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Judicial Independence in Transition: Revisiting the Determinants of Judicial Activism in the Constitutional Courts of Post-Communist States

Abstract. This study investigates the relationship between dimensions of judicial independence and judicial review in constitutional courts Central and Eastern Europe and the Former Soviet Union. In part a modified replication of prior works examining the issue, the study uses newly collected data from a panel of ten countries. It examines the relationship of judicial review with: (1) judicial independence (using both measures employed by the prior works, corrected versions of those measures, and measures original to this study); (2) political and social contextual factors; and (3) the receptiveness of post-communist countries to the importation of transplanted legal institutions. Improvements on the conceptualisation of judicial independence, inclusion of the dimensions of receptiveness, and a more appropriate panel of countries enable this study to present a more complete and accurate portrait of constitutional judicature in transition contexts. The results show that while corrections to prior measures of judicial independence improve the results at the margin, the entirely new measures of the concept represent a greater step forward. Several dimensions of judicial independence are positively related to judicial review, as are the measures of countries' receptiveness to legal transplants. Other key factors positively related to judicial review in transition include legislative fragmentation at the time of each court decision, the scope of rights guarantees in a bill of rights, and popular trust in courts. Presidential power is negatively related to judicial review. The findings further indicate that aside from judicial independence, the prior works do present correct portrayals of most of the contextual influences they investigate.

Keywords: judicial independence; constitutional courts; post-communist states; transitional justice; comparative law

1. Introduction

The collapse of communist regimes in the Former Soviet Union (FSU) and Central and Eastern Europe (CEE) brought with it the dramatic transformation of entire systems of constitutional justice across Europe's eastern

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frontier.¹ Many states where the rule of law had existed in name only for nearly half a century were suddenly freed to design and attempt to build (or import) new institutional frameworks for the administration of law and justice.² Of the structural features designed and built in transitioning states, “by far the most important of the new institutions” were the new constitutional courts each country adopted.³

These new tribunals stand out for at least two reasons. First, while the process and products of transition differed in many ways across the region, the presence of a constitutional court was one of a few important commonalities. Although until 1989 only two countries throughout CEE possessed some (nominally) independent constitutional court, by the mid-1990s every state in the region had established one, most patterned after Germany’s Federal Constitutional Court (FCC).⁴ This yielded a natural experiment of sorts: the same basic court model, transplanted into different contexts, produced noticeably different outcomes on a wide range of important issues.⁵

¹ Schwartz, H.: *The struggle for constitutional justice in post-communist Europe*. Chicago, 2000.; Procházka, R.: *Mission accomplished: on founding constitutional adjudication in Central Europe*. Budapest, 2002.; Přibáň, J.: Constitutional justice and retroactivity of laws in postcommunist Central Europe. In: Přibáň, J.–Roberts, P.–Young, J. (eds.): *Systems of justice in transition: Central European experiences since 1989*. Aldershot, 2003. 29–49.

² Sadurski, W.: *Postcommunist constitutional courts in search of political legitimacy*. Florence, 2001. 8ff.

³ Dupré, C.: *Importing the law in post-communist transitions: the Hungarian Constitutional Court and the right to human dignity*. Oxford, 2003. 26.

⁴ Sadurski: *op. cit.* 1; cf. Tanchev, G.: Constitutional safeguards of legality and legitimacy. In: Kelly, M. (ed.): *Openness and transparency in governance: challenges and opportunities*. Maastricht, 2000; Howard, A. E. D.: Judicial independence in post-communist Central and Eastern Europe. In: Russell, P.–O’Brien, D. (eds.): *Judicial independence in the age of democracy: critical perspectives from around the world*. Charlottesville, VA 2001. 89–110; Dupré: *op. cit.*; Schiemann, J.: Explaining Hungary’s powerful constitutional court: a bargaining approach. *European Journal of Sociology*, 42 (2001) 357–390. Indeed, establishing a constitutional court became the distinguishing “trade mark” and the “proof of the democratic character” of post-communist states eager to demonstrate that a genuine transformation to democracy was underway. Sólyom, L.: The role of constitutional courts in the transition to Democracy: with special reference to Hungary. *International Sociology*, 18 (2003) 133, 134. Procházka insightfully emphasises the importance these states—especially the Visegrad Four (Hungary, Czech Republic, Slovakia, and Poland)—attached to being perceived in Western Europe as genuinely committed to transformation from authoritarian socialism to democracy. Procházka: *op. cit.*

⁵ This experiment has not gone unnoticed by students of courts as policy-shapers. Epstein, L.–Knight, J.–Shvetsova, O.: The role of constitutional courts in the establishment and maintenance of democratic systems of government. *Law and Society Review*, 35 (2001)

Second, these courts played a very active part in shaping not just the outcome, but the even the *process* of democratic transition,⁶ and many became formidable policy players in a very brief span of time. The Hungarian Constitutional Court, for instance, struck down nearly one-third of all primary legislation (273 of 905 national laws) brought before it for constitutional review during its first six years alone.⁷ The weight of the issues in which that Court played a pivotal role is striking: retroactive criminal legislation,⁸ restitution for expropriation by the communist regime,⁹ lustration laws,¹⁰ the IMF-directed economic austerity programme,¹¹ abortion,¹² the death penalty,¹³ same-sex partnerships,¹⁴ and many others.¹⁵ More recently, in July 2005, on the basis of a petition by thirteen citizens, the Slovakian Constitutional Court nullified the

117–164; Boulanger, C.: Beyond significant relationships, tolerance intervals and triadic dispute resolution: constructing a comparative theory of judicial review in post-communist societies. Paper presented at the Law and Society 2003 Annual Meeting, Pittsburgh, PA, 5–8 June 2003; Scheppele, K. L.: Constitutional negotiations: political contexts of judicial activism in post-Soviet Europe. *International Sociology*, 18 (2003), 219–238.

⁶ Dupré: *op. cit.* 26.

⁷ Scheppele: *op. cit.* 224. This is particularly significant given the scope and range of the Hungarian Constitutional Court's exercise of its review powers in its first decade of operation. Nearly all of Hungary's legislative framework was reviewed by the constitutional court, largely as a consequence of the ease of access for petitioning review by the court. Sólyom, L.–Brunner, G.: *Constitutional judiciary in a new democracy: the Hungarian Constitutional Court*. Ann Arbor, 2000. 81. Specifically, via the *actio popularis*, any individual could petition for constitutional review of any law, regardless of whether she was in any way affected by the law itself; some 3,170 cases of this type were initiated between 1990 and 1996, inclusive. *Ibid.*

⁸ See Decisions 11/1992 and 53/1993; available (in English) in Sólyom–Brunner: *op. cit.* For a fuller discussion of the retroactive punishment issue, see Nalepa, M.: Why post-communists punish themselves: a model of transitional justice legislation. Paper presented to the Midwest Political Science Association annual meeting, Chicago, IL, 27 April 2002; Nalepa, M.: Punish all perpetrators or protect the innocent?: a signaling model of truth revelation procedures. Paper presented to the American Political Science Association annual meeting, Philadelphia, PA, 28 August 2003.

⁹ Decisions 21/1990 and 16/1991. In: Sólyom–Brunner: *op. cit.*

¹⁰ Decision 60/1994. In: *ibid.*

¹¹ Decision 43/1995. In: *ibid.*

¹² Decision 64/1991. In: *ibid.*

¹³ Decision 23/1990. In: *ibid.*

¹⁴ See Decision 14/1995. In: *ibid.*

¹⁵ *Ibid.*

legislature's ratification the EU Constitution and (temporarily) barred the country's president from signing it.¹⁶

For students of judicial politics, the development of these new courts is significant not merely as an opportunity to apply existing models, but also because lessons from these unconventional contexts can improve and expand extant theories.¹⁷ The experiences, contexts, and compact histories of the new tribunals may prove pivotal in identifying gaps in existing theory; in particular, their study may bring to light forces which are invisible in 'conventional' contexts, but which ought to be incorporated into any general theory of constitutional adjudication.

Explorations of the courts and the lessons they have to teach have been underway for well over a decade, but one of the discoveries thus far is puzzling. After surveying the judicial decisions of seven CEE constitutional courts, two prominent American political scientists—Eric Herron and Kirk Randazzo—concluded that the degree of institutional judicial independence enjoyed by the courts did *not* affect the likelihood that those courts would annul a statute or other government act. This conclusion, along with several others reached by Herron and Randazzo and other scholars, runs counter to conventional wisdom, raising questions both about these new courts themselves and, more broadly, about broader theories of judicial independence. In short, if Herron and Randazzo are correct, then either (A) the new courts are *sui generis*, and have less in common with their Western templates, or (B) a basic tenet of political science—i.e., that institutional design affects behaviour—may not be true of constitutional courts.

Both the implications of Herron and Randazzo's findings and problems with their and others' studies make it necessary to revisit this question empirically. This Article does just that, seeking to uncover a more complete picture of CEE courts themselves and of judicial independence more generally. Building on the prior studies' research design, the Article principally explores whether the degree of institutionally inscribed formal independence of the courts themselves affects the incidence of judicial review in CEE and the FSU. This study

¹⁶ Jurinová, M.: President ready to sign EU Constitution. *The Slovak Spectator*, 25 July 2005. <<http://www.slovakspectator.sk/clanok.asp?cl=20421>>. Forbes.com (2005): Slovak Constitutional Court blocks ratification of EU constitution. *Forbes.com*, 14 July 2005. <<http://www.forbes.com/finance/feeds/afx/2005/07/14/afx2139424.html>>

¹⁷ As Scheppele observes, the new courts "are good to study not because they are different in kind from what becomes normal politics, but precisely because they reveal in sharper relief the problems buried in what passes for normal in 'consolidated' democracies." Scheppele: *op. cit.* 220.

also examines other factors that may influence the level of judicial review—some studied in previous work, and some original to this study. The study's findings regarding the determinants of judicial review by constitutional courts in CEE and the FSU will contribute not only to an understanding of these courts, but they can also help to both test and reshape general theories of both constitutional adjudication and the transplantation of legal institutions.

To this end, the Article proceeds as follows: Part 2 reviews existing literature addressing constitutional judicial politics in transition, describing and critique two particular investigations—Herron and Randazzo's, and another by John Ishiyama and Shannon Smithey—that studied the relationship between judicial independence and judicial review in CEE and the FSU.¹⁸ Part 3 describes the data and methodology employed in this study, and Part 4 analyses the results. Part 5 offers conclusions regarding methodological improvements and substantive findings.

At the outset, it is important to note several obstacles that hinder all studies of the new courts. At a theoretical level, despite myriad volumes on judicial politics produced over the last two decades, a general theory of judicial independence—even a common definition—is still lacking.¹⁹ A novel, though elementary, model is developed and used here, but it goes only a short way towards constructing a sound, comprehensive definition of judicial independence. Second, the methodologies developed for studying constitutional politics in stable democracies with long traditions of constitutional review may be inadequate to investigate states where the courts are brand new, that have no recent tradition or legacy to build upon, and where the rules of the game are constantly in flux.²⁰ This problem—troublesome enough when studying conventional, consolidated democracies²¹—is heightened in transition contexts where the existence, content, and effectiveness of formal and informal rules of law are never known with certainty.

Finally, the transition context presents problems concerning the actual data needed for study. There is no standardised, transparent, and widely used

¹⁸ Smithey, S. I.—Ishiyama, J.: Judicial activism in post-communist politics. *Law and Society Review* 36 (2002) 719–741; Herron, E.—Randazzo, K.: The relationship between independence and judicial review in post-communist courts. *Journal of Politics* 65 (2003) 422–438.

¹⁹ Russell, P.: Toward a general theory of judicial independence. In: Russell—O'Brien: *op. cit.* 1–24; Herron—Randazzo: *op. cit.*

²⁰ Boulanger: *op. cit.*

²¹ Stone Sweet, A.: A comment on Vanberg: rules, dispute resolution, and strategic behaviour. *Journal of Theoretical Politics*, 10 (1998) 3, 327–338; Vanberg, G.: Reply to Stone Sweet. *Journal of Theoretical Politics*, 10 (1998) 3, 339–346; Boulanger: *op. cit.*

database on court activity available, as there is for the world's most-studied court.²² Moreover, lack of basic familiarity with the new courts makes it hard for scholars to know what data to collect. Add to these problems the tremendous language barriers,²³ numerous inconsistencies between the courts in what documents and statistics are publicly available, and the fact that most in-depth research continues to come from single-country studies where the authors frequently are sitting or former jurists on the court they describe, and the challenges facing researchers of the new courts become quite daunting.

