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14. Efficacious judging on apex courts

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For decades now we have been teaching courses and running seminars on judicial behavior. Many of the “students” in our courses have not been students in the traditional sense; they have day jobs as judges, law clerks, professors, and attorneys in the private and public sectors. And they come from many countries—including Argentina, Brazil, China, Germany, Norway, Hong Kong, Israel, and on and on.

As you would expect, our students differ on many dimensions: their values, politics, and personal and professional aspirations. And yet their concerns about judging coalesce. Some, to be sure, are interested in the theories developed in countless social science or law papers. But mostly they want to understand how they can apply the lessons in the scholarship to their jobs. The students pay close attention to the literature on the selection and retention of judges, for example, believing that it can help them—leaders in their society—choose which among the many options to write into their constitutional documents and laws.

But what really sparks their interest, what generates days and days of discussion, are the big overarching questions about judging, especially this one: Assuming judges want to issue efficacious decisions—those that relevant external actors will respect and with which they will comply—and assuming judges want to build and maintain the legitimacy of their court over time, what paths should they follow?

We suppose questions of this sort reflect political realities in many contemporary societies, where the regime would like to modify or even eradicate the power of judges to review acts of government or otherwise do damage to the court. Focusing on countries of the former Soviet Union, Bugaric and Ginsburg put it this way:

In the last 25 years, constitutional courts have been major players in the governance of Central and Eastern Europe, and were arguably the most important defenders of the rule of law in the region. Yet the last few years have exposed the institutional fragility of constitutional courts in the face of illiberal democracy, as several countries have moved to pack the courts. Without quick and sustained pressure, the dismantling of the hard fought freedoms associated with the rule of law will succeed, and we will again speak of an Eastern Europe that is closer to Russia than to the West. (Bugaric and Ginsburg 2016)

But questions concerning the efficacy of judges and the legitimacy of courts are hardly confined to countries that are (at best) precarious democracies. Virtually every time we deliver talks or speak informally with legal professionals working in full democracies,

* This chapter draws on some of our other work on judicial behavior and on talks and lectures we have delivered over the years. Epstein thanks the National Science Foundation, the John Simon Guggenheim Foundation, and Washington University in St. Louis for supporting her research on law, legal institutions and judicial behavior. We also thank the editors and Evan Bianchi for their helpful comments.

or even (perhaps especially) in the United States, these very questions arise. And they also arise, to greater and lesser extents, in many papers and books in the comparative judicial space (see, e.g., Arguelhes and Hartmann 2017; Epstein, Knight, and Shvetsova 2002; Varun, Staton, and Cullell, 2015; Helmke 2005; Helmke 2017; Iaryczower, Spiller, and Tommasi 2002; Krehbiel 2016; Staton, 2010; Staton and Vanberg 2008; Vanberg 2005). It isn't terribly surprising that we scholars express concern about and study deeply how judges and courts can not only survive but thrive. Just as the students in our seminars smell trouble brewing for their judiciaries, we scholars too regularly—and not merely occasionally—observe threats to courts all over the world, as Bugarcic and Ginsburg make plain (Bugarcic and Ginsburg 2016).

How best to tackle questions of efficacy and legitimacy remains contested, with scholars debating the most appropriate theories and methods. In this brief (and rather informal) chapter, we dodge the debates and opt instead to lay bare four methods available to judges who want to issue decisions that their regime will respect, as well as establish and maintain their institution's legitimacy over time. Our focus is on justices serving on apex courts with constitutional review power—a power held by almost all apex courts (Ginsburg and Versteeg 2014)—but we'd like to think that the approaches we set out have some application to other judges, too.

In so offering these suggestions, we make no claim of originality. Quite the opposite: Other scholars have proposed virtually every approach we describe. Our contribution comes in bringing together their answers. We should also note that we make no attempt to specify formally the circumstances under which one method might work better than others, though no doubt this is an important task that we hope others will undertake.

A. WHY WORRY ABOUT JUDGES?

Before turning to the four methods, we should address a possible objection to our entire project; namely, that it's unnecessary. Why worry about judges issuing inefficacious decisions when at least two prominent approaches to judicial behavior—the “ruling regime” and strategic accounts—predict that these are non-events, while a third—the “insurance theory”—suggests that judges could find themselves in trouble but there's little they can do to prevent it?

On the first of these, the ruling regime account, “the policy views dominant on the Court are never for long out of line with the policy views dominant among lawmaking majorities” and so conflicts between judges and elected actors are highly unlikely (Dahl 1957). Under (strong versions) of the second—strategic approaches to relations between courts and elected officials/the public—in equilibrium, there will be no attacks on judges because judges can prevent them by perfectly anticipating the preferences and likely actions of their would-be attackers (see, e.g., Epstein and Knight 1998a; Epstein, Knight, and Martin, 2001; Eskridge 1991a; Eskridge 1991b; Richman,

274 *Comparative judicial review*

Bergara, and Spiller 2003). The third, insurance theory,¹ holds that the relative competitiveness of a country's party system determines whether its courts will act independently (Ramseyer 1994; Stephenson 2003)—with seemingly little role for courts to play in their own destiny.²

A quick response to all three is that the real world provides evidence to the contrary. The theories, in other words, just don't seem to explain the data we observe. If they did, only rarely would we notice courts overturning laws passed by the contemporaneous regime (the ruling regime theory's prediction); or elected actors (and the public) punishing their judges and courts (strategic accounts) even when there's a competitive party system (insurance theory).

