the 42 countries that have in their history adopted some model of judicial review, 76% of them have chosen constitutional courts at some point; in Asia and Africa, 57% and 51% respectively have done so; but only 33% in the Middle East, 20% in America, or even 0% in Oceania.

Recent studies have shown that the design of judicial institutions has important implications for various economic, social and political processes. Feld and Voigt [2004] show that in countries in which courts are *de facto* independent, especially because of the length of judicial office, few changes in the number of judges and constant salaries, have higher economic growth rates. La Porta et al. [2002] corroborate that the insulation of judges from political branches guarantees economic freedom and that the power of judicial review of legislation ensures political freedom. Sweet and Brunell [1998] have argued that the creation of a court system accessible by private litigants has been a major force behind the process of European integration. In this context, beyond the question of why the writers of constitutions decide to establish the possibility of review of parliamentary legislation by an independent body, it becomes important to ask questions about the institutional design of judicial review.[11] Why does the institution of a constitutional court appear? Why concentrate the power of judicial review in one body? Why not? This paper investigates the positive reasons that lead to the choice of

[9]Marbury v. Madison, 5 U.S. 137 (1803).

[10]Contrary to what is usually believed, that Austria was the first Constitution to foresee a constitutional court, the Czechoslovakian Constitution (February 29^{th}, 1920) preceded the Austrian (October 1, 1920) by seven months. There are some authors that claim that one can find functioning constitutional courts earlier. See Drago [1999-2000] who claims that the Monegasque Tribunal Suprême, created in 1911, was the first real constitutional court; Luzaga [1997] claims the same for an earlier Cuban court. Without knowing these institutions in detail, one can venture that those were ordinary courts that were entrusted with the exclusive power of judicial review and therefore, were not really separate institutions. Historically, one also finds the *Reichsgericht* (Imperial Constitutional Court) of the German *Paulskirche* Constitution of 1848, which never came into effect. See Beyme [1988, 25-28].

[11]As to the theories about the establishment of some form of judicial review of legislation, see, e.g., Ginsburg [2001, 3-8], Ginsburg [2003, 21-33] and Hirschl [2004].

one model of judicial review over others. In particular, it focuses on the question of why some institutional designers decide to create constitutional courts while others don't.

This is how the paper proceeds. First of all, section 2 presents several choices related to the institutional design of judicial review: whether it is diffuse or concentrated, whether a constitutional court is created or not, and the relations between the institutions of government. Section 3 dwells into the second of those questions and presents several theories as to the establishment of constitutional courts in democratic countries: the institutional designers' willingness to establish checks and balances when the strength and balance of political forces is uncertain, the distrust of judiciaries of past regimes, the imitation of previous democratic experiences, the needs of federal arrangements and the attempt to ensure legal certainty derived from the rules of ordinary adjudication. The last two sections of the paper offer evidence in favor of those theories at the origin of constitutional courts: section 4 presents the data that operationalizes the theories and section 5 the results, with a discussion of the findings. After studying 128 democratic constitutions of 112 countries during the 19^{th} and 20^{th} centuries, it seems that there is some *prima facie* evidence for the claims that constitution writers recur to constitutional courts to establish checks and balances when the relation of political forces is unclear, and to avoid the inadequacies of some judicial institutions for the exercise judicial review. The findings also support the idea that institutional designers are influenced by the choices made in other proximate constitutional experiences. However, the claim that constitutional courts are established to overcome the resistance of public officials of previous autocratic regimes only finds support in the European experience.

2 The institutionalization of judicial review

Scholars usually distinguish between the American and European models of judicial review. The American model is characterized by the fact that the power of review is assigned to ordinary courts that examine the constitutionality of legislation in the process of deciding specific legal disputes. Referring to the European model implies talking about the concentration of the power of review in a constitutional court which can examine the validity of legislation *in abstracto* –in an action brought against a piece of legislation by some actors– and/or *in concreto*

–by reviewing the decisions of ordinary judges–.[12]

In fact, in spite of these simplifications, there are several choices open to an institutional designer, which may result in some interesting combinations of features of the pristine American and European models. Three major options can actually be distinguished[13]: First of all, the institutional designer can choose whether to concentrate or disperse the power of judicial review of legislation.[14] Second, the constitution may set up a new institution in charge of exercising the review of legislation –exclusively or concurrently with other institutions–.[15] Third, the institutional designer must determine the relations between the institutions that it decides to set up and other bodies, in other words, she must establish the rules of the game. This usually involves specifying the relations between the legislature, ordinary courts and possibly the constitutional court. Here she must address whether courts can exercise judicial review before or after the passage of legislation, whether constitutional courts can review or not the decisions of ordinary courts, or whether ordinary courts can refer or not cases to the constitutional court or the supreme court for review.[16]

The actual models of judicial review around the world reflect all those possibilities in interesting ways. Along the sides of the European model of concentrated

[12]Like in typical "cassation proceedings". Beyond parliamentary statutes, constitutional courts also usually review constitutional amendments, international agreements, executive regulations, acts of the heads of state, acts of territorial or administrative units, they adjudicate disputes between government institutions, between the branches of the state, between the state and regional sub-units, and they can also decide disputes relating to the constitutionality of political parties, referenda, elections, and finally they deal with issues that may arise as to the capacity to hold office and impeachment of public officials. See Harutyunyan and Mavcic [1999, Chapter 4].

[13]There are more choices but these affect the basic institutional structure. As to the others, see Ginsburg [2001].

[14]The American model is also called the "diffuse model" of judicial review because it allows a multitude of judges or courts to exercise it, whereas the European model is also called the "concentrated model" because it entrusts this power to a single court, the rest being forbidden to exercise it.

[15]The American model is usually characterized by the fact that it is ordinary judges that are entrusted with this task, while the European model implies the creation of a new body with features that distinguish it from ordinary courts. The appointment process of constitutional judges normally differs from that of ordinary judges: they are selected by political bodies (President, Prime Minister, Parliament, Senate, etc.) and the process is politically charged. See a comparative table in Favoreu [1994, 32-33].

[16]This is an aspect that is not sufficiently emphasized in the study of the models of judicial review but which is of course crucial from the perspective of understanding the practices that will develop within a given institutional structure. From a game theoretic perspective, it is not enough to specify the players in the game, it is also necessary to specify the rules of the game.

review of legislation in a constitutional court, one can find concentrated models that assign this task to ordinary supreme courts –lower courts being forbidden to exercise it–.[17] The French model is characterized by the existence of a constitutional court that does not interact with other ordinary judges because it can only intervene before the passage of legislation.[18] In Italy, the constitutional court cannot review the decisions of ordinary courts but the later must/can refer to it cases that raise constitutional issues.[19] In some countries, the American model of diffuse review by ordinary courts coexists with a constitutional court imported from the European tradition. In this case, the constitutional court may intervene ex-ante before the passage of legislation or ex-post or both.[20] Finally, the New Commonwealth model, as Mavcic calls it, allows for the ex-ante judicial review of legislation by the ordinary supreme court.[21]

These different combinations, of course, reflect a diversity of conceptions about the role of different institutions in governance and result from a variety of political and social circumstances. We will deal with some of these aspects in the next section when we dig into the origins of constitutional courts. Moreover, the concrete choices determine the ultimate behavior of the public officials in charge of the judicial review of legislation in the new constitutional setting. Scholars agree that judicial activism, politics, or influence –however one likes to call it– varies from country to country, and some, if not most, of those differences can be traced back to the institutional choices made during the constitutional process.[22]

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[17]For example, as of 2004, this is the case in Iceland, Liechtenstein, Monaco, Burkina Faso, Cameroon, Chad, Eritrea, Niger, Sudan, Uganda, Zaire, Zambia, Yemen, Costa Rica, Nicaragua, Panama, Paraguay, Uruguay and the Philippines. See Mavcic [2004]. Note that Mavcic updates the table as changes occur, or as he notices them, and therefore the classification of a country may change.