2. Existing Literature on the new courts

2.1. Methodologies and Findings of Prior Research

The new constitutional courts of CEE and the FSU remain the most “under-theorized” of any of the aspects of transition.²⁴ Although they have received attention from around the world and from a variety of disciplines,²⁵ much of this attention has been descriptive and exploratory in nature.²⁶ Moreover, those studying the courts often bring with them established theories and models of judicial independence developed in other contexts,²⁷ and thus comparatively little new theoretical ground has been broken.²⁸

²² Prof. Harold Spaeth's databases for the United States Supreme Court is “certainly the most important and influential”—as well as the most comprehensive and transparent—dataset available for the study of that Court. Epstein, L.—Knight, J.—Martin, A.: The political (science) context of judging. *Louis University Law Journal*, 47 (2003) 783, 807.

²³ Schwartz, whose book on the new constitutional courts in CEE is perhaps the most frequently cited major work on the topic, acknowledges: “I do not, however, know the languages of the many countries covered in this book, I certainly am not very familiar with either their legal systems or national cultures, and I have translations of only some of the decisions and actions I discuss” (2000, xix).

²⁴ Sadurski: *op. cit.*

²⁵ Dupré: *op. cit.* 3–4.

²⁶ Schwartz: *op. cit.*; Přibáň—Roberts—Young (eds.): *op. cit.*; Krygier, M.—Czarnota, A. (eds.): *The rule of law after communism: problems and prospects in East-Central Europe*. Aldershot, 1999. 55–76. Constitutional courts in the process of articulating constitutional rights in post-communist states of Central and Eastern Europe, Part I: social and economic rights. European University Institute Law Working Paper No. 2002/14. Florence, 2002; Harutyunyan, G.—Mavčič, A.: *The constitutional review and its development in the modern world: a comparative analysis*. Ljubljana, 1999.

²⁷ Howard: *op. cit.* Burbank, S.—Friedman, B. (eds.): *Judicial independence at the crossroads: an interdisciplinary approach*. Thousand Oaks, California, 2002.

This is surprising not only because of the ubiquity, activist tendencies, and importance of these courts to the transformation to democracy, but also because constitutional judicature in transition lies at the nexus of two rich fields of the political science and transition literatures. First, the theoretical and empirical literature on constitutional judicial politics has produced several methodologies and models for investigating established constitutional courts.²⁹ Intertwined with these advances have been efforts, incomplete as yet, to uncover the nature, causes, and effects of judicial independence.³⁰ Several applications of these theories and methods to transition contexts are discussed in the following section.

Second, the literature on the “transplantation”³¹ or “importation”³² of legal systems, and the explicit extensions of this line of investigation to post-communist contexts,³³ offers several critical insights pertinent to constitutional

²⁸ There are exceptions, of course. See Procházka: *op. cit.*; Scheppele, K. L.: Declarations of independence: judicial reactions to political pressure. In: Burbank–Friedman (eds.): *op. cit.* 227–280.

²⁹ Shapiro, M.: *Courts: a comparative and political analysis*. Chicago, 1981; Stone Sweet, A.: *Governing with judges: constitutional politics in Europe*. Oxford, 2000; Vanberg, G.: *The politics of constitutional review in Germany*. Cambridge, 2005; Garrett, G.–Kelemen, R. D.–Schulz, H.: The European Court of Justice, national governments, and legal integration in the European Union. *International Organization*. 52 (1998) 149–176; Epstein, L.–Knight, J.: *The choices justices make*. Congressional Quarterly, Washington, 1998; Epstein–Knight–Martin: *op. cit.* As Boulanger recounts, three major threads of have taken shape in the literature on courts and their role in governance: formalist (i.e. rational choice) models, “behavioural/empiricist accounts” employing several tools of statistical analysis, and the more abstract “triadic dispute resolution” models such as that elaborated by Stone Sweet. Boulanger: *op. cit.* 7ff. As scholars have begun to turn their attention toward CEE and FSU constitutional courts, they have made more use of the first two of these approaches, while the third has been partly subsumed in historical-contextual accounts, such as those of Procházka and Boulanger.

³⁰ Russell–O’Brien: *op. cit.* Ackner, L.: The erosion of judicial independence. London, 1997; Burbank–Friedman: *op. cit.* Lane, L.: Judicial independence and the increasing executive role in judicial administration. In: Shetreet, S.–Deschenes, J. (eds.): *Judicial Independence: The Contemporary Debate*. Dordrecht, 1985; Ramseyer, J. M.–Rasmusen, E.: *Measuring judicial independence: the political economy of judging in Japan*. Chicago, 2003.

³¹ Watson, A.: *Legal transplants*, 2nd ed. Athens, Georgia (USA), 1993; Watson, A.: From legal transplants to legal formants. *American Journal of International and Comparative Law*, 43 (1995) 469.

³² Ajani, G.: By chance and prestige: legal transplants in Russia and Eastern Europe. *The American Journal of Comparative Law*, 43 (1995) 93–117.

³³ Dupré: *op. cit.* Pistor, K.: The demand for constitutional law. *Constitutional Political Economy*, 13 (2002) 73–87; Hendley, K.: Rewriting the rules of the game in Russia: the neglected issue of the demand for law. *East European Constitutional Review*, 8 (1999).

jurisprudence in transition countries. Most importantly, such explorations have identified several strategic and contextual factors—including a transitioning state’s familiarity with and adaptation of the legal system transferred³⁴—that can influence the successful transfer of legal norms and institutions from one state to another. When such factors are absent, the systems will not function as effectively as in their original context, a phenomenon that commentators call the “transplant effect.”³⁵

Despite this intersection of disciplines and the possibilities it may hold for developing new theories of constitutional adjudication, scholars have instead relied on two familiar methodologies: static rational choice models and statistical analysis of judicial decisions. Each offers distinct costs and benefits. Rational choice models are among most prevalent and provocative tools for modelling courts and other institutions in non-transition contexts.³⁶ Because of the transition literature’s youth, however, only a few attempts to apply rational choice models to new constitutional courts have appeared. The best example is the work of Epstein, Knight, and Shvetsova,³⁷ in which the authors employ rational choice theory to predict the interaction of constitutional courts with legislative and executive branches.

Although rational choice does offer a window into the ‘black box’ of judicial decision making, allowing outsiders to understand political influences on the courts as strategic actors, models like Epstein, Knight, and Shvetsova’s face serious limits. First, to the extent they can accurately reflect the strategic rubric of political decisions faced by courts in a given country, they are likely too closely tied to that country’s context to be of broader value. Second, as Alec Stone Sweet has observed,³⁸ rational choice models are as yet unable to

³⁴ Pistor, K.–Raiser, M.–Gelfer, S.: Law and finance in transition economies. Center for International Development Working Paper No. 49. Cambridge, MA 2000; Berkowitz, D.–Pistor, K.–Richard, J. F.: The transplant effect. *American Journal of Comparative Law*, 51 (2003) 163–204.

³⁵ Berkowitz, D.–Pistor, K.–Richard, J. F.: Economic development, legality and the transplant effect. *European Economic Review*, 47 (2003) 165–195.

³⁶ Ferejohn, J. A.–Weingast, B. R.: A positive theory of statutory interpretation. *International Review of Law and Economics*, 12 (1992) 263–279; Knight, J.: Law and rational choice. Paper (draft) presented at Politics and Rationality Lectures, Collective Choice Center, University of Maryland, 23 Feb 2001. <<http://www.bsos.umd.edu/umccc/knight.pdf>>; Vanberg, G.: Legislative-judicial relations: a game-theoretic approach to constitutional review. *American Journal of Political Science*, 45 (2001) 346–361.

³⁷ Epstein–Knight–Shvetsova: *op. cit.*

³⁸ Stone Sweet: Comment... *op. cit.*

explain situations where the ‘rules of the game’ themselves are in flux, especially when such changes are the result of interaction among the players.³⁹

Third, the stylized portraits of political interactions that rational choice models present often include unrealistic, misleadingly oversimplified assumptions that affect their conclusions significantly. For example, Epstein, Knight, and Shvetsova ground their model in the assumption that courts do not have the final say in determining the outcome of a given constitutional controversy, and accordingly they hypothesise—and confirm empirically—that constitutional courts can only survive, let alone increase their position in the political order, if they issue decisions which *all* of the other branches find it too costly to contest. Because many of the new courts’ most important cases concern conflicts between other branches of government, however, the authors’ underlying assumption leads them astray. Their model excludes the possibility of a court deciding in favour of one branch of government, over and against another, and if necessary relying on the branch it supported to protect it from attacks. Yet the courts of Hungary⁴⁰ and Poland⁴¹ did precisely this.⁴²

The main alternative to formal rational choice models is statistical analysis, which Boulanger labels the “behavioural-empiricist” approach.⁴³ Transition scholars have employed statistical modelling to study both the creation of constitutional courts in CEE and the FSU⁴⁴ and the actual behaviour of the courts in deciding cases.⁴⁵ Of the latter type, two studies deserve mention: using a same measure of judicial independence developed by Smithey and Ishiyama, both Smithey and Ishiyama themselves and Herron and Randazzo

³⁹ The third analytical framework in the broader literature on courts—the ‘triadic dispute resolution’ model—sets out to solve precisely this problem. Shapiro: *op. cit.* Stone Sweet: *op. cit.*

⁴⁰ Scheppele: *op. cit.* Schwartz: *The struggle for constitutional justice... op. cit.*; Halmai, G.: The Hungarian approach to constitutional review: the end of activism?: the first decade of the Hungarian Constitutional Court. In: Sadurski, W. (ed.): *Constitutional justice, east and west: democratic legitimacy and constitutional courts in post-communist Europe in a comparative perspective*. The Hague, 2002. 189–212.

⁴¹ Brzezinski, M.: *The struggle for constitutionalism in Poland*. London, 2000.

⁴² Additionally, the Epstein, Knight, and Shvetsova model ignores the role of parties/coalitions within legislatures or cabinets, which ought not and need not be excluded from rational-choice-type models, as evidenced by Steunenberg, B.: Courts, cabinet and coalition parties: the politics of euthanasia in a parliamentary setting. *British Journal of Political Science*, 27 (1997) 551–571.

⁴³ Boulanger: *op. cit.* 7.

⁴⁴ Smithey, S. I.–Ishiyama, J.: Judicious choices: designing courts in post-communist politics. *Communist and Post-Communist Studies*, 33 (2000) 163–182.

⁴⁵ Smithey–Ishiyama: Judicial activism... *op. cit.* Herron–Randazzo: *op. cit.*

examined what relationship, if any, existed between the level of judicial independence and the incidence of judicial review. Except for differences in time span examined,⁴⁶ the studies are markedly similar. Both aimed to capture the influence of various country-level attributes on the level of judicial review, and both examined a cross-sectional pool of constitutional court decisions from similar panels of countries through logit or probit analysis.⁴⁷

Both the Smithey-Ishiyama and Herron–Randazzo studies yielded similar but surprising results. First, though both studies hypothesised a positive relationship between judicial independence and judicial review, the Herron–Randazzo study found no significant relationship, and Smithey and Ishiyama identified a significant *negative* relationship.⁴⁸ Each study, however, highlighted several contextual factors—political, social, and even economic—that were strongly associated with judicial review. Smithey and Ishiyama found significant positive relationships between judicial review and the degree of legislative fragmentation, the number of elected layers of government, and popular trust in the courts. Herron and Randazzo identified significant *negative* relationships between judicial review and change in the country’s GDP growth as well as the level of presidential power.⁴⁹ At the level of individual decisions, Herron and Randazzo also found that cases where the president or an ordinary individual citizen was the appellant were more likely to result in judicial review, as were cases concerning economic issues. Consequently, each pair of authors concluded that these aspects of context, rather than judicial independence embedded in institutional design, must be the dominating factor in explaining the experience of constitutional courts in CEE and the FSU.

⁴⁶ Smithey and Ishiyama studied only the first three years of each court’s operation, while Herron and Randazzo examined all available years.