But these things happen, and they happen regularly (see generally Helmke 2017). In a comprehensive study of the US Supreme Court, Whittington and Clark tell us that the justices are (expectedly) ideologically sensitive when reviewing federal legislation, but they are not particularly deferential to their own ideological (partisan) allies, as ruling regime accounts anticipate (Whittington and Clark 2009). And, contrary to the equilibrium prediction of strategic accounts, voters in the US states unseat incumbent judges at higher rates than members of Congress (Hall 2001). The Hungarian Constitutional Court paid a price for its judicial "activism" when the legislature refused to reappoint many of the original justices after their terms expired (Rose-Ackerman 2005; see also Bugaric and Ginsburg 2016). Boris Yelstsin, angry that his constitutional court could check his power, suspended the court in 1993. The justices weren't able to resume their work until nearly two years later, when Russia adopted a new constitutional text (Epstein, Knight and Shvetsova 2002). And then there's Poland's 2012 Constitution, which repealed all Court decisions issued before 2012 (Bugaric and Ginsburg 2016). As for the United States, whose (competitive) parties should tolerate an independent court: Numerous studies recount incidences of Court curbing and, more generally, find that Congress regularly monitors, and not infrequently reverses, the justices' decisions (Clark 2011; Eskridge 1991a; Murphy 1962).

We could point to many other systematic studies of courts challenging the regime in their decisions and the regime retaliating with a vast array of sticks and stones (the above examples are suggestive, certainly not inclusive³). But the more important

¹ Through the two are related, we refer here to insurance theory regarding the maintenance of judicial independence, not Ginsburg's version, which focuses on why framers establish independence in the first place (Ginsburg 2003). See also Dixon and Ginsburg, Chapter 3, this volume.

² Specifically, when there are competitive parties, they "may be willing to tolerate an independent judiciary that constrains their ability to pursue policies unhampered if they expect that the judiciary will also protect the party's interests when it finds itself in opposition ... for the current government, [there's an] indirect benefit of the promise of enjoying judicial protection" when it's out of office (Vanberg 2015, 173).

³ Of course, there are override attempts and noncompliance (see Carrubba, Gabel, and Hankla 2008), but also: enacting constitutional amendments to reverse decisions or reduce the court's power; impeachment; withdrawing jurisdiction over certain subjects; altering the selection and removal process; requiring extraordinary majorities for declarations of unconstitutionality; removing the power of judicial review; slashing the budget; and altering the size of the Court, among others. See Rosenberg 1992.

question is why the mechanisms in the three theories don't seem to work as expected. The primary and perhaps all too obvious answer is that their assumptions are not often met. The ruling regime account assumes periodic turnover—such that the government has an opportunity to appoint new justices who will hold sway on the Court.⁴ It turns out, though, that “moving the median” on many courts is very hard, as Krehbiel demonstrates theoretically and empirically for life-tenured justices (Krehbiel 2007; see also Epstein and Jacobi 2008). Even mandatory retirement or term limits—rules in effect for most European constitutional court judges—do not guarantee a median aligned with the ruling regime (Epstein, Knight, and Shvetsova 2001). One problem is that mandatory retirement ages tend to be high and terms reasonably long—on average, over nine years. This is far higher than the mean duration of governments in Europe (between about 500 and 700 days, depending on the study, region, and measure) (see, e.g., Diermeier, Eraslan, and Merlo 2002; Conrad and Golder 2010). Courts just don't seem to turn over as frequently as governments. The insurance theory's assumptions are even more numerous and stringent—so numerous, in fact, that it's a bit surprising scholars have developed even a modicum of evidence to support its predictions (see, e.g., Stephenson 2003 and more generally Vanberg 2015).