[18]The French model can be found, for instance, in France, Algeria, Comoros, Djibouti, Ivory Coast, Morocco and Mozambique. See Mavcic [2004].

[19]Art. 134 Italian Constitution 1948 in connection with Law No. 1 of February 9, 1948 and Law No. 87 of March 11, 1953 art. 23. This stands in sharp contrast to, for instance, the position of the German and Spanish constitutional courts, which can review the decisions of ordinary judges on the basis of complaints filed by litigants (art. 93.1 of the German *Grundgesetz* 1949 and art. 53.2 Spanish Constitución 1978). On the other hand, German and Spanish ordinary judges are also allowed to refer cases to the constitutional court (art. 100.1 of the German *Grundgesetz* 1949 and art. 163 of the Spanish Constitución 1978).

[20]These are the cases of Portugal, Colombia, Ecuador, Guatemala and Peru, for instance. See Mavcic [2004].

[21]It has been adopted by Mauritius. See Mavcic [2004].

[22]Alivizatos [1995] models "judicial politicization" as a function of the degree of institutional decentralization, the degree of political polarization, the number of veto players, the degree of

This is, the configuration of the institutions becomes an important explanatory variable of the adjudicatory practices that develop.

3 Theories of the establishment of constitutional courts

One of the major choices open to a constitutional designer envisaging the introduction of some form of review of legislation is whether to create a new institution in charge of exercising it or not.[23] Scholars have dwelled into the historical reasons for the invention and adoption of constitutional courts and, at the same time, on their advantages and disadvantages.[24] We will explore here several theories, and formulate several hypotheses, which are geared to the explanation of constitutional courts in *democratic* regimes.[25]

3.1 Distrust of previously appointed ordinary judges

A first theory of the origins of constitutional courts that has been put forward is that they are the result of a distrust of ordinary judges appointed under the old regime by politicians involved in the crafting of the new constitution during a regime transition.

In democratic transitions, the fear of politicians is that judges appointed under the old authoritarian regime will not respond to the demands of the new constitution. The lack of change in power in authoritarian regimes for a long period of time will have resulted in a judiciary from a given ideology and, therefore, biased against the democratic regime. Scholars talk about constitutional courts that spring from historical democratic anomalies, from departures from parliamentary

parliamentary anomaly since World War I and the degree of integration in Europe. Cooter and Ginsburg [1996] use a model in which the discretion of judges depends on the number of legislative vetoes and the duration of government coalitions. Lijphart [1999, 225-226] correlates judicial activism with constitutional rigidity. Tsebelis [2002, 225-235] regresses the number of veto players, the degree of polarization and decentralization on several measures of judicial activism.

[23] Exclusively or not, but this is the separate question of how diffuse should the power of judicial review be.

[24] See, e.g., Favoreu [1994, 16-27]. It should always be remembered that Kelsen conceived of constitutional courts as contingent, rather than essential institutions. See Kelsen [1934, 292, 332-333].

[25] Dictatorships also establish constitutional courts as the cases of Algeria (1989), Azerbajan (1995), Burundi (1992), Cambodia (1972), Egypt (1971), for example, show.

rule or post-authoritarian constitutional courts *tout court*.[26] This fear would not exist in constitutional moments preceded by a previous democratic regime with alternations in power, or even by political circumstances, which, while not democratic, did not result in a stable regime. One could thus posit this hypothesis:

> *Autocratic Past Hypothesis*: constitutions are more likely to establish constitutional courts in countries that have a recent and stable autocratic past.

3.2 Uncertainty as to the relation of political forces

Students of regime transitions have elaborated on the circumstances under which one should expect to see constitutions that establish checks and balances, a constitutional court being an important institution in this regard.

Those accounts usually start with a particular conception of how democratic constitutions are made: they result from a bargaining process among political forces about the institutional framework that will govern them in the future.[27] Institutions have distributional consequences and each political force has its own interests. Since each political force is likely to prefer the institutional framework that best furthers its interests, the different forces of a polity may have conflicts over institutions. The resulting constitution will thus represent the result of a bargain over institutions.

One these accounts, the basic parameters to predict what institutional framework will emerge, and whether a constitutional court will be created, turn on the relation of political forces, especially, on whether the relation of forces is known and whether it is balanced.[28] The clearest proposition is that if the relation of forces is unknown, political factions are likely to establish significant checks and balances to insure themselves against political adversity. Constitutional courts are likely to arise in this context as checks on the other branches of government.[29]

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[26]For Italy, see Pasquino [1998]; For Spain, see Pz Royo [1995, 636-637]; In general, see Ferejohn [2002-2003, 51], and Ginsburg [2003, 9-10]. Note that this theory is not necessarily limited to democratic transitions and ideological biases. In more general terms, one could posit that politicians will distrust ordinary judges for any bias that they perceive relevant, which may also be ethnic, social, or economic. Although the example might be a little contrived, one could even envisage the heads of a military coup establishing a constitutional court to control old institutions.

[27]See for all Przeworski [1991, 79-88].

[28]See Przeworski [1991, 79-88].

[29]See Beyme [1988, 30]. Talking about the origin of the Austrian constitutional court of 1920, he suggests that the "constitutional jurisdiction arose out of completely different sources from the

Agreement also seems to exist regarding the proposition that constitutional courts are not likely to be set up if the relation of forces is known and unbalanced, because in those circumstances the major political actor will not want to encumber its future exercise of power.[30] More disagreement exists regarding whether constitutional courts will arise if the relation of forces is known and balanced. This situation might result in a political deadlock, in which some claim that anything can happen[31], although others see this as an ideal situation favorable to the emergence of the judicial review of legislation, although not necessarily in the form of a constitutional court.[32]

In those theories, uncertainty mainly bears on the future composition of democratic institutions and the participation of different political factions in those. However, it is determined by the knowledge politicians have, which will likely be influenced by previous or present political and social circumstances, such as who has "won" in the past, the degree of present political support, the distribution of values in society, etc. Therefore, one should see the following:

> *Political Uncertainty Hypothesis*: constitutional courts are more likely in countries in which the future composition of institutions (mainly the legislature and the executive) is uncertain.

Note that this theory is applicable to any type of institutional bargain, and not only to democratic constitutions. Therefore, it may be able to explain recent moves among some democracies like Andorra, Bolivia, Colombia, Ecuador and Luxembourg to adopt a constitutional court as their model of judicial review.

3.3 Legal uncertainty resulting from adjudicatory institutions

Another theory that is frequently found in the literature, coming mostly from legal scholars, contends that constitutional courts are desirable institutions because

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American principle of judicial review. It came into being on account of the distrust of the various political camps. The state of tension called for stress-relieving institutions to be as apolitical as possible." Ginsburg [2003, 25] calls this the "insurance model of judicial review". In the context of studies of judicial independence and the establishment of the power of judicial review of legislation, similar accounts have been given by Ramseyer [1994] and [Hirschl, 2004, 43-44].

[30] See Przeworski [1991, 79-88], Ginsburg [2003, 24].

[31] Przeworski [1991] says that one might expect anything from civil war to peaceful democracy, and the constitution is likely to be a temporal solution to impasses in the negotiations.