⁴⁷ Each includes the Czech Republic, Estonia, Georgia, Lithuania, Moldova, and Russia; to this common set of six, Smithey and Ishiyama add Latvia and Slovakia, and Herron and Randazzo add Slovenia. Smithey and Ishiyama employ logistic (logit) regression, while Herron and Randazzo employ probit; as the underlying dependent variable is nominal, however, logit appears a more appropriate specification, and is thus used here. See Pampel, F. C.: *Logistic regression: a primer*. Thousand Oaks, CA. 2000.

⁴⁸ In addition, Smithey and Ishiyama observed, but did not test statistically, that judicial activism (defined as the frequency of judicial review) rose with judicial independence (measured by their judicial independence index scale) up to around 0.55 on the judicial—approximately the mean and median of the countries in their sample as well as the sample utilised in their earlier work which first employed the index—and then judicial activism begins decreasing, thus presumably yielding a unimodal peak. This possibility is tested and verified in the replication study herein.

⁴⁹ Herron–Randazzo: *op. cit.*

2.2. *Grounds for Scepticism*

As noted, the main conclusion of the Herron–Randazzo and Smith–Ishiyama studies is surprising. Both political theory and elementary intuition suggest that judicial independence, if defined meaningfully, should bear some positive relationship to courts’ exercise of their independence through judicial review.⁵⁰ Accordingly, if these two studies are correct, then either conventional theory does not apply to these new courts, or that theory itself is incomplete or misguided.

A closer look at the design and execution of both the Smithey–Ishiyama and Herron–Randazzo research, however, reveals that one should not take their conclusions at face value. Both studies exhibit two critical problems: the data and cases selected, and the conceptualisation of the independent variables. After reviewing these key deficiencies, the need to revisit the ground these authors covered will be clear.

2.2.1. Data and Case Selection

Three troubling attributes of the Herron–Randazzo and the Smithey–Ishiyama studies concerning data and case selection should immediately stand out to those familiar with the work of these courts. First, both studies exclude several of the most visible and most intensely investigated courts in the region. Each pair of authors excludes Hungary—which was at the time “perhaps the most activist constitutional court not only in the CEE but also in the world”⁵¹—as well as Poland, a court which began as one of the weakest in the region, but began a steady rise to power years before its authority was formally expanded in the 1997 Constitution.⁵²

⁵⁰ *Ibid.* 425.

⁵¹ Sadurski: Postcommunist... *op. cit.* 3; Osiatynski, W.: Rights in new constitutions of East Central Europe. *Columbia Human Rights Law Review*, 26 (1994) 111, 151ff.; Brunner, G.: Development of a constitutional judiciary in Eastern Europe. *Review of Central and East European Law*, 18 (1992) 535, 539–540. See also Scheppele: *op. cit.* Schwartz: *op. cit.*; Sólyom: *op. cit.*; Procházka: *op. cit.*; Halmai: *op. cit.*

⁵² Brzezinski: *op. cit.* Schwartz: *op. cit.* The authors of both studies indicated (in response to queries) data availability as the grounds for excluding Hungary, Poland, and other countries, both pairs of researchers indicated that data availability was a concern. However, it would appear that such data limitations result from those authors’ decision to use decisions published on court websites as the source of their data, which is commented on below. Cases from Hungarian Court, however, were available in non-electronic form in Hungarian from the first case forward (in the *Hungarian Official Gazette*), began to be

Second, both studies exclude or mischaracterize one of the most important areas of the courts' activity: abstract review. The new constitutional courts in post-communist states, and especially those of CEE, were modelled not on Anglo-American templates, but rather imported their structure mostly from Western European constitutional courts, specifically Germany's FCC.⁵³ The abstract review competence—which enables courts to adjudicate the constitutionality (or legality, for sub-statutory acts) outside of the context of a concrete dispute⁵⁴—is absolutely central to courts' activity and power,⁵⁵ especially in transition countries.⁵⁶ But the Herron–Randazzo study excludes cases involving the exercise of abstract review from their sample altogether,⁵⁷ and the Smithey–Ishiyama study implicitly conflates *a priori* review, which is abstract by nature, with *a posteriori* abstract review.⁵⁸ This confusion—which was explicit in their earlier work⁵⁹—makes it difficult to decipher how Smithey and Ishiyama conceptualise judicial review.

published in German from 1995 forward, Dupré: *op. cit.* 7, and are now available in print in a number of languages including English.

⁵³ Tanchev: *op. cit.*; Sólyom–Brunner: *op. cit.*; Procházka: *op. cit.* The model adopted in CEE represents the third generation of Kelsenian constitutional courts, after the pattern designed by Hans Kelsen for Austria in 1920 and later imported into post-war Germany and Italy. Sólyom: *op. cit.* The new courts, importantly, are linked to the Kelsenian model both in that they imported much of their structure (and in some cases, substantive jurisprudence—see Dupré: *op. cit.*) from Germany, and *also* through more direct ties to the original Kelsenian design. See Schwartz: *op. cit.* 270–271. n. 9.

⁵⁴ There remains, surprisingly, non-trivial disagreement over the border between concrete and abstract review. E.g., Procházka: *op. cit.* 79–80. Procházka distinguishes his own view from that of Stone Sweet in regard to review by constitutional courts of lower court decisions, which Procházka believes can be seen as abstract but which Stone Sweet classifies as concrete only.

⁵⁵ Stone Sweet: *Governing...* *op. cit.* 45ff.

⁵⁶ Procházka: *op. cit.*; Sólyom: *op. cit.*

⁵⁷ Herron–Randazzo: *op. cit.* 429. Herron and Randazzo give some reasons for their exclusion of cases of what they term “abstract review”, but their description applies only to instances where legislators petition for review. The courts of CEE and the FSU do not limit this power to legislators, however, and thus their arguments, as stated, are unpersuasive.

⁵⁸ Smithey–Ishiyama: *Judicial activism: op. cit.* The difference between the two categories is actually quite important. For purpose of disambiguation, *a priori* review—or preventive norm control—enables the court to review statutes prior to either passage by the legislature, promulgation by the executive, or application. *A posteriori* review—or repressive norm control—can include both abstract and concrete review of statutes after they have been passed, promulgated, and brought to application. Schwartz: *op. cit.*; Sólyom–Brunner: *op. cit.*; Procházka: *op. cit.*

⁵⁹ Smithey–Ishiyama: *Judicious choices...* *op. cit.* 167–168.

One final data concern relates to the actual source of the prior studies' data. Both works used cases available from the websites of the respective courts, using a combination of original language publications and English translations.⁶⁰ Courts' selectivity in publishing decisions on their websites means that both studies relied on non-representative samples.⁶¹ Although most of the new constitutional courts are required by law to publish their decisions in an official state publication, publishing any, let alone all, of those decisions on websites is neither required nor frequently practiced.⁶²

Some degree of selectivity is unavoidable, of course, as many courts publish only their more important decisions even in print. The difficulty, however, lies in the *differences* between the courts' procedures and standards for choosing cases for *electronic* publication. Whereas some courts offer electronic versions of every published decision (e.g., Slovakia), others offer only a selection of the most important cases (e.g., Hungary and the Czech Republic). Each country may employ different standards to choose which cases merit publication. Accordingly, the samples used by the Herron–Randazzo and Smithey–Ishiyama studies for country A may be more representative, while the sample taken from country B will reflect only the more important cases. Because of this selectivity differential, the prior studies may have distorted the actual practice of individual countries.

2.2.2. Operationalising the Independent Variable

Beyond data and case-selection concerns, both studies also suffer from a deficient conceptualisation of the key independent variable, judicial independence. As noted above, both Herron and Randazzo and Smithey and Ishiyama employ the “Smithey and Ishiyama Index” of judicial independence (“SII”) the latter pair developed in an earlier work.⁶³ The SII is a scalar measure, ranging from 0 to 1, with higher scores reflecting greater independence. It reflects the average of

⁶⁰ Herron and Randazzo explicitly state this, Herron–Randazzo: *op. cit.* 428, and—both pairs of authors confirmed this in response to queries by the author.

⁶¹ Herron and Randazzo do note that their study is limited only to published decisions, and thus generalizable only to the universe of published decisions, *ibid.*; however, it is their conflation of publishing of decisions with publishing *electronically*, and in some cases *in an accessible language* which creates the difficulty.

⁶² In Hungary, for instance, a total of 11 092 proceedings were initiated between 1990 and 1996. Sólyom–Brunner: *op. cit.* 72. But the Court's website currently lists only 3 837 decisions or case descriptions in Hungarian, and fewer than 50 in English.

⁶³ Smithey–Ishiyama: *Judicious choices... op. cit.* 167–169.

six individual scores—each also ranging from 0 to 1—representing six purported aspects of judicial independence.⁶⁴

There are several problems with the SII's design and application in these prior studies, however. First, there is reason to doubt that it can measure a court's judicial independence meaningfully. Its six components supposedly represent various (vaguely-defined) dimensions of judicial independence, but the metrics employed appear arbitrarily chosen.⁶⁵ For instance, though Smithey and Ishiyama describe the SII as a measure of "judicial power,"⁶⁶ only two of its six components relate to the competences of the courts, while the rest deal with elements of the judges' protection from manipulation by other branches. Although both dimensions—powers and insularity—are conceptually important to judicial independence, the SII makes unstated and unjustified assumptions about the weight and interaction of these two dimensions. Accordingly, the SII does not reflect a well-grounded conception of the factors that comprise judicial independence, nor of the interactive relationships between those component factors.

Moreover, both studies rely on apparently erroneous SII values for the countries they study.⁶⁷ Coding errors are apparent in measuring countries' *a priori* review powers, judges' relative term length, and number of parties involved in appointment of judges. Thus, even if the SII were a valid measure by construction, there are reasons to question results achieved using it.

This is not to say that the prior studies' findings are necessarily incorrect—only that their conclusion must be tested more rigorously through modified replication. Replication also presents the opportunity to incorporate additional independent variables—both to test alternative causal stories and to control for important factors not accounted for in the original studies. The remainder of this Article undertakes that task.

⁶⁴ See Table 2 (and notes accompanying it) for original and corrected scores (corrections coded by the author) on each dimension of the index. See Smithey–Ishiyama: *Judicious choices...* *op. cit.* 167–169, for a detailed discussion of the construction and coding of the index.

⁶⁵ Moreover, even if the balance of areas represented by the six components was appropriate, the particular measures used to reflect each of the six components are markedly deficient proxies for the dimensions they are used to represent.

⁶⁶ Smithey–Ishiyama: *Judicial activism...* *op. cit.* 731.

⁶⁷ A full account of the errors described summarily here is provided in the notes to Table 2.

3. Data and Methodology

3.1. Hypotheses

3.1.1. Hypotheses for Variables Studied in Prior Works

The study undertaken here examines the effect on judicial review of judicial independence, legislative fragmentation,⁶⁸ and several new variables not studied in previous works (introduced to measure the ‘receptiveness’ of the transition countries to the new legal institutions⁶⁹). Regarding judicial independence, both the Smithey–Ishiyama and Herron–Randazzo studies—drawing on substantial support from the literature—anticipated that judicial independence and/or power is positively related to the degree of judicial review, which both defined as the frequency of judicial review. This expectation is premised on the view that courts enjoying “greater guarantees of independence” are “freer to exercise their own will” without fear of censure or retribution by the other branches.⁷⁰ The primary hypothesis for judicial independence is therefore:

H_{1-A}: Judicial *independence* is positively related to the frequency of judicial review (exercised by the constitutional court).

Because the prior authors use the exact same measure (the SII) to capture both judicial independence and judicial power, and because the present work aims to disambiguate these concepts, a second formulation of the first hypothesis is:

H_{1-B}: Judicial *power* is positively related to the frequency of judicial review (exercised by the constitutional court).

Also, because the present investigation also seeks to improve on several aspects of the execution of the prior works, this hypothesised relationship between judicial independence and judicial review should become gradually more apparent with each marginal methodological improvement.

Regarding legislative fragmentation, the prior studies harboured diverging expectations. Herron and Randazzo, building on an argument advanced by Stone Sweet,⁷¹ argue that a more divided legislature is likely to pass laws that are “generally less contentious than those produced by one dominant party.”⁷²

⁶⁸ As both the expectations and findings of Smithey and Ishiyama and Herron and Randazzo diverged on this issue, a clear hypothesis is necessary.