As for strategic accounts, we think the underlying mechanism is right: Judges must be forward thinking if they hope to issue efficacious decisions and otherwise build respect for their institution—and we say so in the next section. But more often than not the assumption of perfect foresight isn't satisfied. Mistakes happen owing to a lack of complete and perfect information about the relevant players' preferences, their likely actions, or both. Cameron shows as much in his study of presidential vetoes (Cameron 2000)—which should never occur if the actors perfectly anticipate the preferences and likely actions of the relevant players—and Ferejohn, Rosenbluth, and Shipan suggest that the same holds for courts (Ferejohn, Rosenbluth, and Shipan 2007). We agree. There's another problem too: It is possible that some judges don't care all that much about the efficacy of their decisions because the failed decision won't be so bad relative to the alternatives (Helmke 2017). When a society has the power to impeach its judges (or worse) and regularly uses it, that may be a bigger threat than, say, a government willing to override decisions, decrease the court's budget, or pack it with political hacks. Under these circumstances, judges will weigh the costs and benefits of reaching a decision they prefer over one the regime prefers (Ferejohn, Rosenbluth, and Shipan 2007). Judges may well find themselves in situations where they are at odds with the regime but where the reprisals are not very severe or enduring, tipping the balance towards benefits.⁵

B. METHODS FOR EFFICACIOUS JUDGING

The upshot is this: Absent very uncommon circumstances (a perfect coincidence of judicial and political preferences, an institutional mechanism that allows a regime to

⁴ We focus here on the lack of periodic turnover. See Ferejohn 2013 for a discussion of political fragmentation, which too presents a problem for Dahl's account.

⁵ For a variation on this same theme, see Spiller and Tiller 1996.

276 *Comparative judicial review*

replace the entire court, or judges who don't care about the efficacy of their decisions or the legitimacy of their institution), potential value conflicts between judges and the political regime will be the norm. In such situations, judges face a complex choice: They must weigh the benefits of establishing a new legal precedent that reflects their most-preferred outcome against the costs to their efficacy and legitimacy that may be imposed by a hostile political regime.

How might courts respond? What approaches are available to ensure the efficacy of their decisions in the short term and their institution in the longer term? In the sections to follow we consider four methods: (1) anticipate the reaction of relevant (current) external actors; (2) anticipate the reactions of incoming external actors; (3) develop avoidance procedures and limiting doctrines; and (4) cultivate public opinion.

1. Anticipate the Reactions of Relevant (Current) External Actors

Perhaps the most well-rehearsed of the methods for ensuring efficacious decisions is for judges to anticipate the reactions of relevant external actors and respond accordingly even if that means engaging in sophisticated behavior (see, e.g., Eskridge 1991a; Eskridge 1991b; Epstein and Knight 1998a; Richman, Bergara, and Spiller 2003; Segal, Westerland, and Lindquist 2011). Of course, there's no guarantee that this strategy will always work for the reasons previously emphasized. But the literature suggests that judges can increase their chances of minimizing conflict and maximizing efficacy and legitimacy if they use one or more of the following methods: interpret dynamically, write vague opinions, and create rules designed to acquire information.

i. Interpret dynamically

Whether in the constitutional or statutory context, judges invoke various methods for interpreting text, to state the obvious. One such method, dynamic interpretation, is based on the premise that judges should read acts of government or constitutional provisions in line with the preferences and likely actions of the contemporaneous government—not the desires, intent, or understanding of the framers of the law or provision (Eskridge 1991a; Eskridge 1991b; Epstein, Knight, and Martin 2001; Vanberg 2005).

In the United States, lower courts engage in this form of behavior vis-à-vis the Supreme Court. Rather than interpreting a precedent in accord with the will of the enacting Court, they rationally anticipate the preferences and likely response of the current Court (Westerland et al. 2010). Peak courts in other societies seem do the same, attempting to gauge the reactions of relevant government actors and the voting public (Vanberg 2005; Iaryczower, Spiller, and Tommasi 2002). When engaging in this form of interpretation, it is possible that courts will find their preferences aligned with the relevant external actors (as ruling regime accounts predict), in which case they can act as they wish. Likewise, certain forms of political fragmentation may give judges more room to maneuver. Iaryczower, Spiller, and Tommasi, for example, find that the Argentine Supreme Court tends to rule in favor of the government when the regime is unified but is often “defiant” when it's divided (Iaryczower, Spiller, and Tommasi 2002).

If the government is relatively united and the judges' preferences are distant from it, however, sophisticated behavior provides a plausible path—and we know judges often take it. Well-developed data and case studies in the US context indicate that Supreme Court justices modify their interpretations of laws and constitutional provisions to consider possible reactions from Congress and the President (see, e.g., Richman, Bergara, and Spiller 2003; Segal, Westerland, and Lindquist 2011). This results in decisions that attempt to narrow the gap between the preferences of the judges and those of the other branches of government. Iaryczower, Spiller, and Tommasi's study suggests the same for Argentine justices, as do similar analyses of courts in Russia (see, e.g., Epstein, Knight, and Shvetsova 2002) and Germany (Vanberg 2005), among others.

ii. Write vague opinions

Dynamic interpretation may receive the lion's share of attention but it isn't the only method available to judges facing potential opposition to their rulings. Another is the production of vague opinions (Staton and Vanberg 2008). What Staton and Vanberg plausibly assume is that the costs to implementers of deviating from a clear court decision are higher than the costs of deviating from a vague decision because noncompliance is easier to detect. If so, a court facing "friendly" implementers may be better off writing clear opinions; clarity will increase pressure for—and thus the likelihood of—compliance. But when the probability of opposition from implementers is high, clarity could be costly to the judges: If policymakers are determined to defy even a crystal-clear decision, they highlight the relative lack of judicial power.