[32] Ginsburg [2003, 29].

of the dangers, in terms of a loss of legal certainty and predictability, of entrusting a quasi-legislative function to *regular* adjudicatory institutions, which are not adequately designed for that purpose.[33] First, it is often the case that ordinary courts are specialized by subject-matter and there are a multitude of courts of last resort.[34] The concentration of the power of judicial review in a constitutional court is desirable to solve conflicting interpretations that could arise among those courts.[35] Second, many ordinary supreme courts render decisions in panels of judges drawn from a larger bench. While this makes it possible for the court to decide more cases, it is perceived to make the occurrence of conflicting interpretations more likely and, again, a constitutional court to resolve those issues would be convenient.[36] Finally, in civil law systems there is a lack of vertical *stare decisis*: Higher court decisions are not binding on lower courts.[37] This would allow lower courts to disregard decisions of higher courts and eventually a situation could arise in which some courts apply a statute while others do not. A constitutional court in charge of resolving those issues authoritatively would seem to be necessary.[38]

[33] I draw on Ferreres Comella [2003, 76-80]

[34] See also Favoreu [1994, 19-20]. This organization results from both historical reasons related to the doctrine of the separation of powers and the gains from specialization and expertise. See Merryman [1985, 85-89] for a brief explanation of the separation between the ordinary and administrative jurisdictions. As regards specialization, Germany may be the most extreme case: there are Civil/Criminal Courts, Administrative Courts, Labour Courts, Social Security Courts, Tax Courts, plus a Constitutional Court.

[35] The added value from this perspective is that a constitutional court is a specialized court in its turn.

[36] Note, however, that one could attribute the power to resolve those conflicts to a formation within the same institution, especially if they involve the same issues that the court usually deals with, because a constitutional court would only deal with constitutional issues. Therefore, this seems to be a weak argument.

[37] The reasons for this are both related to the prohibition on judges to create "binding rules" and as a guarantee of judicial independence. But it should be noted that Kelsen had no issue with judges creating norms. He understood legislation and adjudication as different steps in the process of creating norms for particular facts. The legislative power entailed the creation of general norms that the judicial power concretized in a given case. Kelsen [1934, 301-305]. At the top of this system of norms, he put the Constitution as the ultimate source of validity. Kelsen [1934, 325-327].

[38] This, as Ferreres Comella [2003] emphatically notes, was apparently a crucial aspect for Kelsen who saw in the exercise of judicial review a legislative function requiring decisions of a general character. See Kelsen [1942]. See also Beyme [1988, 30-31]. On the other hand, it would be possible to make declarations of constitutionality by higher courts binding for other courts and weaken this argument. As it becomes clear, those "legal arguments" in favor of setting up constitutional courts tend to be weaker than the "political theories" of previous paragraphs

Interestingly enough, most of those factors frequently obtain in civil law systems, where they are conflated. Here we will focus on the aspect that, as we have seen, authors emphasize: the existence or not of a precedential practice of *stare decisis*.[39] In this respect, the Anglo-American legal tradition seems unique and differs from other legal traditions such as the Civil Law, Socialist, Scandinavian or Islamic traditions. From this, one should expect that:

> *Common Law Tradition Hypothesis:* Institutional designers in common law countries are less likely to set up constitutional courts than those of other legal traditions.

3.4 The needs of federal arrangements

Constitutional courts are also said to be particularly desirable in federal arrangements.[40] Indeed, in federal states, it may be that, side by side with the federal judiciary, states within the federation maintain their own judicial structures. But neither federal nor local judiciaries seem to be appropriate fora to handle issues of allocation of powers between the federation and sub-entities.[41] Alternatively, it may be that the federation maintains a single judiciary and the prospect of leaving those allocative decisions to federal judges may push for the establishment of a separate forum to which local entities can appeal.[42].

But, taking these structural elements as givens, the ultimate reasons to establish constitutional courts in a federal arrangement, are somewhat related to some of the explanations of constitutional courts that we have already seen. On the one hand, it may be that the future political composition of the various representative institutions is uncertain, and more so because they are chosen by different fractions of the polity, and constitution makers of the various political camps want

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for the simple reason that the design of future institutions is potentially within the hands of the constitution writer. Allegedly it is easier to change the rules of the game than to change people.

[39]Note that, from the point of view of "political theories", the lack of *stare decisis* also matters, either because it increases uncertainty as to the ultimate policies that will result, or because it makes it more likely that a single distrusted judge will use the power of judicial review against desirable policies. Therefore, this "legal account" could be collapsed into a "political theory". But, on the other hand, since both "political theories" posit similar relations for this variable, they could not be distinguished on this dimension.

[40]See Kelsen [1928].

[41]An existing case on point may be the EU: scholars have proposed the creation of a constitutional council to decide those issues (see Schilling et al. [1996])

[42]A good example here may be the Spanish Constitution of 1978

to guard against political disadvantage.[43] On the other hand, it may be that in complex state structures, the existence of a variety of *locus* of power requires a constitutional court to authoritatively resolve issues among the organs of the federation and ensure legal certainty and predictability. The first explanation is related to the "political theories" spelled above, and the second to the "legal theories".

Be it as it may, according to this theory, the following should occur:

> *Federation Hypothesis*: constitutional courts are more likely in federal arrangements.

3.5 Imitation of similar democratic experiences

A final theory of the choice of a model of judicial review that we will consider suggests that imitation of similar democratic experiences may have played an important role in the spread of constitutional courts. Scholars and constitution makers have pointed out that the institutional choices made by countries with a similar experience in the vicinity have exerted a great influence in subsequent constitutions.[44]

The reasons for this influence remain a little obscure and could range from a simple constitutional fad, that politicians have followed, to a conscious attempt at coping with the uncertainty as to the fittest institutional design for a particular political experience. In this latter sense, one could image a model of herd behavior or a sort of informational cascade that would result in politicians following the choices, which have resulted in a successful democratic experience, made by other actors in homogeneous circumstances.[45]

For a variety of reasons, the condition of homogeneity suggests that countries that are geographical close will look at each other. This might be one of the reasons why one observes a clustering of constitutional courts in European countries and their absence on the American continent. And temporally, following the logic

[43] For instance, federal governments may distrust national judiciaries, regional governments may distrust federal judiciaries, etc.

[44] See, e.g., Rubio Llorente [1988, 257], Planchart Manrique [1988, 353], and Ginsburg [2002, 20]. But see Djorjevic [1988, 197-198] who talks about the specificity of the Yugoslavian case.

[45] The selection of a model of judicial review can be understood as the choice of the institution that is most fit to the political circumstances of a given polity. There are a variety of elements that may make a given model more suitable to some circumstances than others, such as the distribution of preferences among citizens and public officials, their competence, the political/institutional structure of the state, whether the design will improve deliberation over public affairs, whether it will allow a better control of this anti-majoritarian power, etc.

of a herd, imitation should be more likely the more spread the phenomenon is. As a result, the following hypothesis is put forward:

> *Regional Imitation Hypothesis:* Constitutional courts are more likely in regions were more previous democratic constitutions also foresee one.

4 Data and methods

Many of the theories formulated above are part of the lore of constitutional theorists, but have never been systematically tested.[46] In fact, the apparently clear hypotheses suggested by the theories turn out to be difficult to operationalize, particularly if one aims at being systematic. This section explains how the data has been gathered for the dependent and independent variables, the methods that will be used and the issues that arise in this process.

4.1 Dependent variable

We are interested in the likelihood that a constitutional court will be established in a given country, but several questions arise as to what one should be looking at specifically or, in other words, how to operationalize the dependent variable.