⁶⁹ The other variables included by Smithey and Ishiyama and Herron and Randazzo are likewise tested here for purposes of replication, but separate hypotheses are not offered for these. Expectations for each variable are presented in the following section.

⁷⁰ Herron–Randazzo: *op. cit.* 425.

⁷¹ Stone Sweet: *Governing... op. cit.* 54ff.

⁷² Herron–Randazzo: *op. cit.* 427.

Legislation thus produced should be less prone to challenge, as presumably more parties were involved in its design and thus have less reason to petition for its nullification.

Although this argument is plausible, the literature more strongly supports the Smithey–Ishiyama study’s hypothesis that legislative fragmentation is positively associated with judicial review, which that study confirmed empirically. Less unified legislatures or governing coalitions invite challenges by the judiciary, which (the judiciary expects) the legislature or coalition will be unable to override.⁷³ With this in mind, the primary hypothesis for legislative fragmentation follows Smithey and Ishiyama’s expectations and results:

H_{2-A}: Legislative fragmentation is positively related to the frequency of judicial review.

The Herron–Randazzo view—that diverse participation may yield less contentious legislative output—should not be discarded entirely, however. Specifically, their expectation may be true of fragmentation *within* governing coalitions. Although overall fragmentation would not seem to guarantee that a party’s preferences are incorporated into the legislative programme, membership in the coalition might offer some assurance of this. Additionally, whereas overall fragmentation would serve to weaken the legislature’s ability to override a court which struck down the legislature’s bills (in that overriding a court may require, as it does in many transition countries, a super-majority vote), fragmentation within the coalition seems less likely to generate this weakness: despite its internal divisions, the members of a coalition would presumably be willing to defend the coalition’s policies against interference by the courts. Thus, a secondary hypothesis for legislative fragmentation is:

H_{2-B}: Legislative fragmentation within the governing coalition is negatively related to the frequency of judicial review.

For the remainder of the variables included for purposes of replication, separate hypotheses are not necessary, as the original authors’ hypotheses and findings serve as the propositions to be verified or rejected.⁷⁴

⁷³ Vanberg: Legislative-judicial... *op. cit.*; Tate, C. N.–Vallinder, T. (eds.): *The global expansion of judicial power*. New York, 1995. 31ff.; Holland, K.: *Judicial activism in comparative perspective*. New York, 1991. 9ff. A possible exception pertinent to some transitioning states is noted by Procházka: *op. cit.* 117, who suggests that legislatures divided to the point of fragility might receive extra deference from a constitutional court concerned more with stability of the new state than with conformity of certain legal provisions with the constitution.

⁷⁴ King, G.: Replication, replication. *PS: Political Science and Politics*, 28 (1995) 443–499; Herrndon, P.: Replication, verification, secondary analysis, and data collection in political science. *PS: Political Science and Politics*, 28 (1995) 443–499.

3.1.2. Hypotheses for Variables Not Studied in Prior Works

A few other hypotheses are needed, however, for several new independent variables that were not examined by the Smithey–Ishiyama or Herron–Randazzo works. These variables reflect aspects of the “demand for constitutional law,”⁷⁵ namely: familiarity with the imported legal traditions, adaptation of imported institutions, and political participation in the design of new institutions. These variables aim to capture the ‘receptiveness’ of each country to the ‘transplantation’⁷⁶ or ‘importation’⁷⁷ of legal institutions, including constitutional adjudicatory systems.

According to Pistor, Raiser, and Gelfer,⁷⁸ transplants of law to ‘receptive’ countries are more successful than those to ‘unreceptive’ countries. In countries which are receptive to the institutions they import, the import/transplant will be successful, whereas in unreceptive countries the institutions grafted in are more likely to operate dysfunctionally, exhibiting what scholars have termed a legal “transplant effect.”⁷⁹ Countries “without previous exposure to the modern formal legal order before the collapse of the socialist system” are termed “new transplants,” which are expected to function similarly to unreceptive transplants.⁸⁰

This may not be true, however, of *constitutional* systems transplanted into new contexts. A country with no exposure to a system of constitutional judicature might have a ‘clean slate,’ as compared to those which are distinguishably “unreceptive” for substantive reasons, and therefore the transplant may be more successful.⁸¹ Testing this requires a definition of ‘dysfunctionality,’ but what this means in the case of constitutional review is not clear from the transplant literature. One possibility is that ‘dysfunctional’ courts do not develop in the

⁷⁵ Pistor: *op. cit.*

⁷⁶ Watson: Legal transplants... *op. cit.*

⁷⁷ Ajani: *op. cit.* Dupré: *op. cit.* Pistor: *op. cit.*

⁷⁸ Pistor–Raiser–Gelfer: *op. cit.* 15ff.

⁷⁹ Berkowitz–Pistor–Richard: Economic development... *op. cit.*; Berkowitz–Pistor–Richard: Transplant effect... *op. cit.*; Pistor: *op. cit.*; Dupré: *op. cit.*; Ajani: *op. cit.* Pistor, Raiser and Gelfer (and works which build on this framework) identify countries classed *either* as exhibiting adaptation *or* familiarity as receptive; intuition suggests altering this definition to limit it to those countries exhibiting *both*.

⁸⁰ Pistor–Raiser–Gelfer: *op. cit.*

⁸¹ For example, in the case of Poland, the Constitutional Tribunal began operations several years prior to the formal transition to democracy, but this brief heritage proved all but fatal to the Tribunal as a potent political actor in its early years after transition. See Schwartz: *op. cit.* 264 n. 10.

spiral-shaped pattern characteristic of the judicialization-politicization cycle.⁸² As this pattern is associated with continually (if subtly) increasing judicial power and purview, this study expects that judicial review will be positively associated with the aspects of the demand for law indicated above. Thus, the final hypotheses are as follows:

- H₃: The more a country adapts the legal institutions it imports, the higher the level of judicial review its constitutional court exercises.
- H₄: The greater a country's familiarity institutions it imports, the higher the level of judicial review.
- H₅: Judicial review is higher in countries 'receptive' to legal transplants than those that are 'unreceptive'.
- H₆: Judicial review is higher in countries which are 'new transplants' than those which are 'unreceptive'.
- H₇: The greater the diversity of political participation in the decisions to design and/or import legal institutions at the beginning of transition, the higher the level of judicial review.

This last hypothesis connects also to the principal-agent theories of courts. The more 'principals' engaged in designing a new constitutional court should mean (1) more legitimacy and support for the court,⁸³ and (2) less unity among the principals, meaning (a) the court can become powerful by adjudicating disputes between principals, and/or (b) the principals may find it more costly to constrain the court.

3.2. Variables and Data

To test these hypotheses, the study examines decisions of constitutional courts of ten countries of CEE and the FSU: the Czech Republic, Estonia, Georgia, Hungary, Lithuania, Moldova, Poland, Russia, Slovakia, and Slovenia.⁸⁴ All available cases (n=915) from these ten countries where judicial review was requested by the petition or referral to the court are included, from the earliest (available) year of each court's operation through the end of 2003. Table 1 presents a comparison, by country, of the samples examined by Smithey and Ishiyama, Herron and Randazzo, and the modified replication study.

The sample includes decisions involving both abstract review (both *a priori* and *a posteriori*) of legal norms and concrete review. The source of the data is

⁸² Stone Sweet: *Governing... op. cit.*

⁸³ Pistor: *op. cit.* 84.

⁸⁴ This includes all but one of the countries (Latvia, excluded to avoid overrepresenting the Baltic region) examined by both Herron and Randazzo and Smithey and Ishiyama.

the CODICES Database published by the Venice Commission of the Council of Europe, which provides full-text decisions and case descriptions from constitutional courts around the world. The CODICES Database does not entirely remove the problem of selection bias, but it significantly reduces the problem of *differential* selection bias, as cases are selected according to a single set of standards by a central agent.

3.2.1. Dependent Variable: Judicial Review

To replicate the prior works' methods, both bivariate correlation analyses and logistic regression analysis (logit) are used here. For the logit analysis, which forms the main part of the study, the dependent variable is the likelihood of a constitutional court exercising its powers of judicial review. Following Herron–Randazzo and Smithey–Ishiyama, cases were coded 1 if the courts declared unconstitutional or otherwise annulled a statute, explicit government action, substatutory legislation or regulation, a treaty, or other similar legal norms, and 0 if the courts did not.

For the correlation analysis, following Smithey–Ishiyama, static, country-level attributes are compared with an aggregate measure of judicial review's frequency: the number of cases where courts did exercise review across all years divided by cases where it was petitioned (or otherwise empowered) to do so. Three measures of this were used: (1) the scores originally calculated by Smithey and Ishiyama covering the first three years of each court's operation, (2) the same scores supplemented by third-party data on Hungary and Poland,⁸⁵ and (3) scores calculated from the replication dataset. In a second set of correlations presented side-by-side with counterparts of the first set, each of these three measures of the dependent variable is adjusted to reflect disparate levels of accessibility of the courts in each country.

3.2.2. Independent Variables

3.2.2.1 Judicial Independence: Power, Access, and Insularity

The prior works operationalise judicial power in the form of the SII described above, a synthetic measure designed to encompass “both the extent to which the constitutional courts possess judicial review powers and the extent to which the constitution extends independence of action to the constitutional court or supreme court from other institutional actors.”⁸⁶ The present study begins

⁸⁵ Data from Scheppele: *op. cit.* and Brzezinski: *op. cit.*

⁸⁶ Smithey–Ishiyama: *Judicious choices... op. cit.* 167.

with this measure judicial independence, testing both the prior authors' values and corrected values (to fix arithmetical and coding errors in prior studies). Table 2A presents the Smithey and Ishiyama Index (SII) of judicial independence as originally calculated. Table 2B presents the SII when corrected for coding and calculation errors.

Additionally, Smithey and Ishiyama observe casually, without testing systematically or attempting to explain, that the level of judicial review generally rises with judicial independence up to 0.55, a point immediately between the mean (0.54) and median (0.56) and mode (0.56) of the original distribution of judicial independence scores,⁸⁷ but that judicial review declines thereafter. This possibility of a central peak is tested by comparing the absolute value of the distance of a country's SII score from this central 'peak' point (0.55) with its level of judicial review. If 0.55 is indeed at the apex of a curve, then the distance between a country's score and the peak will be negatively correlated to judicial review.

The limits of the SII itself can only be pushed so far, however, before a wholly new measure is needed. At the very least, judicial independence and judicial power—nebulous concepts which the literature has failed to define⁸⁸—cannot be treated as coterminous. An improved measure of judicial independence must conceptually identify, separate, and thoughtfully recombine various dimensions of judicial independence, and should be designed from theoretical premises rather than an unbalanced, unrepresentative amalgamation of attributes of transition courts.⁸⁹

The present study achieves this by identifying three separate conceptual components of judicial independence: Access, Power, and Insularity. 'Access' refers to the range of actors authorised to invoke the court's jurisdiction and request judicial review. It is comprised of the average access score of four types of constitutional review cases, each weighted equally: *a priori* review, *a posteriori* abstract review, *a posteriori* concrete review, and unconstitutional omissions. The access score for each of these case types is determined by the number of categories of petitioner authorised to initiate a case of that type.

⁸⁷ *Ibid.*

⁸⁸ Burbank–Friedman: *op. cit.*; Shetreet–Deschenes: *op. cit.*

⁸⁹ An alternative and/or supplement to designing such an index deductively is factor analysis, a data reduction method aimed to identify underlying forces in a range of independent variables. However, when employed in the present case, no single component derived accounted for even a majority of variance, and the main components identified were not associated with groupings of independent variables which were intuitively meaningful.

‘Power’ refers to the range of the court’s substantive competences, reflecting the scope and depth of its judicial review authority. This measure is built in the same way as Access, constituted of four average power scores (reflecting the proportional number of powers within each of the four case types which the court possesses) which are also in turn averaged together.