Staton and Vanberg provide several interesting examples to illustrate the strategic use of vagueness, including the Warren Court's 1955 decision in *Brown v. Board of Education II*⁶ and the German Constitutional Court's rulings in two important taxation cases.⁷ In both, the justices had the same reason for leaving ambiguous "the precise actions that would be consistent with the decision" (Staton and Vanberg 2008): concerns about compliance and, ultimately, legitimacy. And now there is more rigorously developed support for Staton and Vanberg's ideas. Using software called Linguistic Inquiry and Word Count (LIWC), Black et al. (2016) show that US Supreme Court justices strategically craft language in their opinions, adjusting the level of clarity to correspond to their assessment of the likelihood of noncompliance by external actors, including federal agencies and the states.⁸

iii. Uncover preferences and likely actions

Knowing when to write clear decisions and knowing when to write vague ones—as well as when to interpret the Constitution dynamically—require that judges learn about

⁶ 349 U.S. 294 (1955).

⁷ BVerfGE 54, 34; BVerfGE 86, 369

⁸ Along similar lines Corley and Wedeking find that lower courts are more likely to follow Supreme Court decisions that are written at higher degrees of certainty, with certainty also assessed using LIWC (Corley and Wedeking 2014). Although we endorse this general line of work, we withhold judgment on LIWC. Because it was developed for ordinary speech and texts, we wonder whether it has been sufficiently validated for legal materials.

278 *Comparative judicial review*

the preferences and likely actions of those able to thwart their objectives. To that end, we should, and do, see courts develop information-acquiring rules and procedures (see, e.g., Collins 2008; Epstein and Knight 1998b; Johnson 2004; Spriggs and Wahlbeck 1997).

Exemplary in the United States are rules governing the participation of the federal government as an *amicus curiae*. Out of the belief (we suspect) that the government's briefs can advance its project of learning about the likely response of a key implementer (or potential thwarter) the Court maintains a rather lax rule (Rule 37):

No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative. ...⁹

As for other potential amici, Rule 37 seems a bit more stringent:

An *amicus curiae* brief ... may be filed if accompanied by the written consent of all parties When a party to the case has withheld consent ... motion for leave to an *amicus curiae* brief ... may be presented to the Court.¹⁰

By granting almost all such motions, however, the justices have signaled the parties not to deny consent in the first place (O'Connor and Epstein 1983). Brodie suggests much the same about the Canadian Supreme Court, where the justices now "grant almost all interest group applications for leave to intervene" (Brodie 2002, 36).

Carrubba, Gabel, and Hanka's (2008, 440) analysis of the European Court of Justice (ECJ) runs along similar lines but also shows the effect of government briefs (Carrubba, Gabel, and Hanka 2008, 440). In all cases pending before the Court, EU institutions and member state governments can file briefs (called "observations"), which help the ECJ assess the "balance of member-state preferences regarding the legal issue." The more observations for one side, the higher the chances of that side winning (Carrubba, Gabel, and Hanka 2008). To the authors, this makes good sense: If the member states favor one side and the Court rules the other way, the states could form a coalition to override the decision, thereby rendering it ineffective.

These results and, more relevant here, the very fact that the ECJ allows government observations, are not surprising. Courts must place a premium on lawyering as a form of information transmission if they are to anticipate the reaction of relevant external actors.¹¹ Moreover, to the extent that encouraging a diversity of inputs will likely lead to better decisions (see, e.g., Posner 1996), using rules to learn about preferences has benefits beyond the strategic context of decision making.

⁹ U.S. SUP. CT. R. 37(4).

¹⁰ U.S. SUP. CT. R. 37(2)(a)–(b).

¹¹ Oral argument can play the same role. See, e.g., Johnson 2004.

2. Strategic Anticipation of the Reactions of Incoming External Actors

The approaches we just outlined pertain to judicial attitudes towards the *current* regime. Helmke's (2005) path-marking work on Argentina suggests another possibility: When judges fear impeachment or worse, they will concern themselves less with current actors than with the *incoming* regime (Helmke 2005). Ginsburg's analysis of Korea, Taiwan, Thailand, and Pakistan reaches a similar conclusion (Ginsburg 2013, 46). In disputes over "whether prominent political figures could retain or take office," courts in these countries tend to "respond to majority preferences" (Ginsburg 2013). As a result, the judges play a role in facilitating transitions to democracy but only after "transition is secured" (Ginsburg 2013).

What of countries in which democratic institutions are less fragile and the courts less fearful of retaliatory tactics on the part of the incoming regime? Anticipation of the desires of the new leaders still may be a useful approach for courts hoping to ensure their place in the new order. Gillman's (2001) book on *Bush v. Gore*¹² makes the nice point that a majority of justices on the US Supreme Court ruled the way they did because they had political cover: They knew the incoming regime would support their selection of Bush over Gore (Gillman 2001).