To begin with, one may question whether it is sufficient for our purposes, as we will be doing here, to look at written constitutions that were adopted as some point.[47] By focusing on those formal documents, one may be overoptimistic about

[46]Only Alivizatos [1995, 585] has tested some of those propositions on a modest sample of 18 European countries. In the equation "Systems of Judicial Review", he finds that decentralization, political polarization, the number of veto players, parliamentary anomalies and integration in the European Union have all a positive effect on the establishment of a constitutional court. In particular, the variable *Parliamentary Anomalies* seems to be moderately significant (p-value = 0.071). However, he uses OLS on a dichotomous dependent variable –the linear probability model- which is not the most efficient estimator of the parameters and, since the disturbances are not normally distributed, the tests of hypotheses are likely to be misleading. See Gujarati [2003, 582-586]. An exact replication of the results with a probit model renders huge coefficients and standard errors, most likely due to the high degree of collinearity among the explanatory variables. Limiting the study to the effects of *Parliamentary Anomalies*, one can confirm the hypothesis that European countries with past parliamentary anomalies are significantly more likely to adopt a constitutional court.

[47]There are a few known countries without constitutions, namely Israel, New Zealand, Saudi Arabia, and the UK (These are those that I could identify following Maddex [2001]). But New

the study of the real world: some constitutions are never implemented and some institutions never start functioning in the way they were designed. On the other hand, the concrete information as to the particular regimes of review of legislation that are effectively established turns out to be very difficult and extremely costly to gather, while written records are easier to track. Still, I believe that it is sufficient to look at written constitutions because it is likely that, to a large extent, the actual regime of judicial review will be explained by those written documents.[48]

Second of all, one may ask what are the constitutions that one should be looking at. The first issue is to decide what types of political entities one is interested in. The choice has been made here to look only at constitutions of what are called independent states, both present and past.[49] Appendix 1 contains a list of states included in the sample. Second, one should decide whether to take into account all constitutions or only those that establish some system of judicial review. Since we are studying the choice between a diffuse or concentrated model of judicial review, it seems relatively straightforward that it is sufficient to look at constitutions that set up some system of review. Table 1 shows the countries without a history of judicial review of legislation as of 2000 classified by continent.[50]

A third question is whether one should only look at constitutions after 1920. The reason for this would stem from the claim that Kelsen invented constitutional courts in 1920 and that, therefore, the choice of a model of judicial review did not appear before that year. In fact, the idea of a constitutional court seems to have pre-existed Kelsen and, consequently, all constitutions are considered.[51] A final question is how to identify constitutions that result from democratic transitions, because the theories we are trying to test are geared at explaining those. Here we

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Zealand, Saudi Arabia or the UK are excluded from the analysis because they do not have any system of judicial review. For Israel, the date of independence was used. Sometimes a system of judicial review is established through a constitutional amendment and this is taken into account. The system of judicial review is considered to be set up on the year of the amendment. Note the restriction to *enacted* constitutions.

[48] In another context, Hayo and Voigt [2003] show that *de iure* judicial independence is the main predictor of *de facto* judicial independence.

[49] A list of independent states can be found in U.S. Office of the Geographer and Global Issues [2005]. The constitutions of the sub-entities of those states, like those of the German Länder, are therefore disregarded.

[50] I think there is some disagreement between Mavcic [2004], and Maddex [2001], as to whether some of those countries should be included in this list. The list results from my own best research efforts. Note that countries that have known some form of judicial review in the past are excluded.

[51] See Beyme [1988, 29-30]. Kelsen can be credited for perfecting the idea of a constitutional court and his influence resulted in its inclusion in the Austrian Constitution of 1920. The results presented below, however, do not change if one includes only constitutions after 1920

Table 1: Countries Without a History of Judicial Review of Legislation as of 2000

Africa	America	Asia	Europe	Middle East	Oceania
Ethiopia	None	Afghanistan	Holy See	Bahrain	New Zealand
Guinea-Bissau		Bhutan	Netherlands	Kuwait	
Libya		Brunei	United Kingdom	Oman	
Sao Tome & Principe		China		Qatar	
Tunisia		Indonesia		Saudi Arabia	
		Iran			
		Iraq			
		Laos			
		North Korea			
		Turkmenistan			
		Vietnam			

will focus on constitutions that resulted in a regime that scored at least 4 on the 0 to 10 Democracy scale of the Polity IV Data Set.[52]

Several sources were used to determine whether a system of judicial review was established and whether a constitutional court was foreseen in those constitutions.[53] An effort was made at finding as many constitutions as possible for all countries. This search uncovered 268 constitutions or constitutional amendments establishing a system of judicial review of legislation representing 166 independent states.[54] Of those, only 128 constitutions of 112 states resulted in a democratic regime with the previous criteria. This information was used to build the dummy variable *Constitutional Court* which adopts the value 1 if the constitution determines the creation of a constitutional court and 0 otherwise.[55]

[52]This is the variable DEMOC of the Polity IV Data Set. See Marshall and Jaggers [2003]. Note that this procedure leaves out of the analysis constitutions such as that of Argentina of 1853 because it did not result in a democratic regime at that time, although subsequent democratic regimes have existed under that same constitution, which is still applicable. Note that old democracies that undergo constitutional changes are taken into account as these changes usually result in democratic regimes. This is the case, for example, of France in 1958.

[53]Those sources were used simultaneously: Harutyunyan and Mavcic [1999]; Instituto de Derecho Público Comparado Manuel García Pelayo. Universidad Carlos III de Madrid [2002]; Mavcic [2004]; Maddex [2001]; Central Intelligence Agency [2002]; Brown [2001]; Association des Cours Constitutionnelles Ayant en Partage l'Usage du Frans [2003]; European Comission for Democracy Through Law (Venice Comission). CODICES Database [2003]; and the websites of many supreme courts and constitutional courts.

[54]As it was pointed out, no reliable information could be found as regards the Maldives, San Marino, Somalia and East Timor.

[55]The *name* of the institution in the constitution is not important: constitutional councils, for example, and in particular those modelled after the French Conseil Constitutionnel, were counted as constitutional courts.

4.2 Independent variables

Each of the five hypotheses above is operationalized through one or more variables. Summary statistics for those can be found in Appendix 2.

Democratic Past. This variable captures the degree of democracy of previous political regimes. It is build on the variable POLITY2 of the Polity IV Data Set which measures on a scale from -10 to 10 the orientation of a polity on the autocracy–democracy scale.[56] *Democratic Past* averages the values of the variable POLITY2 during the 10 years before the year of the Constitution.[57] In this process, an issue arises with newly independent countries, which, in some way, *do not have a past*. Here a distinction is made between newly independent countries that were part of another polity like the former USSR or Yugoslavia and former colonies. The first are coded with the values of POLITY2 of the previous polity. Former colonies are more complicated because although they were part of a colonial empire, and thus could be coded on the basis of the situation in the colonial power, the political situation in the colonies seems for the most part to have been radically different from that in the parent state. For this reason, one could hypothesize that the values of POLITY2 for those countries during colonial periods should be -10 and here this assumption is used.[58] The expected effect of *Democratic Past* depends on the theory: under the Autocratic Past hypothesis, it should have a negative effect on the likelihood that the country adopts a constitutional court; but under the Political Uncertainty Hypothesis, it should have a positive effect, since in countries that have a working democracy political factions are more likely to be uncertain as to the future composition of the legislature and the executive.

[56] Marshall and Jaggers [2003]. The data set bases its measures of institutionalization of democracy on the competitiveness of executive recruitment, the openness of executive recruitment, the constraints on the chief executive, the regulation of political participation and the competitiveness of political participation. For the concrete elements taken into account and the weights attributed in the construction of the variables see Marshall and Jaggers [2003, 12-14].

[57] Independently of whether other constitutions were adopted in the interim. The Polity IV Data Set gives special codes to transitions, state failures, interrupted polities, etc. Those codes were not considered and the codes of the regimes before those periods were employed.