Finally, the measure ‘Insularity’ reflects the degree to which constitutional courts are shielded from political attacks or censure for decisions unfavourable to other political actors. It results from the average of five component scores (each ranging from 0 to 1) reflecting different aspects of judges’ protection from political retribution: judges’ immunity from prosecution,⁹⁰ the number of effective appointing actors (deflated by a factor of 4 to yield an index with limits at 0 and 1),⁹¹ the term length of the judges relative to a legislative session (likewise deflated by 4),⁹² the original SII component for removal,⁹³ and the original SII component for who controls court procedure.⁹⁴

Table 3a details the composition of the individual elements used to construct new indices of judicial independence; Table 3b lists the computations used to generate these indices.

These basic elements are tested both by themselves and in certain specific combinations to test interactive relationships. Thus, the measure Power * Insularity captures the interactive relationship expected between competences and protection from censure, testing the inference that competences on paper only empower the court to the degree that judges are shielded from retribution. Power * Access aims to adjust the measure of the court’s competences on paper to reflect the ease with which those competences are invoked (since even the court with the greatest competences on paper can achieve nothing if no case can be brought because of justiciability requirements such as litigants’ standing). Also, a “Composite” measure of courts’ power and accessibility is computed by averaging the products of *a priori* power and access, *a posteriori* abstract power and access, *a posteriori* concrete power and access, and omission power and access. This Composite measure was also incorporated in an interactive measure: Composite * Insularity.

⁹⁰ Values: 0: Judges have no special immunity; 0.5: Judges can be removed only with legislature’s consent; 1.0: Judges can be removed only with the Court’s own consent.

⁹¹ $= 1 / \sum (a_i^2)$, where a_i is the proportion of control over Court appointments allotted to each actor i ; same basic modification of Laakso–Taagepera (based on Herfindahl) formula for effective number of political parties.

⁹² $= T / L$, where T is the term length of a single judge in years and L is the length of a legislative session.

⁹³ Values: Constitutional bar on removing judges = 1; Else 0.

⁹⁴ Values: Court sets own procedures = 1; Else = 0.

All the foregoing measures of dimensions of judicial independence have values ranging from 0 to 1 (1 reflecting greater independence). Each reflects one of the many possible elements of judicial independence. All of these elements, taken separately and when combined interactively, should relate positively to judicial review.

3.2.2.2. Additional Replication Variables

For all independent variables included for replication purposes, variable specifications computation (when necessary) followed the formulae used by the original authors. Thus, following Herron-Randazzo, legislative fragmentation—both at time of decision and in the first democratic election—was computed using the widely-used⁹⁵ Laakso-Taagepera measure of effective political parties.⁹⁶ Both of these variables should relate positively to judicial review. The number of parties within the governing coalition, however, should relate negatively to judicial review for reasons given above.

The measure of and data for presidential power incorporates twenty-seven distinct competences potentially possess by presidents, adjusted for cases where powers are shared or if the president is indirectly elected. This is expected to relate negatively to judicial review, in line with both the hypothesis and findings of Herron and Randazzo.

Both the Herron-Randazzo and Smithey-Ishiyama studies include a measure of rights guarantees in each country, both of which are tested here. Herron and Randazzo use each country's "Civil Liberties" score from annual Freedom House surveys. As lower scores on this scale (which ranges from 1 to

⁹⁵ The measure, incidentally just the inverse of the Herfindahl ownership dispersion index from the economics literature, is given by: $EPP = 1 / \sum (p_i^2)$, where p_i is the proportion of seats allocated to each party i . The index was first presented by Laakso, M.–Taagepera, R. (1979): 'Effective' number of parties: a measure with applications to West Europe. *Comparative Political Studies*, 12, 3–27. It was later elaborated upon by Taagepera, R.–Shugart, M. (1989): *Seats and votes: the effects and determinants of electoral systems*. New Haven: Yale University Press. Despite numerous calls for modification some by its own creators, it remains the standard measure. Dumont, P.–Caulier, J.: The 'effective number of relevant parties': how voting power improves Laakso-Taagepera's index. Centre de Recherche en Economie (CEREC), Facultés universitaires Saint-Louis, CEREC Discussion Paper Series, Cahier #2003/7. Available online: <http://centres.fusl.ac.be/CEREC/document/cahiers/cerec2003_7.pdf>. Taagepera, R.: Supplementing the effective number of parties. *Electoral Studies*, 18 (1999) 497–504.

⁹⁶ Data for political parties' proportions of seats came from the University of Essex Project on Political Transformation and the Electoral Process in Post-Communist Europe. All computations of effective political parties are original to the present author.

7) are associated with greater civil rights protection, a negative relationship is expected here, which Herron and Randazzo expected but were unable to find. Smithey and Ishiyama generate their own index reflecting the scope of rights guaranteed in each country's bill of rights, which they expected but did not find to be positively related to judicial review.

Smithey and Ishiyama's measure of popular trust in the courts is also included here. Higher values of public confidence in courts should correspond to higher incidence of judicial review, an expectation which Smithey and Ishiyama confirmed. Additionally, the degree of federalism in each country—manifested in the number of elected subnational tiers of government—was also included in the Smithey and Ishiyama models and thus in the replication. The hypothesis, which Smithey and Ishiyama's data supported, is that greater divisions of power between the centre and regions should result in higher judicial review frequency.⁹⁷

The final replication variable is the identity of the petitioner requesting the court to exercise judicial review. Following Herron and Randazzo, dummy variables for individual citizen petitioners and the president as petitioner are included. In addition, this study includes dummies for legislators as well as administrative or cabinet officials (e.g. ministers, ombudsman, etc.) as petitioners.⁹⁸ Each of these dummy variables should relate positively to judicial review, following Herron and Randazzo's hypotheses and findings.⁹⁹

3.2.2.3. New Independent Variables

Aside from legislative fragmentation in the first democratic election, variable specifications and data for measures of countries' receptiveness to legal transplantation are taken from Pistor, Raiser, and Gelfer¹⁰⁰ and Berkowitz, Pistor, and Richard.¹⁰¹ Both sets of authors present the same coding scheme, used with modifications here, which identifies countries as possessing 'Familiarity', 'Adaptation', both, or neither. Those "without previous exposure to the modern formal legal order before the collapse of the socialist system" are coded as "new transplants."¹⁰² In the present study, the presence of Familiarity, Adaptation, or

⁹⁷ Smithey and Ishiyama cite the World Bank's annual *World Development Report* as their source, though there are discrepancies between the edition they cite and the numbers they report. In these cases, the original World Bank numbers are preferred.

⁹⁸ Herron and Randazzo identify cases where the legislature is the respondent, not the petitioner.

⁹⁹ Herron and Randazzo: *op. cit.*, 431.

¹⁰⁰ Pistor–Raiser–Gelfer: *op. cit.*

¹⁰¹ Berkowitz–Pistor–Richard: *Economic development... op. cit.*

¹⁰² Pistor–Raiser–Gelfer: *op. cit.* 15.

both, as well as being coded as “new transplants,” should relate positively to judicial review.

3.2.2.4. Control Variables

Both as a possible explanatory independent variable and as a necessary macro-level control, Herron and Randazzo incorporate the annual change in GDP growth in their model. They suggest several reasons why such economic conditions may lead to either higher or lower levels of judicial review,¹⁰³ none of which are compelling, but their findings are uniformly negative and statistically significant. The present study thus incorporates change in GDP growth as well (base year = 1990), expecting negative results in line with Herron and Randazzo’s finding.

Additionally, in the correlation analysis only, each set of correlations were run a second time to control for ease of access to the constitutional court; to do so, the judicial review aggregate statistic was multiplied by the country’s Access score. This is done to account for the possibility that easier access to the courts yields not only an increase in case volume but also a decrease in the proportion of cases with strong legal merits.¹⁰⁴ For example, for courts such as

¹⁰³ *Ibid.* 426.

¹⁰⁴ The aim of adjusting the dependent variable—the frequency of judicial review—for access to the courts is to control for the possibility that easier access permits not only more persons to petition the court, and thus presumably more cases, but also a higher proportion of cases with weak legal merits. The rationale for this expectation is complex, and can only be sketched briefly here: Assuming all parties are rational actors, if access to a court is suddenly opened to more parties and/or in more types of cases, the costs of petitioning the courts has effectively fallen (from infinity to a non-infinite level for those previously unable to petition the court at all; for some others, their ability to petition the court may have been indirect [as is common in CEE]—in that they could only request the ombudsman or an MP to petition the court on their behalf). Lower costs of petition, *ceteris paribus*, mean a fall in the cost-benefit ratio of petitioning the court—in short, a fall in the relative price of petitioning. That a fall in ‘price’ of petitioning should be met by an increase in the number of petitions, *ceteris paribus*, is not surprising. The important inference, though, is that presumably the group of ‘sub-marginal petitioners’—for whom it was not on balance worthwhile to petition the courts (due to the cost-benefit ratio) before access was made easier, but for whom *ex post* petitioning is worthwhile—would come to make petitions with a lower average likelihood of success (since cases more likely to succeed would already have a lower cost-benefit ratio). In short, it is most likely, on average, sub-marginal cases (in terms of legal merits and/or likelihood of success in securing judicial review) which are added to the courts’ docket when access is made easier.

Hungary's where access is wide open to all,¹⁰⁵ it makes sense that a smaller proportion of the 11,092 cases submitted in the court's first six years covering nearly every statute the legislature had passed were actually of sufficient legal merit to warrant judicial review.¹⁰⁶ Correcting for access controls for this possibility to some extent.

4. Results & Analysis

The results of bivariate correlations and selected regression analyses conducted (forty-eight regression models in total) are presented in Tables 4–16, reflecting of each layer of corrections and expansions upon the original Smithey–Ishiyama and Herron–Randazzo models.¹⁰⁷ The following sections discuss the key findings from these analyses.

4.1. Effects of Alternative Measures of Judicial Independence

Table 4 presents bivariate correlations of various independent variables with three aggregate measures of judicial review. Tables 5, 6, and 7 report results of logit regressions testing the SII (original, arithmetically fixed, and data-corrected) against both pairs of authors' original models.

The results concerning the influence of judicial independence on judicial review are indeed mixed, but a number of important are noteworthy. First, though the original SII is clearly a poor predictor of judicial review, substantive corrections in coding improve it noticeably. Correlations yield weak negative

¹⁰⁵ Under the *actio popularis*, any individual can petition for abstract review of any statute without having been affected by the statute herself; See Hungarian Constitution and *Act on the Constitutional Court*, Act XXXII of 1989.

¹⁰⁶ Solyom–Brunner: *op. cit.* 72.

¹⁰⁷ All 48 logit regressions run employ a weighting procedure, developed by Herron and Randazzo and also used by Smithey and Ishiyama, to ensure that countries which issue comparatively fewer decisions are not treated as less important by the regression analysis. A similar, slightly modified method of weighting cases was employed here. The full technical details of Herron and Randazzo's weighting procedure are not detailed in their article, and were also not available on request; however, the procedure detailed above achieves the same purpose very similarly. In this study, the weight factor w given to each case decided by the court of country x is given by:

$$w_x = \frac{(\text{Total number of cases in the dataset})}{(\text{Total number of cases from country } x) * (\text{Number of countries in dataset})}$$

results, and no significant results were obtained by regression,¹⁰⁸ even when technical and arithmetical errors are corrected. However, the data-corrected version of the SII reflects a small but important improvement in the SII's predictive power: in correlation analysis it is positively correlated with judicial review (e.g. $r = 0.297$), a relation which is stronger when judicial review is adjusted for accessibility of the courts ($r = 0.389$ using original authors' data plus Hungary and Poland; $r = .263$ using the new replication dataset). It also yields a positive, statistically significant relationship in one of four regressions where it is tested, and in all others yields no significant relationship.

Second, Smithey and Ishiyama's casual observation that judicial review increases up to around the midpoint of the judicial independence scale before declining is confirmed. Tables 8 and 9 present results from models testing the 'peak' observation, but otherwise still following the authors' original template.

Using Smithey and Ishiyama's own judicial review statistics, the correlation between judicial review and absolute value of the distance from 0.55 on the judicial independence SII is -0.668 and -0.907 for the original and data-corrected indices, respectively. This negative relationship is also found in regressions based on Smithey and Ishiyama's (2002) models (where the relationship is statistically significant in every test), though not in those based on Herron and Randazzo's models.