More generally, a great deal of empirical work now suggests that judges do seem to follow the election returns or at least the "mood" of the public (see, e.g., McGuire and Stimson 2004; Giles, Blackstone, and Vining 2008; Casillas, Enns, and Wohlfarth 2011)—though we must admit that the mechanism is unclear. Here (and in the sections to follow), we posit that judges bend to the will of the people because they and their court require public support to remain an efficacious branch of government (see also Friedman 2009). The existing studies could be read to support this view, but they are equally consistent with another mechanism: that "the people" includes judges. On this account, the judges do not respond to public opinion directly but rather respond to the same events or forces that affect the opinion of other members of the public (for more on this debate, see, e.g., Epstein and Martin 2010; Casillas, Enns, and Wohlfarth 2011).

3. Develop Avoidance Procedures and Limiting Doctrines

Studies of strategic anticipation typically focus on decision making on the merits of cases; that is, they offer positive (normative) descriptions (prescriptions) for how judges (should) proceed, assuming judges *must* resolve the dispute at hand. This need not be the case. There are many avoidance techniques, the case-selection process of course being one, as well as other limiting or deference rules courts can develop for the purpose of deciding not to decide (see generally Delaney 2016; Dixon and Issacharoff 2016). The following explores such alternatives.

i. Evade (certain kinds of) disputes

Apex courts tend to receive far more requests for plenary treatment than they can possibly grant. To deal with the piles of petitions, many US-styled Supreme Courts have developed or operate under rules that give them substantial discretion over their

¹² 531 U.S. 98 (2000).

280 *Comparative judicial review*

dockets. According to Flemming’s detailed account of agenda setting in the Canadian Supreme Court, various procedures lead to grants in fewer than 20 percent of the applications requesting leave to appeal (Flemming 2004). The Indian Constitution gives its Supreme Court almost complete control over its docket (Chowdhury 2016); and, after successfully lobbying Congress in 1925 and again in 1988 (Perry 1994), the US Supreme Court now enjoys substantial discretion too, resulting in a grant rate of under 1 percent.

The conventional view of European-style constitutional courts is that they lack “formally recognized discretionary powers to choose which cases they will decide” (Scheppele 2006, 1769). But Fontana demonstrates otherwise (Fontana 2011). The German Constitutional Court (FCC), he reports, grants review in around 1 percent of the constitutional complaints it receives—about the same as the notoriously selective US Supreme Court. This may reflect FCC decision-making procedures, which allow three-judge panels of the FCC to dismiss or otherwise summarily treat cases lacking merit. The Constitutional Court of Hungary was nearly as selective in its early years, receiving about 6,000 petitions but deciding only 200–300 per year (Scheppele 2006).

Assuming discretionary procedures exist, they may leave room for judges to reject disputes that could lead to collisions with the regime or otherwise interfere with their ability to issue efficacious decisions. As Russian constitutional court judge, Boris Ebzееv, noted:

When in December 1995, before the [parliamentary] elections and in the very heat of the electoral campaign, we received a petition signed by a group of deputies concerning the constitutional validity of the five percent barrier for party lists. We refused to consider it. I opposed considering this request, because I believe that the Court should not be itching for a political fight. ... The Court must avoid getting involved in current political affairs, such as partisan struggles. (quoted in Nikitinsky 1997, 85)

This was no isolated incident. After its confrontation with the government in 1993, the Russian Court often resorted to the tactic Ebzееv’s describes: The justices devoted far less of their docket space to the kinds of cases that got them in trouble (e.g., separation of powers and federalism) and far more to those that could enhance their popularity with the public.¹³

It turns out that Russia is hardly alone. As Delaney puts it, “avoidance is everywhere” (Delaney 2016, 3). The Israeli Supreme Court, for example, occasionally avoids controversies by deciding not to decide (Reichman 2013). And even in the United States, where the Supreme Court’s legitimacy is “reasonably secure” (Gibson and Nelson 2014, 201), the justices have used their power of docket control for avoidance purposes—for instance, “to avoid entering the polarizing political debate [over] the constitutionality of the Vietnam war” (Fontana 2011, 628).

Docket monitoring can be quite effective in staving off attacks and controversy but it isn’t the only way courts evade: Strategic adjustments in the timing of their decisions is another. Fontana reports that “many of the world’s most successful constitutional review courts waited several years—until the politics of the situation had cooled off some—before deciding major cases related to the responses by the political branches

¹³ For more on this point, see *infra* Section B.4.

to the events of September 11” (Fontana 2011, 629). Neither the FCC, the House of Lords, nor the US Supreme Court issued any major decisions until 2004 or 2005; the High Court of Australia waited until 2007.