[58] Beyond this, six countries in the sample were not included in the Polity IV Data Set (Andorra, Cape Verde, Liechtenstein, Monaco, Seychelles and Suriname). In an effort to keep those observations, information was gathered on whether those countries were democratic or not. To estimate the values of POLITY2 for Cape Verde, Seychelles and Suriname, the index of freedom of Freedom House [2003] and their history in Central Intelligence Agency [2002], was employed. For Andorra, Liechtenstein and Monaco, Drago [1999-2000], Luchaire [1999-2000] and Gsthl [1999-2000] are used, but ultimately Liechtenstein and Monaco were left out.

Regime Instability. This variable is the variance of the variable POLITY2 in the Polity IV Data Set over the 10 years that precede the constitution. Its use is related to the political theories above in different ways. First and foremost, it will be used as a proxy to approximate the idea of political uncertainty. The intuition is that if there have been oscillations in the institutional framework along the Autocracy-Democracy scale, it is because the democratic and autocratic camps have both shown to be sufficiently strong to win, at least sometimes, and therefore, at the time of a democratic change, any of them, or their heirs, is uncertain as to winner of a democratic election. Thus, one should expect a higher degree of regime instability to make constitution designers more likely to establish a constitutional court. Second, from the point of view of the Autocratic Past Hypothesis, *Regime Instability* matters because it is only if there is a consistently biased regime that one should distrust previously appointed judges. The same issues as with the previous variable arise in the construction of this variable.

*Democratic Past * Regime Instability.* This interaction between the two variables is introduced to account for the fact that some of the theories posit that it is concurrence of two events that makes the emergence of constitutional courts likely. The Autocratic Past Hypothesis says that it is a regime that is both authoritarian *and* stable that accounts for constitutional courts. The Political Uncertainty Hypothesis suggests that it is under an unstable *and* democratic regime that constitutional courts should arise. Note that both hypotheses are mutually exclusive.

Ethnic Fractionalization. This variable is the probability that two randomly selected individuals from a given country will belong to different ethnic groups. It is drawn from the literature on economic growth, in which it has become a common measure of the degree of social fractionalization of a country.[59] The variable will be used as another proxy for political uncertainty to check the robustness of the results. The gist is that in highly heterogeneous societies, it is less likely that any single group will be sufficiently strong to patrimonialize the democratic institutions and bargaining is more likely to be necessary to govern, but the actual parties to a bargain more uncertain. In sum, it is more uncertain who is going to "win". Thus, a higher degree of ethnic fractionalization should have a positive impact on the probability that the country sets up a constitutional court.

*Democratic Past * Ethnic Fractionalization.* Again this interaction is required

[59]The data is from Alesina et al. [2003]. Although the probabilities are computed on a given year, mostly during the second half of the twentieth century, they are used here without taking into account the specific year on which they are based. This can be justified because most constitutions that we will be studying actually fall within this period of time and because the ethnic composition of a society changes rather slowly.

by the fact that the theories posit that it is the concurrence of several factors that makes constitutional courts desirable for political actors. Under the Autocratic Past Hypothesis, countries that are both undemocratic *and* ethnically cohesive are more likely to establish constitutional courts. Under the Political Uncertainty Hypothesis, countries that are both democratic *and* ethnically fractionalized are more likely to do so.

Federation. This dummy variable codes whether the constitution establishes a federal-type of institutional arrangement or not. It receives the value 1 if it does and 0 otherwise. The data for this variable comes from the variable that measures the centralization of state authority in the Polity III Data Set[60] and the CIA World FactBook.[61] According to the theory, *Federation* should have a positive impact on the likelihood that a constitutional court exists.

Regional Model of Democracies. This variable is the percentage of previous *democratic* constitutions in the region that have established a constitutional court.[62] It therefore varies over time and across regions. We will distinguish 6 regions: Africa, America, Asia, Europe, Middle-East and Oceania. A classification of countries in regions can be found in Appendix 1. The theory suggests that the variable should have a positive impact on the likelihood that a constitutional court will be set up.

Common Law Tradition. The legal tradition of the different countries of the world was determined on the basis of the CIA World FactBook[63] and the World Bank's Global Development Network Growth Database.[64] Countries with a common law tradition were coded as 1 and the rest as 0. One should expect countries with a common law tradition to be less likely to create a constitutional court than countries in other legal traditions.

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[60]This is the variable CENT in Jaggers and Gurr [1996]. The variable is coded on a three point scale and here we consider that a federal arrangement is anything (values 2 and 3) except a unitary state (value 1).

[61]Central Intelligence Agency [2002]. The Government Type field usually contains information in this regard.

[62]For constitutions adopted the same year, the variable has the same value. Note that due to the fact that not all constitutions for all countries have been included in the sample, this variable is more of an approximation. Yet, it seems to reflect previous subjective beliefs as to the main differences across the regions of the world and across time.

[63]See Central Intelligence Agency [2002], under the entry Legal System.

[64]Easterly and Yu [2002].

4.3 Methods

The dependent variable *Constitutional Court* is binary and therefore a probit model is adequate to estimate the effects of the explanatory variables. There is only a major problem that one would like to take into account: for some countries, there are several repeated observations over time and one expects that there will be some correlation between the choices made in those different constitutions. For this reason, robust standard errors with clustering on country will be used for hypothesis testing.[65]

5 Results and discussion

The results are divided into several sub-sections: first, we will see some general results and, after that, we will check their robustness by re-specifying the model and check some more specific aspects of the theories. The last sub-section discusses the findings overall and their limitations.

5.1 Main results

Table 2 reports the results of two models: Model 1 takes into account constitutions that resulted in a democratic regime; Model 2 all constitutions for which independent variables could be found. The χ^2 test suggests that it can be rejected for both models that the impact of the parameters is jointly zero. Model 1 correctly predicts 75% of the cases, for a proportional reduction of error of 38.5%, and Model 2 predicts 73% of the cases, for a reduction of error of 31.3%.[66]

Note that, because of the use of interacted variables, the interpretation of the results is not straightforward.[67] To exemplify the results, Figure 1 shows the joint

[65] Stata 8.0's probit command with the cluster option was used. The variances so computed of the coefficients are known as Huber/White/Sandwich standard errors and allow to relax the assumption that observations within clusters are independent.

[66] The percent reduction of error is equal to (PCP–PMC)/(1–PMC), where PCP is the Percent of Correctly Predicted observations from the model and PMC is the Percent of observations in the Modal Category of the data. The modal category in our data is *Constitutional Court* = 0.

[67] Indeed, the sign and significance of the coefficients in the table can be misleading. The effect of an interacted variable is the sum of the variable alone and its interaction, the significance of the coefficient has to be recalculated for this overall effect, and the sign of the effect depends on the values that the other interacted variable takes. See Gill and Theobald [2001].

Table 2: Probit Models of the Establishment of Constitutional Courts (1)

Variable	Model 1 (Robust Std. Err.)	Model 2 (Robust Std. Err.)
Democratic Past	-0.009	-0.018
	(0.022)	(0.021)
Regime Instability	0.025**	0.008
	(0.010)	(0.008)
Democratic Past * Regime Instability	0.004***	0.002
	(0.002)	(0.002)
Common Law Tradition	-1.380***	-1.349***
	(0.366)	(0.347)
Federation	0.092	0.078
	(0.353)	(0.299)
Regional Model of Democracies	0.018***	0.025***
	(0.005)	(0.005)
Intercept	-0.521**	-0.579**
	(0.238)	(0.187)
N	128	252
Clusters	112	159
Log-likelihood	-60.248	-130.528
Pseudo R^2	0.303	0.227
% Correctly Predicted	75.00	73.02
% Reduction Error	38.46	31.31
$\chi^2_{(6)}$	41.14***	58.80***

Significance levels : $*$: 10% $**$: 5% $***$: 1%

effect of *Democratic Past* and *Regime Instability* using Model 1, which is the main focus of the theory.[68]

One can see that countries that have an unstable democratic past are more

[68]The simulated probabilities to calculate first differences, percentage differences, and confidence intervals of probabilities are generated using CLARIFY. King et al. [2000]. As one variable changes, the rest of the variables are held at their means for continuous variables and their medians for dummy variables (*Federation* = 0 and *Common Law Tradition* = 0).