Although Smithey and Ishiyama do not offer an explanation for this, at least one possibility deserves mention.¹⁰⁹ As both Vanberg¹¹⁰ and Stone Sweet¹¹¹ suggest, more powerful courts can influence policymaking without striking down statutes, or indeed without hearing a case, if the legislature (or other branch or body) *anticipates* that passing a bill which the court might unconstitutional will result in it being struck down by the court. In short, "the spectre of constitutional censure hovers over the legislative process."¹¹² This is true only to the extent that others anticipate court intervention *and* only to the extent that the court possesses the authority to do so. Thus, the degree of the court's formal authority determines, as it were, the length of the shadow that the court casts over the legislature process. If this is true, it may in part explain the

¹⁰⁸ In all statistical procedures the α value is .10, as used by Herron–Randazzo: *op. cit.*

¹⁰⁹ A second explanation may also account for this, which parallels the argument for adjusting the dependent variable for ease of access to the courts: the more powerful a court, the greater the demand for its services by individual appellants, and thus the greater its caseload and potentially the greater the proportion of cases with weak legal merit.

¹¹⁰ Vanberg: Legislative-judicial... *op. cit.*; Vanberg: Politics... *op. cit.*

¹¹¹ Stone Sweet: Governing... *op. cit.*

¹¹² *Ibid.* 196.

finding of the ‘peak’ in judicial review: the more power courts have, the less they need to exercise it, as statutes and other legal norms which they are likely to strike down are never passed in the first place.

Tables 10, 11, 12, and 13, report findings regarding new measures of judicial independence, tested in the framework of the prior authors’ original models. Variables measuring countries’ receptiveness to legal transplants are included in Tables 14 and 15. Finally, Table 16 presents three composite models which incorporate components from both the Smithey and Ishiyama or Herron and Randazzo template.

The new measures of the dimensions of judicial independence developed above do reflect some improvement over the SII, but the results are not consistent. On the one hand, the separate and combined measures of Power and Access (and the Composite power and access term) yield several positive, statistically significant relationships. On the other hand, both Insularity and its interactive term with Power (Power * Insularity) generate some positive and some negative statistically significant results. Moreover, no statistically significant relationships at all were evident in regressions based on Herron and Randazzo’s models.

Taken together, these findings thus warrant caution making generalizations about the relationships between judicial independence and judicial review. The central hypothesis, that judicial independence is positively associated with judicial review in CEE and the FSU, is confirmed in part and rejected in part. However, the alternative formulation of this hypothesis, that judicial *power* is positively related to judicial review (as the prior authors used the same SII to reflect both independence and power on different occasions), is confirmed. At the very least, the findings show that excluding independence from the judicial politics puzzle in transition countries is premature. Better conceptualisations and operationalisations are certainly needed, but writing judicial independence out of the equation in CEE and FSU would be mistaken.

4.2. Effects of Other Replication Variables

Although the prior authors differed in their expectations of the effect of legislative fragmentation, the replication findings here resolve that question. In all but two models in which it is included (35 of 37 regressions), legislative fragmentation (at the time of the decision) is positively related to judicial review, statistically significant at or below the .01 level. The primary hypothesis concerning legislative fragmentation is thus confirmed, affirming the hypotheses findings of Smithey and Ishiyama but rejecting the hypotheses of Herron and Randazzo.

As noted earlier, however, Herron and Randazzo's expectation may make sense if applied to fragmentation inside governing coalitions. This is supported by the evidence: party fragmentation is negatively associated with judicial review to a statistically significant degree in every model where it appears. This therefore confirms the secondary hypothesis regarding legislative fragmentation inside coalitions (which neither previous work had tested).

Findings for presidential power clearly affirm the findings of Herron and Randazzo. In the overwhelming majority of models where it is included, presidential power is negatively associated with judicial review to a highly statistically significant degree. This makes intuitive sense for reasons described above: a powerful executive is in a better position to constrain the courts (by action or by explicit or implicit threat).

Findings for the degree of federalism, however, appear counterintuitive at first glance: in almost every regression, the number of elected sub-tiers of government is *negatively* correlated to judicial review, to a statistically significant degree—directly contrary to Smithey and Ishiyama's findings. While the negative and significant relationship is surprising, part of the problem may lie in the original authors confusing *direct* with *indirect* effects of federalism. While it is reasonable to expect a higher number of central, regional, and local layers of authority to generate jurisdictional conflicts yielding increased judicial *involvement*, it need not result in increased frequency of courts invalidating laws or official acts.

Smithey and Ishiyama's finding concerning popular trust in the courts is also confirmed: in most models where it appears it is positively associated with judicial review, to a statistically significant degree. Those authors' own index of written rights guarantees is also, in most models, positively and significantly related to judicial review.¹¹³ The measure used for rights guarantees by Herron and Randazzo, on the other hand, generated conflicting results: as higher degrees of civil liberties are reflected by lower scores on the index used, a negative relationship was expected, yet both positive and negative relationships appeared at statistically significant levels in different models. Herron and Randazzo themselves were likewise unable to find a clear-cut relationship.

¹¹³ Their data is taken from a variety of popular opinion surveys by the University of Strathclyde; however, direct access to this data was unavailable for replication, thus Smithey and Ishiyama's reported figures had to be relied upon. Yet again, these figures exclude Hungary, Poland, and Slovenia, as well as Georgia, warranting considerable caution (as the sample size is more than halved when these countries are excluded, and the representativeness of the panel is greatly reduced).

The final attribute replicated here is the identity of the petitioner requesting that the court engage in judicial review in each case. Herron and Randazzo included the categories of individual citizens and the president, and the replication study coded these in addition to legislative petitioners (Herron and Randazzo also coded cases where the legislature was the respondent) and where the petition was made by a cabinet member or administrative officer, such as an ombudsman. Cases where the president or a cabinet or administrative official made the appeal were positively and significantly associated with judicial review in almost every model where they appeared. Additionally, where the categories of individual petitioner and legislative petitioner were related significantly to judicial review, the relationship was positive, confirming Herron and Randazzo's hypotheses and affirming their findings.

4.3. Effects of New Variables

Replication also provided the opportunity to test additional causal factors influencing judicial review, namely those concerning the receptiveness of countries to legal transplantation. The present study set out five hypotheses, generally grounded in the existing literature on the 'demand for law', and the empirical data confirms all five.

First, it was hypothesised that in countries which showed a tendency for adapting the entire legal system (i.e. not just the constitutional court) which they had imported, the constitutional court the country imported would also function more 'normally' (i.e. resemble the model in the 'exporting' state more directly), meaning a higher level of judicial review than those which did not show a pattern of adaptation. Empirical findings clearly support this hypothesis: in all six regressions in which it is included, Adaptation¹¹⁴ shows a positive relationship to judicial review (statistically significant to at least the 0.01 level). It was also hypothesised that a country's familiarity with the general legal system it imported during the transition period would be positive related to judicial review. The results here are less resounding, but they still confirm the expectation: statistically significant results appear in two of six regressions, and in both of these cases the relationship is positive.

In light of these first two, the results of testing the third hypothesis are therefore unsurprising. It was expected that receptiveness—meaning the presence of *both* adaptation and familiarity—would be positively related to judicial review. In both models where 'receptiveness' measured in this way is included, a highly statistically significant, positive relationship is evident.

¹¹⁴ Data from Pistor–Raiser–Gelfer: *op. cit.*

The fourth hypothesis departed somewhat from the literature. It stated the expectation that countries which had no exposure at all to the “modern formal legal order”¹¹⁵ would also experience a higher level of judicial review. In each of eight models where it is included, the dummy variable for ‘new transplants’ is positive, and in seven of these the results are statistically significant, indicating that new transplants exhibit a higher level of judicial review than the reference category, ‘unreceptive’ transplants. Thus, the fourth hypothesis is also confirmed.

Finally, it was hypothesised that the greater the diversity of participation in the constitutional design and negotiation process, the greater the legitimacy of the court, and thus the greater the support for an active, powerful tribunal. Thus, more varied participation at the constitutional design stage (measured by legislatively fragmentation at the first democratic election¹¹⁶) should be associated with higher levels of judicial review. This hypothesis is confirmed by the fact that the only model which includes this measure of participation yields a positive, statistically significant relationship between participation (i.e. legislative fragmentation at first election) and judicial review. Notably, in the models testing these new independent variables of receptiveness, the most important attributes of political context detailed above (viz. presidential power, legislative fragmentation at most recent election) return the expected results (negative and positive, respectively).

4.4. *Effects of Control Variables*

While change in GDP growth was included in Herron and Randazzo’s model as a control variable, they make a number of arguments concerning its potential substantive import. For instance, following Tate and Vallinder,¹¹⁷ that in periods of poor or declining economic performance, “if citizens and corporations are dissatisfied with the ability of the political branches of government to efficiently regulate the economy, then they may turn to legal remedies in order to advance their own self-interests.”¹¹⁸ This argument is not totally implausible, but appears to explain increases or decreases in the public’s resorting to the courts, rather than judicial review.

¹¹⁵ *Ibid.* 15.

¹¹⁶ Complete and accurate data on the composition of various transition countries’ Round Table negotiations was not available, thus a proxy measure was necessary; note, however, that Smithey and Ishiyama use this same indicator to measure the same concept. Smithey–Ishiyama: *Judicious choices... op. cit.*

¹¹⁷ Tate–Vallinder: *op. cit.*

¹¹⁸ Herron–Randazzo: *op. cit.* 426.

While access to the courts was included as a component of the new measures of judicial independence, it was also incorporated as a type of dependent-variable control in a second set of bivariate correlations. The purpose was to account for the possibility that courts where the right to petition was widely diffused would as a result receive far more cases, a larger proportion of which would have lower legal merit and thus not warrant the exercise of judicial review.¹¹⁹ Adjusting the dependent variable (overall average of judicial review incidence) for access to the courts yielded much stronger correlations (e.g. $r = 0.389$ vs. 0.147 ; $r = 0.263$ vs. 0.007) with the data-corrected SII than non-adjusted measures. More strikingly, several dimensions of the new measures of judicial independence (Power; Composite power and access; Composite power and access * Insularity) switch from strong negative correlations ($r = -0.547$, -0.547 , and -0.521 , respectively) to strong positive correlations with judicial review (using original Smithey and Ishiyama data plus Hungary and Poland, $r = 0.744$, 0.815 , and 0.800 , respectively; using replication dataset, $r = 0.851$, 0.972 , and 0.943 , respectively).¹²⁰ Again, more rigorous and sophisticated methods of adjusting the dependent variable properly are still needed, but the elementary method employed here has yielded remarkable results.¹²¹

5. Conclusion

5.1. Methodology

As the foregoing study is designed partly to improve upon methodology and operationalisation of key variables, one of its most important findings is that the changes incorporated above to improve the execution, data-accuracy, and conceptualisation of judicial independence *do* make a difference. Technical and substantive corrections to the original SII both (1) yield small but still noteworthy improvements in the predictive power of judicial independence and also (2) bring the findings more in line with Smithey and Ishiyama's, Herron and Randazzo's, and this study's hypotheses.

¹¹⁹ See the Note to Table 4, *supra*.

¹²⁰ While it may appear that the including measures of access in both of the variables correlated is unsound, the computation of the measure of access incorporated into the Composite measure renders it quite different (in algebraic form and in outcome) from the single scalar measure used to adjust judicial review figures.

¹²¹ For instance, various non-logit regression models were tested where the dependent variable (*viz.* decision outcome) was adjusted by access, but the resulting synthetic dependent variable was too highly leptokurtic to remain within regression assumptions.

Moreover, the new, theoretically-grounded measures capturing several dimensions of judicial independence also mark a methodological advance. A number of statistically significant results, which are supported by the literature, indicate that the measures are at least a step in the right direction. Specifically, the new measures are designed to assess separately the different dimensions of judicial independence (before combining them via interactive terms), but which the prior measure does not.

5.2. Substantive Findings

Beyond these improvements in the study of judicial independence, the foregoing investigation yields a number of intriguing findings. The first hypothesis, that judicial independence positively correlates with judicial review, was partially confirmed and partially rejected. The Insularity dimension of judicial independence appears negatively related to judicial review, while the Power and Access of the court are both positively related. The second form of this hypothesis, that judicial power correlates with judicial review, is thus confirmed. Additionally, a central ‘peak’ does exist in the level of judicial review *vis-à-vis* the judicial independence distribution, for which there are several possible explanations.