Along somewhat different, though related, lines, Delaney documents the South African Constitutional Court’s occasional practice of delaying a suspension of invalidity to allow the legislature to respond to its decision (Delaney 2016, 48–9). The Canadian courts do much the same—and in high-profile cases at that. As Dixon and Issacharoff note, when the US Supreme Court invalidated all existing bans on same-sex marriage, its decision had immediate effect: Gays could marry in every US state. Not so in South Africa and Canada, where the courts “explicitly deferred the effect of decisions to recognize a right to same sex equality, giving provincial and national legislatures twelve to twenty-four months to respond to their decisions” (Dixon and Issacharoff 2016, 685). These delays might be focused on concerns about “the practical costs of immediately effective judicial decisions” (Dixon and Issacharoff 2016, 685; see also Delaney 2016). But some suspensions “look strategic”—designed to promote institutional legitimacy (Delaney 2016, 49).

Evidence on strategic timing also comes from recent large-*n* studies by Arguelhes and Hartmann and by Epstein, Landes, and Posner. Arguelhes and Hartmann show that Brazilian Supreme Court justices delay hearing a case or announcing a decision until the justices believe there is a favorable political climate (or court more inclined to rule their way) (Arguelhes and Hartmann 2017). Epstein, Landes, and Posner document the U.S. Supreme Court’s practice of issuing its most important and, often, controversial and divisive cases in the last week or two of June—the so-called “end-of-term crunch.”¹⁴ One possible explanation for the crunch is that “the Justices delay certain decisions for public-relations reasons. The close proximity of decisions in the most important cases may tend to diffuse media coverage of and other commentary regarding any particular case, and thus spare the Justices unwanted criticism” (Epstein, Landes, and Posner 2015, 1022).

ii. Deploy limiting doctrines

In much the same way that avoiding and timing disputes can keep courts out of hot water, so too can developing (and applying) various deference (limiting) doctrines. The political question doctrine provides an interesting example. Anticipated by Chief Justice John Marshall in *Marbury v. Madison*,¹⁵ the doctrine has two strands. One entails textual, constitutional interpretation (i.e., some questions are committed to the unreviewable discretion of the political branches), but the other is prudential (i.e., some legal questions ought to be left to the political branches as a matter of prudence). This second, prudential strand implicates judicial discretion. When deciding whether to dismiss a case because it raises a political question, US courts can look to a lack of judicially discoverable standards, enforcement problems, and institutional difficulties—including the efficacy and legitimacy of the courts and their decisions.

¹⁴ Richard L. Hasen, *What’s Taking the Supreme Court So Long?*, DAILY BEAST (June 21, 2013), <http://www.thedailybeast.com/articles/2013/06/21/what-s-taking-the-supreme-court-so-long.html>.

¹⁵ 5 U.S. 137 (1803).

282 *Comparative judicial review*

Despite the occasional rumor of its death (or the stronger contention, that it never existed), the political question doctrine remains in the canon of US constitutional law. No casebook neglects it; and no constitutional law course (of which we're aware) fails to cover it. More importantly, we know that the justices continue to rely on the doctrine¹⁶—*Bush v. Gore*¹⁷ (perhaps) to the contrary.

As a formal matter, European constitutional courts do not seem to have a political question doctrine. We suppose this reflects their typically capacious textual authority over constitutional disputes. But whether the doctrine exists as an informal norm is a matter of contestation. Some flatly declare that “there is no such doctrine in Europe,” while others contend “broadly similar doctrines have been developed in other constitutional systems” (see Pasquino 2008; Koopmans 2003, 101). But even those who deny its application suggest that courts have devised approaches that yield a roughly similar result: some form of (prudential) deference to other branches of government. As Pasquino tell it, the political question doctrine may be unknown in Europe but the German Constitutional Court can “return to Parliament a question that it believes to be the exclusive competence of politically accountable branches of the government” (Pasquino 2008).

Pasquino thinks the distinction between this practice and the political question doctrine is meaningful because the German approach has “less to do with self-restraint than with [a] desire to prevent elected politicians from avoiding their political responsibility and accountability vis-à-vis the citizens by abdicating their power to make decisions under the convenient cover of a judicial verdict of the Constitutional Court” (Pasquino 2008). But Koopmans suggests otherwise. As he explains, European judges may not “use the expression ‘political question’, but the problems this concept was intended to deal with continue to crop up” (Koopmans 2003, 104). As a result, the doctrine “remains alive as long as representative bodies have to co-exist with an independent judiciary” (Koopmans 2003, 104).

Perhaps this is why some writers in Eastern and Central Europe have urged their courts to develop approaches akin to a (prudential) political question doctrine (e.g., Nikitinsky 1997; see generally Issacharoff 2011). To them, it can work to prevent costly collisions between judges and the regime.

We can't say we disagree, though we understand that commentators have long questioned the appropriateness of any form of a political question. Among other claims they say that the doctrine is antithetical to *Marbury v. Madison*-type review, in that it amounts to an abdication of the judicial role. The former President of the Israeli Supreme Court, Aharon Barak, put it this way: “I regard the doctrine of ... ‘political questions’ with considerable wariness. ... I accept that certain disputes are best decided elsewhere. However the court should not abdicate its role in a democracy merely because it ... fears tension with the other branches of the state” (Barak 2006, 177–8).