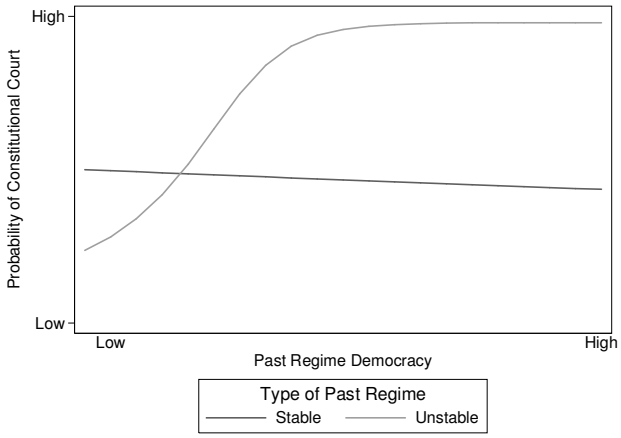

Figure 1: Effects of Past Regime Democracy and Stability

likely to set up a constitutional court than other countries and, in particular, than countries with a stable autocratic past. The overall effect of *Democratic Past* is statistically significant for high degrees of past regime instability.[69] It is worth noting that, in stable regimes, whether the country has a democratic past or not does not affect the probability of setting up a constitutional court. This is, stable democratic regimes and stable autocracies have similar probabilities of establishing a constitutional court. In Model 2, which takes into account all constitutions, and not only constitutions that have resulted in a democratic regime, the shape, sign and significance of these effects remain, but the results are only significant at the 1% level, which suggests that the theory could be more broadly applicable, but other factors would have to be taken into account, or the theories operationalized differently. We will come back to this in Section 5.4.

These findings are closer to the Political Uncertainty Hypotheses than the Autocratic Regime Hypothesis. In countries with an unstable democratic past, un-

[69]When *Regime Instability* is at its maximum, the overall effect of *Democratic Past* is equal to 0.365, s.e.=0.218, p-value=0.094, two-tailed test. As a robustness check, the variables DEMOC and AUTOC have been used as independent variables. The shape and sign of the effects does not change, although their significance disappears. For instance, using DEMOC, the overall effect of *Democratic Past* is 0.243, s.e.=0.327, p-value=0.457, two-tailed test. And, using AUTOC for *Democratic Past*, the overall effect is not significant for any value of *Regime Instability*. The results do not change either if *Democratic Past* and *Regime Instability* are measured over the previous 25 years.

certainty is bound to be much higher than in any of the other combinations of circumstances and, therefore, politicians would be much more likely to create checks and balances. Judges in those regimes could not be especially distrusted by politicians since it would be hard to consider that they are biased. Most likely, in those regimes judges may be distrusted because they are unpredictable, which in fact would be another type of uncertainty that politicians would take into account. Moreover, in situations in which judges could potentially be more biased, in countries that have known a stable autocratic regime in the past, the probability of setting up a constitutional court is not particularly different from that of countries in which judges could hardly be considered to be biased, namely stable democratic regimes, which contradicts the Autocratic Regime Hypothesis.

Regarding the rest of the theories, not all hypotheses can be confirmed. While *Federation* has a positive impact on the establishment of a constitutional court, the effect is not significant.[70] The Regional Imitation Hypothesis, though, is confirmed in both models: in Model 1, compared to countries in regions where only a quarter of the previous democratic constitutions chose a system of judicial review based on a constitutional court, countries in regions in which three quarters of the constitutions did so, were on average .30 more likely to foresee a constitutional court in their turn (95% Confidence Interval: .14 and .45). The variable has a statistically significant effect. Finally, turning to the effects of legal tradition, it seems that, as the Common Law Hypothesis advanced, countries within the Anglo-Saxon legal heritage were 80% less likely to set up constitutional courts (95% Confidence Interval: 68% and 92%). The effects are highly statistically significant in both models.[71]

5.2 Robustness check of the Political Uncertainty Hypothesis

The results in the previous section allow us to confirm the Political Uncertainty Hypothesis. The robustness of this result is now checked in Table 3 by replacing the variable *Regime Instability* with the variable *Ethnic Fractionalization*, which represents another aspect of the same hypothesis. As before, Model 3 takes into account only democratic constitutions, and Model 4 all constitutions.

In both Models 3 and 4, *Democratic Past * Ethnic Fractionalization* allows us

[70] To some extent, the result is not surprising since, as was pointed out, the effect of *Federation* is possibly not direct, but rather indirect. In any case, this disconfirms any simple understanding of the relationship between the two variables.

[71] Recall that both "political theories" predicted that the effect of this variable would be significant

Table 3: Probit Models of the Establishment of Constitutional Courts (2)

Variable	Model 3 (Robust Std. Err.)	Model 4 (Robust Std. Err.)
Democratic Past	-0.069*	-0.079*
	(0.035)	(0.036)
Ethnic Fractionalization	1.956**	1.343**
	(0.743)	(0.570)
Democratic Past * Ethnic Fractionalization	0.167**	0.161**
	(0.074)	(0.066)
Common Law Tradition	-1.351***	-1.393***
	(0.353)	(0.339)
Federation	-0.291	-0.140
	(0.399)	(0.325)
Regional Model of Democracies	0.026***	0.028***
	(0.007)	(0.005)
Intercept	-1.330**	-1.110**
	(0.460)	(0.351)
N	127	249
Clusters	111	157
Log-likelihood	-56.370	-125.096
Pseudo R^2	0.341	0.248
% Correctly Predicted	80.31	75.50
% Reduction Error	50.98	37.11
$\chi^2_{(6)}$	42.65***	54.97***

Significance levels : $*$: 10% $**$: 5% $***$: 1%

to confirm the Political Uncertainty Hypothesis. Figure 2 shows the joint effect of the interacted variables, and the clear divergence between ethnically homogeneous and heterogeneous democratic societies. Using Model 3, one can see that heterogeneous and democratic societies were .82 more likely to establish a constitutional court than homogeneous and democratic societies (95% Confidence Interval: .34 and .99). The overall effect of *Ethnic Fractionalization* is statistically significant

for almost all values of *Democratic Past*.[72] On the other hand, again the evidence seems to disconfirm the Autocratic Past Hypothesis: countries with an autocratic past were not more likely to establish a constitutional court compared to countries with a democratic past.[73] The conclusions do not change for the rest of the variables, either.