Additionally, the study answers conclusively at least one question left in doubt by the prior research and sheds at least some light on others. Overall legislative fragmentation at the time a decision is issued by a court is positively related to judicial review in the transition states studied. Fragmentation within the governing coalition, however, is negatively related to judicial review. These findings support the replication study’s hypotheses, and make sense out of the disparate expectations and findings of Herron and Randazzo and Smithey and Ishiyama.

The study further confirms several secondary findings of the prior works: presidential power is negatively related to judicial review, while popular trust in the courts, extent of rights guarantees in the bill of rights, and popular trust in the courts are all positively associated with the frequency of judicial review. Likewise, cases where the president or an administration or cabinet official is the petitioner are more likely to result in the striking down of the law named in the petition.

Finally, the empirical data reveals relationships not studied in prior works. First, factors which affect the success of legal transplantations broadly speaking appear to influence the functionality of the newly imported constitutional courts. Second, the relative ease of access to courts has a significant, although complicated, effect on the frequency of judicial review.

All of these findings, taken together, present a clearer and more complete picture of the contextual influences on judicial review than the prior works. Both the holistic portrait of the determinants of judicial review in transition and the new operationalisations of judicial independence offered here are merely first steps. While many scholars lament the dearth of theoretically sound, widely applicable conceptions and measures of judicial independence,¹²² for all its faults, Smithey and Ishiyama's work represents one of the few which actually sets out to fill the gap.

More importantly, the integration of better conceptualisations of independence with measures of receptiveness represents an important step towards understanding how the process and conditions of transplanting constitutional adjudication institutions affects their development and behaviour. It is here in part where future research of constitutional jurisprudence in transition contexts must now focus. If it is true that the study of post-communist transition is rapidly becoming a matter of history,¹²³ it is all the more important that the lessons taught by the experiences of constitutional judiciaries in CEE and the FSU be gleaned before the opportunity has vanished.

* * *

¹²² Russell: *op. cit.*; Herron-Randazzo: *op. cit.*; Ramseyer-Rasmussen: *op. cit.*

¹²³ Dupré: *op. cit.* 3ff.

TABLES

Table 1.
Sample Comparisons—Prior Research vs. Replication Study

<i>Country</i>	Herron and Randazzo (2003)		Smithey and Ishiyama (2002)		Replication Study	
	<i>N</i>	<i>Years</i>	<i>N</i>	<i>Years</i>	<i>N</i>	<i>Years</i>
Czech Republic	11	1992–1996	10	1993–1995	61	1993–2003
Estonia	42	1993–2000	19	1993–1995	58	1994–2003
Georgia	11	1996–1997	11	1997–1999	17	1996–2003
Hungary	0	n/a	0	n/a	118	1991–2003
Latvia	0	n/a	13	1993–1995		n/a
Lithuania	103	1993–2000	41	1993–1995	136	1993–2003
Moldova	228	1995–2000	74	1995–1997	33	1998–2003
Poland	0	n/a	0	n/a	250	1991–2003
Russia	86	1995–1998	59	1995–1997	60	1995–2003
Slovakia	0	n/a	96	1993–1995	47	1994–2003
Slovenia	93	1993–1995	0	n/a	135	1992–2003
TOTAL	574		323		915	

Table 2a.

Smithey and Ishiyama Index (SII) of Judicial Independence (2000): Original Index

<i>Country</i>	(A) Can judicial decision be overturned?	(B) Presence of a priori review?	(C) Judges term relative legislative session	(D) No. of actors involved in selecting judges	(E) Who establishes court procedures	(F) Conditions for judicial removal	Judicial power score: A+B+C+ D+E+F/6
Czech Republic	1.00	0.00	0.33	0.50	1.00	0.50	0.56
Estonia	1.00	0.00	0.33	0.50	0.00	0.50	0.39
Georgia	1.00	0.00	0.33	1.00	0.00	0.00	0.56 (0.39) †
Hungary	1.00	0.00	1.00	0.50	0.00	1.00	0.58
Lithuania	1.00	0.00	0.67	1.00	1.00	0.50	0.70
Moldova	1.00	0.00	0.33	1.00	1.00	1.00	0.72
Poland (1989– 1997/9)	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Poland (1997/9)	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Russia	1.00	0.00	1.00	0.50	0.00	0.00	0.42
Slovakia	1.00	0.00	0.33	0.50	0.00	0.00	0.31
Slovenia	1.00	0.00	0.33	0.50	1.00	0.50	0.56

Table 2b.

Smithey and Ishiyama Index (sii) of Judicial Independence (2000): Data-corrected Index

<i>Country</i>	(A) Can judicial decision be over- turned? ¹	(B) Presence of a priori review? ²	(C) Judges term relative legislative session ³	(D) No. of actors invol- ved in selecting judges ⁴	(E) Who estab- lishes court proce- dures	(F) Condi- tions for judicial removal	Judicial power score: (A+B+ C+D+ E+F)/6	<u>Net Diffe- rence</u>
Czech Republic	1.00	0.00	<u>0.67</u>	0.50	1.00	0.50	0.61	<u>0.05</u>
Estonia	1.00	<u>1.00</u>	0.33	<u>1.00</u>	0.00	0.50	0.64	<u>0.25</u>
Georgia	1.00	0.00	<u>0.67</u>	1.00	0.00	0.00	0.45	<u>-0.11</u> <u>(0.06)</u> ⁵
Hungary	1.00	<u>1.00</u>	1.00	<u>0.25</u>	0.00	1.00	0.71	<u>0.13</u>
Lithuania	1.00	0.00	0.67	1.00	1.00	0.50	0.70	0.00
Moldova	1.00	0.00	0.33	1.00	1.00	1.00	0.72	0.00
Poland (1989– 97/9)	0.00	0.00	<u>0.67</u>	<u>0.25</u>	0.00	0.00	0.15	<u>0.15</u>
Poland (1997/9)	<u>1.00</u>	0.00	<u>0.67</u>	<u>0.25</u>	0.00	0.00	0.32	<u>0.32</u>
Russia	1.00	<u>1.00</u>	1.00	0.50	0.00	0.00	0.50	<u>0.08</u>
Slovakia	1.00	0.00	<u>0.67</u>	0.50	0.00	0.00	0.36	<u>0.05</u>
Slovenia	1.00	<u>0.50</u>	<u>0.67</u>	0.50	1.00	0.50	0.70	<u>0.14</u>

¹ Poland's Constitutional Tribunal gained the ability to issue binding decisions which the Sejm cannot override in the 1997 Constitution (which took effect in October 1997), and the provisions concerning binding decisions (not open to overruling by the Sejm) took effect in October 1999. Smithey and Ishiyama (2000) acknowledge this but ignore the change in computing Poland's index score.

² From the text of their respective constitutions and laws empowering their constitutional courts, it is clear that the Supreme Court (Constitutional Chamber) in Estonia and the Constitutional Court of Hungary can each consider constitutional challenges prior to the final promulgation (and thus application) of legislative acts. Also, though Smithey and Ishiyama specifically consider the possibility that a court could have a priori jurisdiction in a narrow area of cases, such as the review of not-yet-ratified treaties, they do not count Russia nor Slovenia in this group, in contrast to the text of those courts' respective empowering statutes.

Country:	(A) Can judicial decision be over- turned? ¹	(B) Presence of a priori review? ²	(C) Judges term relative legislative session ³	(D) No. of actors invol- ved in selecting judges ⁴	(E) Who estab- lishes court proce- dures	(F) Condi- tions for judicial removal	Judicial power score: (A+B+ C+D+ E+F)/6	<u>Net Diffe- rence</u>
Poland (1989– 97/9)	0.00	0.00	<u>0.67</u>	<u>0.25</u>	0.00	0.00	0.15	<u>0.15</u>
Poland (1997/9)	<u>1.00</u>	0.00	<u>0.67</u>	<u>0.25</u>	0.00	0.00	0.32	<u>0.32</u>
Russia	1.00	<u>1.00</u>	1.00	0.50	0.00	0.00	0.50	<u>0.08</u>
Slovakia	1.00	0.00	<u>0.67</u>	0.50	0.00	0.00	0.36	<u>0.05</u>
Slovenia	1.00	<u>0.50</u>	<u>0.67</u>	0.50	1.00	0.50	0.70	<u>0.14</u>

N.B.: Scores in bold underline indicate a change from the original Smithey and Ishiyama (2000) score.

³ Smithey and Ishiyama (2000, 168) define the values of this variable as follows: the variable “was coded as 0 when the term of the constitutional court judge was less than or equal to one term of the actor with the longest constitutional term; 0.33 when it was less than or equal to two parliamentary sessions; 0.67 when the judges term was more than two parliamentary sessions (but had constitutionally specified limit in the number of terms) and 1 when the term was life or until voluntary retirement”. However, the maximum term length of parliamentarians in all of these countries is four years, and the term lengths of judges are as follows: Czech Republic, 10 years; Georgia, 10 years; Poland, 9 years; Slovakia, 12 years; and Slovenia, 9 years.

⁴ In Estonia, the chairman of the Supreme Court is proposed by president, and adopted by national assembly; others are proposed by the chairman, and adopted by national assembly; the five members of constitutional panel elected by General Assembly of the Supreme Court. In Hungary, the court is chosen by a special committee of the (unicameral) parliament comprised of one member from each political party represented in parliament. In Poland, the panel of judges is chosen by the Sejm, but the President can appoint any of these to be the President and Vice-President, without the approval of the Sejm. Thus, for Estonia, a score of “1” seems more appropriate, and “.25” for Hungary and Poland.

⁵ In their original table, Smithey and Ishiyama report this total as .56, when data in their table yield a value of .39.

Table 3a.

New Measures of Judicial Independence: Elements of New Indices

Power	Average of binary scores for each of the following powers (1: court has this power; 0: court lacks this power):
<i>A priori</i>	Review of: Constitution itself; International Agreements; Statutes; Regulations; Acts of the President; Acts of local/regional units; Other General Acts
<i>A posteriori</i> abstract	Review of: Constitution; International Agreements; Statutes; Parliamentary Resolutions; Regulations; Acts of the President of the State; Local Government Statutes; General Acts–Exercise of Public Powers; Other General Acts; National Norms versus Treaties; Regional Agreements
<i>A posteriori</i> concrete	Review of constitutional complaints
Unconstitutional Omission	Declare instance of unconstitutionality by omission (i.e. legislature has failed to act where it is obligated to do so)
Access	Average of binary scores for each of the following actors who have this right of access (1: this actor can invoke court for this power; 0: this actor cannot invoke court for this power):
<i>A priori</i>	Initiation by: President; Parliamentary leadership/cabinet; Individual members of parliament; Second legislative chamber's leadership; Individual members of second legislative chamber; Court itself; Other/lower courts; Administrative or legal official; Any citizen.
<i>A posteriori</i> abstract	Initiation by: President; Parliamentary leadership/cabinet; Individual members of parliament; Second legislative chamber's leadership; Individual members of second legislative chamber; Court itself; Other/lower courts; Administrative or legal official; Any citizen.

<i>A posteriori</i> concrete	Initiation by: Court itself; Lower court; Administrative/legal official; Local/regional government; Individuals with specific vested interest; Any individual citizen regardless of interest
<i>Unconstitutional Omission</i>	Initiation by: Court itself; Any individual citizen regardless of interest
Immunity	Values: 0: Judges have no special immunity; 0.5: Judges can be removed only with legislature's consent; 1.0: Judges can be removed only with the Court's own consent.
Number of Effective Appointers	$= 1 / \sum (a_i^2)$ Where a_i is the proportion of control over Court appointments allotted to each actor i ; same basic modification of Laakso-Taagepera (based on Herfindahl) formula for effective number of political parties. N.B. where two parties share authority for the same appointment, the proportion they share is split between them (e.g. if Legislature and President each must confirm every appointee, they are each coded 0.50).
Relative Term Length	$= T / L$ Where T is the term length of a single judge in years and L is the length of a legislative session
Control of Court's Procedures	Smithey and Ishiyama Index, component E; Values: Court sets own procedures = 1; Else = 0
Removal Score	Smithey and Ishiyama Index, component F; Values: Constitutional bar on removing judges = 1; Else 0

Table 3b.