The idea, we suppose, is that deeming certain questions “political” could lead to a result that the doctrine was designed (in part) to prevent: an emasculation of the court. A preferable strategy, on this logic, is for judges to reach the merits of disputes with

¹⁶ See, e.g., *Nixon v. United States*, 506 U.S. 224 (1993); *Goldwater v. Carter*, 444 U.S. 996 (1979).

¹⁷ 531 U.S. 98 (2000).

due deference to the elected branches, rather than leave some constitutional provisions solely to the branches' discretion. But when courts engage in a strategy of deferential review to accomplish much the same ends as the political question doctrine (that is, to avoid collisions with external actors), normative questions arise. For example, under highly deferential review, judges mostly uphold and thus legitimate the regime's action; under the political question doctrine, they also allow the government to do as it pleases but do *not* necessarily legitimate the action. If the US Supreme Court's disastrous decision in *Korematsu v. United States*¹⁸ indicates anything, it is that this is, in fact, a distinction with meaning.

4. Cultivate Public Opinion

The point of avoidance doctrines is, well, to avoid disputes that may harm the judiciary in the short and long terms. To the extent that it calls on courts to go on the offensive, this final approach—cultivating public opinion—is something of the reverse. The idea is that if judges can develop deep reservoirs of public support, they can increase the costs of noncompliance by elected officials ultimately offsetting the benefits of court bashing (Vanberg 2005).

In this way, “public support provides a shield for judicial independence” (Vanberg 2015, 177). Or, as we frame it, when judges generate public confidence in their institution and their rulings, they advance their cause with the ruling regime by lengthening the elected actors' “tolerance intervals” (Epstein, Knight, and Shvetsova 2002). By tolerance intervals we mean intervals around the actors' ideal points such that they would be unwilling to challenge a court decision placed within that interval.

What methods are available to courts wishing to increase the costs of attacks via the public? The extant literature suggests three.¹⁹

i. Incorporate public opinion into jurisprudence

We've already discussed how judges occasionally follow the “election returns” or the general mood of the public. Here we mean something different: not following public sentiment, but incorporating it explicitly into doctrine.

In the US context, two obvious examples come to mind. One is obscenity cases, in which the Court has said that triers of facts must determine:

- (a) whether “the average person, *applying contemporary community standards*” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.²⁰

¹⁸ 323 U.S. 214 (1944).

¹⁹ There are others. For example, judges must convince the public that they “are not merely legislators in robes but are constrained by professional codes of conduct that transcend their narrow policy preferences” (Vanberg 2015, 179). They can do this by justifying “their decisions with respect to the constitutional text” (Vanberg 2015, 179)—which elected politicians typically don't do.

²⁰ *Miller v. California*, 413 U.S. 15, 24 (1973) (emphasis added) (citations omitted).

284 *Comparative judicial review*

Note clause (a)'s emphasis on "contemporary community standards": The notion is that juries and judges should look to the views of people in their community to help decide whether a work is obscene or not. We can think of no more obvious way to ensure the public's representation in judicial decisions.

The second example comes into play when courts must determine whether a particular punishment that the government wants to impose is "cruel and unusual" and so forbidden by the 8th Amendment of the US Constitution. In making that determination, the Supreme Court has declared: "The words of the [8th] Amendment are not precise, and ... their scope is not static. The Amendment must draw its meaning from the *evolving standards of decency that mark the progress of a maturing society*."²¹

To assess whether a punishment comports with "evolving standards" of decency, judges can and do look at public opinion polls. Illustrative is *Atkins v. Virginia*.²² There the Court was considering whether to overrule an earlier decision, *Penry v. Lynaugh*,²³ which held that applying the death penalty (executing) the mentally retarded does not constitute cruel and unusual punishment. What attorneys for the defendant in *Atkins* demonstrated was that Americans had demonstrated a change of heart since *Penry*: "polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong."²⁴ Along with other arguments, the polls convinced the majority that executing the mentally retarded no longer comported with Americans' "standards of decency."

ii. Go public

Staton's important book, *Judicial Power and Strategic Communication in Mexico*, documents the Mexican Supreme Court's "coordinated and aggressive" public relations campaign (Staton 2010). Its goal? To generate conditions as favorable as possible to the exercise of its power. As Staton writes, "communication strategies are broadly designed to advance the transparency of the conflicts constitutional courts resolve and to promote a deep societal belief in the judicial legitimacy, conditions that promote judicial power" (Staton 2010, 7).

The Mexican Supreme Court is not alone. According to Staton, judges serving on constitutional courts throughout the world now go public, attempting to engage the citizenry through various channels. Publicizing their decisions is commonplace: nearly 90 percent of the courts he studied make them available on the Internet; many also issue press releases announcing (select) decisions (Staton 2010). And these days it's hard to identify a court that doesn't maintain a website housing information about its procedures, cases, and even bios of its members.