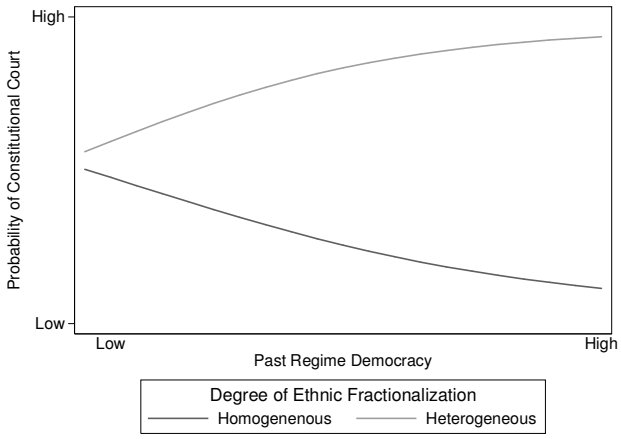

Figure 2: Effects of Past Regime Democracy and Ethnic Heterogeneity

5.3 Diverging Patterns in European Countries and Other Parts of the World

The results of the previous sections run counter to what many theorists believe is the experience of the establishment of constitutional courts in Europe over the last half of the 20^{th} century. It is possible, however, that the range of application of the theory is narrower than is usually thought and that the logic behind the establishment of constitutional courts in countries in other regions of the world is different.

[72] If *Democratic Past* is put at its maximum value, the overall effect is 3.623, s.e.=1.333, p-value=0.006, two-tailed test. *Ethnic Fractionalization* is not significant for low values of *Democratic Past*. Using DEMOC AND AUTOC instead of POLITY2 to represent *Democratic Past* did not alter the results.

[73] In fact, in Model 3, countries with a democratic past are .11 more likely to establish a constitutional court than countries with an autocratic past (95% Confidence Interval: -0.25 and .45), a difference that is not statistically significant.

To verify this intuition, I estimate in Table 4 the effects of the variables of interest on two sets of countries: Model 5 takes into account constitutions of European countries only and Model 6 those of countries in other parts of the world.

Model 5 shows that the Autocratic Past Hypothesis fits well the experience of European countries, the context in which the theory was developed. The overall effect of *Democratic Past* reveals that European countries with a stable anti-democratic past, like Germany, Italy, Spain, and the countries formerly within the Soviet sphere of influence were .51 more likely to establish constitutional courts than consolidated and stable democracies (95% Confidence Intervals: .03 and .86), an effect that is statistically significant.[74] But the political uncertainty as to the strength of democratic and autocratic forces still seems to have played an independent and important role even in Europe: for countries that have had a moderately democratic past, the overall effect of *Regime Instability* is positive and statistically significant, which suggests that constitutional courts have been used as institutions to consolidate a shaky democracy.[75] The rest of the results do not change.[76]

Turning to other regions of the world in Model 6, a very different picture emerges. Here it seems that countries that have had a democratic past were more likely to establish constitutional courts than countries that came out of an authoritarian regime, which is the opposite of what the Autocratic Past Hypothesis expected. [77] And political uncertainty seems to have played a major role in shaping the decisions of politicians: a simulation shows that non-European countries

[74]The overall effect of *Democratic Past* for almost all values of *Regime Instability* is positive, the exception being the lowest values. Substituting *Democratic Past* for similar measures build on the variables DEMOC and AUTOC of the Polity IV Data Set rendered the same results for this sample of European countries.

[75]The overall effect of *Regime Instability* is negative and insignificant for low values of *Democratic Past* and becomes positive and statistically significant for moderate and high values of the later variable. For instance, when *Democratic Past* is at its maximum, the effect is equal to 0.275, s.e.=0.111, p-value=0.014, two-tailed test). On the other hand, replacing *Regime Instability* by *Ethnic Fractionalization* shows that the degree of ethnic fragmentation of European societies is not a good predictor of why those countries established constitutional courts and, for this reason, the results are not reproduced. This is not surprising, however, and should not lead us to discard the Political Uncertainty Hypothesis, as European societies are relatively homogeneous ethnically, while very heterogeneous in many other respects.

[76]*Common Law Tradition* was dropped from the model along with two observations because it perfectly predicted the failure of Cyprus and Ireland to create a constitutional court.

[77]Indeed, the overall effect of *Democratic Past* is positive and statistically significant for almost all values of *Ethnic Fractionalization*. Substituting *Democratic Past* for variables constructed on the basis of the measures DEMOC and AUTOC of the Polity IV Data Set did not alter the results.

Table 4: Probit Models of the Establishment of Constitutional Courts (3)

Variable	Model 5 (Robust Std. Err.)	Model 6 (Robust Std. Err.)
Democratic Past	-0.157***	0.054
	(0.036)	(0.071)
Regime Instability	0.051**	
	(0.026)	
Ethnic Fractionalization		1.923*
		(1.017)
Democratic Past * Regime Instability	0.022**	
	(0.009)	
Democratic Past * Ethnic Fractionalization		-0.007
		(0.125)
Common Law Tradition	dropped	-1.160**
		(0.367)
Federation	0.796	-0.521
	(0.880)	(0.438)
Regional Model of Democracies	0.026**	0.041**
	(0.012)	(0.018)
Intercept	-0.466	-1.448**
	(0.808)	(0.593)
N	38	88
Clusters	35	75
Log-likelihood	-12.600	-35.214
Pseudo R^2	0.3943	0.3034
% Correctly Predicted	84.21	80.68
% Reduction Error	33.33	26.09
$\chi^2_{(5)}$	28.50***	28.50***

Significance levels : $*$: 10% $**$: 5% $***$: 1%

with highly heterogeneous societies and a democratic past were .71 more likely to create a constitutional court than non-European countries with an homogeneous

society and an undemocratic past (95% Confidence Interval: .22 and .96), a difference that is statistically significant. It is in those circumstances that politicians would have wanted to protect themselves against political adversity the most. In fact, the overall effect of *Ethnic Fractionalization* is positive and statistically significant for low and moderate values of *Democratic Past*, as politicians face little uncertainty and fear little for democracy in homogeneous and democratic societies.[78] The rest of the results remain the same.

5.4 Discussion

To a greater or lesser extent, the results seem to confirm several theories of institutional choice posited above and their hypotheses on some range of application. We will discuss here three further issues or limitations: first, limitations as to inferences regarding the concrete causal mechanisms that the theories posit; second, limits as to what the variables that are used to operationalize the theories capture; and three, some patterns of adoption of constitutional courts that are outside of the parameters of the models.

To begin, although many variables employed turned out to be statistically significant on some range of application, on closer consideration one can raise doubts as to whether the findings really allow for the causal inferences that are made. For instance, *Democratic Past* is a measure based on aspects of the political system (legislative and executive recruitment basically), that makes it difficult to disentangle the claim that institutional designers establish constitutional courts because of the expected (bad) behavior of judges from the hypothesis that they do so to counteract (bad) politicians that will result from future elections or even (bad) bureaucrats. Presumably the three aspects are highly correlated in former autocratic countries. Similarly, while several factors pointed to the idea that countries within the common law tradition would be less likely to set up constitutional courts, the results for the variables on the legal tradition do not allow to point to any one aspect in particular because of the high correlation among those. In other words, this result confirms some broad expectations, but fails short of confirming whether constitutional courts are less likely in common law countries because of the unity of the court system, the form of organization of higher courts or the existence of

[78] If the variable *Ethnic Fractionalization* is replaced by the variable *Regime Instability*, the effect of political uncertainty remains positive, but the significance of the result disappears, suggesting that uncertainty is more related to the relations of forces between different ethnic groups than to that of the democratic and autocratic camps. For this reason, the results for the later variable are not reproduced.

stare decisis.[79]

Second, it may be that the actual variables that were used to operationalize the hypotheses only capture some of the possible dimensions that are relevant and matter to institutional designers according to the theories. For instance, the Political Uncertainty Hypothesis was operationalized through variables that captured the stability of institutions or the differences in the ethnic composition of societies. A regime's stability or ethnic differences, however, are only some of the aspects that create political uncertainty as to the policies that will ultimately be implemented, and other factors, such as linguistic, religious, or economic differences might actually have been the relevant features of the polity creating uncertainty, and that institutional designers have taken into account. This, for instance, may be the reason why *Ethnic Fragmentation* did not turn out to be statistically significant in predicting the establishment of constitutional courts among European countries, but was in other parts of the world.[80]

Finally, there is still much variation in the data to be explained and that has not been taken into account by theorists or the models above. First of all, while the distrust of *anti-democratic* judges may have been one of the reasons to establish a constitutional court, this may be seen as a specification of a more general theory of the distrust of judges. The example of South Africa stands out: scholars have claimed that the South African constitutional court established during the 90s resulted not from the fear of *anti-democratic* judges –South Africa ranked quite high on its level of democracy–, but rather from the distrust of apartheid judges.[81] Future research on the subject should try to capture these subtleties.[82] Furthermore, while the logic of the processes of decolonization differs from the experiences of European countries, there has been little theoretical elaboration on the choices made in those countries. Future research on the origins of constitutional courts should overcome the Europe or U.S.-centered approach to the study of judicial review of legislation that seems to pervade the literature by analyzing in more

[79]Using the legal tradition as a variable, though, overcomes the information costs of figuring out the structure of judicial institutions for all the countries of the world in the last 200 years.

[80]Alesina et al. [2003] also provide measures of the religious and linguistic fractionalization of countries. Except for an average of all three types of fractionalizations (ethnic, linguistic and religious) among countries in other parts of the world and the average fractionalization among all countries, these two other dimensions rendered worse results in predicting the establishment of constitutional courts.

[81]See on this Philippe [2000].

[82]In part, by coding the past of former colonies as autocratic we have tried to capture this effect, since new independent governments would highly distrust existing colonial judges. The variable did not have the expected effect.

detail the circumstances and experiences of other regions of the world.[83] On the other hand, we have been studying mainly *democratic* constitutions but, in fact, many *non-democratic* constitutions establish constitutional courts and this pattern has received little scholarly attention. One could maybe hypothesize that non-democratic forces establish constitutional courts as a form of distributing perks and privileges, or it may be that they do so to control the judges of past regimes. Further research is necessary to study these institutional choices.

6 Conclusion

This article has explored institutional choice. In spite of the great theoretical advancements that the field has seen in the last years, empirical investigation of the phenomena that lead to the establishment of particular institutions is still in development. Institutions are usually put forward as important independent variables in studying other political phenomena. But the fact that they are endogenous choices within a given social system makes it important to understand their origins to be able to disentangle their effects from those of other factors. The findings in this research allow to confirm in generic terms many theories of institutional choice that have been offered, but there is still a lot of research to be done to start shedding some light into questions that have occupied scholars for decades.

[83] Major steps in this direction have been made by Ginsburg [2002], Ginsburg [2003] and Hirschl [2004].

Appendix 1: Independent states in the sample

This is a list of the independent states for which at least one constitution establishing a system of judicial review is included in the sample. Countries with a least one *democratic* constitution are in italics. The region of the world is indicated by the letters in parentheses (AF: Africa; AM: America; AS: Asia; E: Europe; M: Middle-East; O: Oceania). (*) indicates a country that does not exist anymore as of 2003.

Albania (E)	*Georgia* (AS)	Palau (O)
Algeria (AF)	*Germany* (E)	Panama (AM)
Andorra (E)	*Ghana* (AF)	*Papua New Guinea* (O)
Angola (AF)	*Greece* (E)	*Paraguay* (AM)
Antigua & Barbuda (AM)	*Grenada* (AM)	*Peru* (AM)
Argentina (AM)	*Guatemala* (AM)	*Philippines* (AS)
Armenia (AS)	Guinea (AF)	*Poland* (E)
Australia (O)	Guyana (AM)	*Portugal* (E)
Austria (E)	*Haiti* (AM)	*Romania* (E)
Azerbaijan (AS)	*Honduras* (AM)	*Russia* (E)
Bahamas (AM)	*Hungary* (E)	Rwanda (AF)
Bangladesh (AS)	*Iceland* (E)	*Saint Kitts & Nevis* (AM)
Barbados (AM)	*India* (AS)	*Saint Lucia* (AM)
Belarus (E)	*Ireland* (E)	*Saint Vincent & the Grenadines* (AM)
Belgium (E)	*Israel* (M)	Samoa (O)
Belize (AM)	*Italy* (E)	Senegal (AF)
Benin (AF)	Ivory Coast (AF)	*Seychelles* (AF)
Bolivia (AM)	*Jamaica* (AM)	Sierra Leone (AF)
Bosnia-Herzegovina (E)	*Japan* (AS)	Singapore (AS)
Bostwana (AF)	Jordan (M)	*Slovakia* (E)
Brazil (AM)	Kazakhstan (AS)	*Slovenia* (E)
Bulgaria (E)	Kenya (AF)	Solomon Islands (O)
Burkina Faso (AF)	Kiribati (O)	*South Africa* (AF)
Burma (AS)	Kyrgyzstan (AS)	*South Korea* (AS)
Burundi (AF)	*Latvia* (E)	South Vietnam (AS)
Cambodia (AS)	Lebanon (M)	*Spain* (E)
Cameroon (AF)	*Lesotho* (AF)	*Sri Lanka* (AS)
Canada (AM)	Liberia (AF)	*Sudan* (AF)
Cape Verde (AF)	*Liechtenstein* (E)	*Suriname* (AM)
Central African Republic (AF)	*Lithuania* (E)	Swaziland (AF)
Chad (AF)	*Luxembourg* (E)	*Sweden* (E)
Chile (AM)	*Macedonia* (E)	*Switzerland* (E)
Colombia (AM)	*Madagascar* (AF)	Syria (M)
Comoros (AF)	*Malawi* (AF)	Taiwan (AS)
Congo (AF)	*Malaysia* (AS)	Tajikistan (AS)

Costa Rica (AM)
Croatia (E)
Cuba (AM)
Cyprus (E)
Czech Republic (E)
*Czechoslovakia** (E)
Denmark (E)
Djibouti (AF)
Dominica (AM)
Dominican Republic (AM)
Ecuador (AM)
Egypt (AF)
El Salvador (AM)
Equatorial Guinea (AF)
Eritrea (AF)
Estonia (E)
Fiji (O)
Finland (E)
France (E)
Gabon (AF)
Gambia (AF)
Mali (AF)
Malta (E)
Marshall Islands (O)
Mauritania (AF)
Mauritius (AF)
Mexico (AM)
Micronesia (O)
Moldavia (E)
Monaco (E)
Mongolia (AS)
Morroco (AF)
Mozambique (AF)
Namibia (AF)
Nauru (O)
Nepal (AS)
Nicaragua (AM)
Niger (AF)
Nigeria (AF)
Norway (E)
Pakistan (AS)
Tanzania (AF)
Thailand (AS)
Togo (AF)
Tonga (O)
Trinida & Tobago (AM)
Turkey (E)
Tuvalu (O)
Uganda (AF)
Ukraine (E)
United Arab States (M)
United States of America (AM)
Uruguay (AM)
Uzbekistan (AS)
Vanuatu (O)
Venezuela (AM)
Yemen (M)
Yugoslavia* (E)
Zaire (AF)
Zambia (AF)
Zimbabwe (AF)

Appendix 2: Summary statistics of independent variables

Variable	Mean	Std. Dev.	Min.	Max.	N
Democratic Past	-2.961	6.853	-10	10	128
Regime Instability	8.452	15.673	0	93	128
Ethnic Fractionalization	0.405	0.241	0.002	0.879	130
Common Law Tradition	0.313	0.465	0	1	131
Federation	0.214	0.412	0	1	131
Regional Model of Democracies	24.618	25.32	0	74	131

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