These are indirect, passive forms of communication but, as Staton also shows, more direct contact is not uncommon—especially efforts "to use the media to underline key jurisprudential points" (i.e., to defend decisions or even the rule of law, more generally) (Staton 2010). To list just a few of the many examples Staton offers:

²¹ *Trop v. Dulles*, 356 U.S. 86, 100–1 (1958) (emphasis added).

²² 536 U.S. 304 (2002).

²³ 492 U.S. 302 (1989).

²⁴ *Atkins v. Virginia*, 536 U.S. 304, 316 (fn. 21) (2002).

- Colombia Constitutional Court president Jaime Córdova Triviño gave a series of interviews ... clarifying a decision striking down a popular law that had granted partial amnesty to paramilitary group leaders.
- Canadian Supreme Court Justice Ian Binnie presented a lecture ... in which he discussed whether the Court had usurped legislative authority with its interpretation of the Canadian Charter of Rights.
- German Federal Constitutional Court member Dieter Grimm published a public letter advocating compliance with a controversial decision on church–state relations (Staton 2010).

None of this is new, of course. In the wake of the US Supreme Court’s controversial decision in *McCulloch v. Maryland*,²⁵ Chief Justice John Marshall wrote several articles responding to his critics under the nom de plume “A Friend of the Union.” Along somewhat different lines is Chief Justice Earl Warren’s insistence that his Court issue a short, non-rhetorical, non-technical opinion in *Brown v. Board of Education*.²⁶ The general goal of such strategies is to enhance public support for the court with the goal of making it more costly for the regime to undermine it.

iii. Develop (popular) rights

If recent papers are any indication, an equally commonplace method of appealing to the public is to protect or entrench rights that have broad appeal. Mate’s essay on India attributes judicial empowerment there to the Supreme Court’s development of a public interest litigation “jurisprudential regime” (Mate 2013). Under this regime, the Court “expansively interpreted fundamental rights,” articulated a new “nonarbitrariness standard,” and relaxed standing requirements (Mate 2013). Klug’s analysis suggests much the same about the South African Court: “The Court ... gave confidence to white elites that it would protect property and economic rights, guaranteeing some degree of continuity. At the same time, it gave confidence to black majorities that the democratization process was going to mean a real change for them” (Klug 2013). And Silverstein’s research on Singapore paints a portrait of judges working not so much to protect individual dignity but rather to achieve a collective goal: economic development and the “strengthening of state institutions” (Silverstein 2008).

Whatever the approach, the goal may be the same: to increase the costs of attacking the court and thus to broaden the tolerance intervals of the elected actors. Ferejohn and Pasquino put it this way: “Perhaps the popularity of constitutional courts has grown with their demonstrated effectiveness in protecting rights, [leaving] the governing coalition with less political room for undermining court autonomy” (Ferejohn and Pasquino 2003, 250).

²⁵ 17 U.S. 316 (1819).

²⁶ 347 U.S. 483 (1954).

C. DISCUSSION

We have outlined four general paths that judges can follow if they care about issuing efficacious decisions and establishing and maintaining the legitimacy of their court. In offering these suggestions, we recognize that each is open to normative and positive critiques.

We have already considered objections to evading disputes via the political question doctrine but the other approaches raise similar concerns. For example, methods for attending to external actors' preferences and likely actions sometimes ask judges to act as politicians pandering to their "constituents" rather than reaching decisions based on "proper" judicial methods (e.g., originalism, textualism, *stare decisis*, proportionality analysis, and so on). Likewise, some scholars might claim that when courts write vague opinions, they inappropriately abdicate their role by trading off doing the "right" thing (however defined) in the short term for future legitimacy gains.

The strategy of entrenching rights too has its share of potential pitfalls because decisions so doing can be quite controversial—generating support, yes, but also extreme opposition from the public. The abortion case *Roe v. Wade*²⁷ and litigation over guns²⁸ are just two of the many examples that underscore the point. Should such decisions cumulate, they may produce precisely the same result as contentious rulings in the separation-of-powers context: a decrease in the cost of failure to comply with the court's decisions.

We do not dismiss these concerns willy-nilly; they are important and should be the subjects of more discussion and debate.²⁹ More relevant for our purposes, though, are questions relating to whether the methods we propose actually contribute to the task of establishing or maintaining legitimacy in the long run—or do the courts that regularly deploy them simply become an entrenched part of the ruling regime, and (owing to their timidity) not a particularly relevant part? Almost needless to write, these are also questions we hope scholars will pursue.

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²⁷ 410 U.S. 113 (1973).

²⁸ *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. Chicago*, 561 U.S. 742 (2010).

²⁹ For models on how to analyze the costs and benefits of approaches to establishing and maintaining the legitimacy of courts, see Delaney 2016 and Dixon and Issacharoff 2016.

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288 *Comparative judicial review*

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