New Measures of Judicial Independence: Computation of New Indices

New Indices of Dimensions of Judicial Independence	
Power	= [(<i>a priori</i> power) + (<i>a posteriori abstract</i> power) + (<i>a posteriori concrete</i> power) + (omission power)] / 4
Access	= [(<i>a priori</i> access) + (<i>a posteriori abstract</i> access) + (<i>a posteriori concrete</i> access) + (omission access)] / 4
Insularity	= [(Immunity score) + (number of <i>effective</i> appointers)/4 + (relative term length)/4 + (removal score) + (control of procedure)] / 5
Composite measure of power and access	= [(<i>a priori</i> power)*(<i>a priori</i> access) + (<i>a posteriori abstract</i> power)*(<i>a posteriori abstract</i> access) + (<i>a posteriori concrete</i> power)*(<i>a posteriori concrete</i> access) + (omission power)*(omission access)] / 4
Power * Access	= [(<i>a priori</i> power) + (<i>a posteriori abstract</i> power) + (<i>a posteriori concrete</i> power) + (omission power)] / 4 * [(<i>a priori</i> access) + (<i>a posteriori abstract</i> access) + (<i>a posteriori concrete</i> access) + (omission access)] / 4
Power * Insularity	= [(<i>a priori</i> power) + (<i>a posteriori abstract</i> power) + (<i>a posteriori concrete</i> power) + (omission power)] / 4 * [(Immunity score) + (number of <i>effective</i> appointers)/4 + (relative term length)/4 + (removal score) + (control of procedure)] / 5
Composite measure of power and access * Insularity	= { [(<i>a priori</i> power)*(<i>a priori</i> access) + (<i>a posteriori abstract</i> power)*(<i>a posteriori abstract</i> access) + (<i>a posteriori concrete</i> power)*(<i>a posteriori concrete</i> access) + (omission power)*(omission access)] / 4 } * { [(Immunity score) + (number of <i>effective</i> appointers)/4 + (relative term length)/4 + (removal score) + (control of procedure)] / 5 }

Table 4.
Correlation Results (Modified Replication of Smithey and Ishiyama [2002])

Independent Variable		Data for Dependent Variable					
		Smithey & Ishiyama (2002)		Smithey & Ishiyama (2002) plus Hungary and Poland		Replication	
Variable	Statistic	Incidence of Judicial Review	Incidence of Judicial Review Adjusted for Access	Incidence of Judicial Review	Incidence of Judicial Review Adjusted for Access	Incidence of Judicial Review	Incidence of Judicial Review Adjusted for Access
Judicial Independence							
Smithey and Ishiyama Index							
Original Index (fixed)	Pearson's <i>r</i>	-0.117	-0.276	-0.021	0.225	-0.024	0.181
	Sig. (2-tailed)	0.802	0.549	0.957	0.561	0.947	0.618
	N	7	7	9	9	10	10
	<i>r</i> ²	0.014	0.076	0.000	0.050	0.001	0.033
Data-corrected Index	Pearson's <i>r</i>	0.297	-0.074	0.147	0.389	0.007	0.263
	Sig. (2-tailed)	0.518	0.875	0.706	0.301	0.985	0.462
	N	7	7	9	9	10	10
	<i>r</i> ²	0.088	0.005	0.022	0.151	0.000	0.069
Original Index (fixed): Absolute Value of Distance from 0.55	Pearson's <i>r</i>	-0.421	<u>-0.668</u>	-0.147	-0.595*	-0.262	-0.418
	Sig. (2-tailed)	0.347	0.101	0.706	0.091	0.465	0.229
	N	7	7	9	9	10	10
	<i>r</i> ²	0.178	0.446	0.022	0.354	0.068	0.175
Data-corrected Index (fixed) Absolute Value of Distance from 0.55	Pearson's <i>r</i>	<u>-0.655</u>	<u>-0.907***</u>	-0.441	-0.378	-0.457	-0.126
	Sig. (2-tailed)	0.110	0.005	0.235	0.317	0.184	0.729
	N	7	7	9	9	10	10
	<i>r</i> ²	0.429	0.822	0.194	0.143	0.209	0.016
New Measures:							
Power measure	Pearson's <i>r</i>	-0.338	0.272	-0.547	<u>0.744**</u>	-0.157	<u>0.851***</u>
	Sig. (2-tailed)	0.458	0.556	0.127	0.022	0.665	0.002
	N	7	7	9	9	10	10
	<i>r</i> ²	0.114	0.074	0.300	0.553	0.025	0.724

Independent Variable		Data for Dependent Variable					
		Smithey & Ishiyama (2002)		Smithey & Ishiyama (2002) plus Hungary and Poland		Replication	
Variable	Statistic	Incidence of Judicial Review	Incidence of Judicial Review Adjusted for Access	Incidence of Judicial Review	Incidence of Judicial Review Adjusted for Access	Incidence of Judicial Review	Incidence of Judicial Review Adjusted for Access
Insularity /Measure	Pearson's <i>r</i>	-0.257	-0.437	-0.147	-0.107	-0.256	-0.063
	Sig. (2-tailed)	0.578	0.326	0.705	0.785	0.475	0.863
	N	7	7	9	9	10	10
	<i>r</i> ²	0.066	0.191	0.022	0.011	0.066	0.004
Power * Insularity	Pearson's <i>r</i>	-0.289	-0.064	-0.483	0.643 *	-0.229	0.730 **
	Sig. (2-tailed)	0.530	0.892	0.188	0.062	0.524	0.017
	N	7	7	9	9	10	10
	<i>r</i> ²	0.083	0.004	0.233	0.413	0.053	0.533
Composite power and access measure	Pearson's <i>r</i>	-0.587	0.183	-0.547	0.815 ***	0.065	0.972 ****
	Sig. (2-tailed)	0.166	0.695	0.128	0.007	0.859	0.000
	N	7	7	9	9	10	10
	<i>r</i> ²	0.344	0.033	0.299	0.664	0.004	0.945
Composite power and access measure * Insularity	Pearson's <i>r</i>	-0.522	0.009	-0.521	0.800 ***	0.024	0.943 ****
	Sig. (2-tailed)	0.229	0.985	0.150	0.010	0.948	0.000
	N	7	7	9	9	10	10
	<i>r</i> ²	0.273	0.000	0.272	0.639	0.001	0.889
Legislative Fragmentation							
At first election	Pearson's <i>r</i>	0.350	0.673 *	0.357	-0.126	0.045	-0.263
	Sig. (2-tailed)	0.442	0.097	0.346	0.746	0.901	0.462
	N	7	7	9	9	10	10
	<i>r</i> ²	0.122	0.453	0.127	0.016	0.002	0.069
Overall average	Pearson's <i>r</i>	0.068	0.559	0.155	0.101	0.363	-0.016
	Sig. (2-tailed)	0.884	0.192	0.691	0.797	0.303	0.965
	N	7	7	9	9	10	10
	<i>r</i> ²	0.005	0.313	0.024	0.010	0.132	0.000

Independent Variable		Data for Dependent Variable					
		Smithey & Ishiyama (2002)		Smithey & Ishiyama (2002) plus Hungary and Poland		Replication	
Variable	Statistic	Incidence of Judicial Review	Incidence of Judicial Review Adjusted for Access	Incidence of Judicial Review	Incidence of Judicial Review Adjusted for Access	Incidence of Judicial Review	Incidence of Judicial Review Adjusted for Access
Popular Trust in Courts	Pearson's <i>r</i>	<u>0.620</u>	0.084	<u>0.620</u>	0.084	0.364	-0.243
	Sig. (2-tailed)	0.189	0.874	0.189	0.874	0.478	0.643
	N	7	7	9	9	10	10
	<i>r</i> ²	0.384	0.007	0.384	0.007	0.132	0.059
Rights Index	Pearson's <i>r</i>	-0.577	0.178	-0.577	0.178	0.329	<u>0.792</u>
	Sig. (2-tailed)	0.175	0.702	0.175	0.702	0.471	0.034
	N	7	7	9	9	10	10
	<i>r</i> ²	0.333	0.032	0.333	0.032	0.108	0.627
Federalism	Pearson's <i>r</i>	0.033	0.517	-0.170	0.228	-0.145	0.191
	Sig. (2-tailed)	0.944	0.235	0.661	0.554	0.690	0.597
	N	7	7	9	9	10	10
	<i>r</i> ²	0.001	0.267	0.029	0.052	0.021	0.036

$\alpha = .10$; * $p < .10$; ** $p < .05$; *** $p < .01$; **** $p < .001$.

Table 5.
Logit Results: Factors Affecting Judicial Review (Modified Replication of Smithy & Ishiyama 2002) – Original & Corrected Indices

Independent Variable	Model 1				Model 2			
	Original Index		Corrected Index (Coding Fixed)		Original Index		Corrected Index (Coding Fixed)	
	B (S.E.)	Wald	B (S.E.)	Wald	B (S.E.)	Wald	B (S.E.)	Wald
Judicial Independence								
Original S-I Index	0.430 (1.135)	0.143			5.100 (3.398)	2.252		
Index, Georgia Fixed			0.301 (0.856)	0.124				
Corrected S-I Index							8.660 * (4.640)	3.482
Legislative Fragmentation	0.463 **** (0.139)	11.072	0.445 **** (0.113)	15.436	0.598 (1.152)	0.269	0.438 **** (0.102)	18.255
Popular Trust in Courts							0.099 ** (0.045)	4.803
Rights Index	5.568 * (3.256)	2.924	5.332 * (3.132)	2.899	6.184 * (3.647)	2.875	30.214 ** (13.23)	5.215
Number of Sub-tiers	-0.955 **** (0.281)	11.490	-0.924 **** (0.260)	12.621	-0.918 **** (0.257)	12.684	-0.205 (0.201)	1.041
Constant	-0.721 (1.004)	0.516	-0.591 (0.729)	0.657	-0.834 (0.966)	0.745	-7.694 * (4.444)	2.997
							42.516 ** (17.30)	6.036
							-0.437 * (0.240)	3.302
							-10.702 ** (5.191)	4.251

	414	414	414	414	397	397
N	503.314	503.334	503.188	503.188	478.000	476.610
-2LL	24.695	24.675	24.821	24.821	14.968	16.357
Model Chi Square	0.000	0.000	0.000	0.000	0.005	0.003
Prob < Chi Square	0.080	0.080	0.081	0.081	0.052	0.057
Pseudo R Square	50.00%	50.00%	50.00%	50.00%	50.00%	50.00%
Null Model	69.50%	69.50%	69.50%	69.50%	68.70%	68.70%
Predicted Model	39.00%	39.00%	39.00%	39.00%	37.40%	37.40%
Reduction of Error						

$\alpha = .10$; * $p < .10$; ** $p < .05$; *** $p < .01$; **** $p < .001$.

DV: Dichotomous measure of judicial Review (1 = legal norm/government action struck down)

N.B.: Smaller sample sizes (414 and 397, respectively) result from unavailability of data for Smithey and Ishiyama's synthetic rights index for Hungary, Poland, or Slovenia, and in the case of Model 2, popular trust score for Georgia.

Table 6.

*Logit Results: Factors Affecting Judicial Review
(Modified Replication of Herron and Randazzo 2003) – Original & Corrected Indices*

Independent Variable	Original Index		Original Index (Calculations Fixed)		Corrected Index (Coding Fixed)	
	B (S.E.)	Wald	B (S.E.)	Wald	B (S.E.)	Wald
Judicial Independence						
<i>Original S-I Index</i>	-0.146 0.374	0.151				
<i>Index, Georgia Fixed</i>			-0.123 (0.365)	0.113		
<i>Corrected S-I Index</i>					-0.552 (0.465)	1.404
Economic Conditions						
<i>Change in GDP Growth (base year = 1990)</i>	-0.147*** (0.054)	7.308	-0.147*** (0.054)	7.309	-0.152*** (0.055)	7.785
Contextual Influences						
<i>Presidential Power</i>	-0.084**** (0.023)	13.586	-0.084**** (0.023)	13.275	-0.092**** (0.024)	14.949
<i>Legislative Fragmentation</i>	0.193**** (0.052)	13.532	0.195**** (0.051)	14.307	0.186**** (0.051)	13.477
<i>Civil Liberties</i>	0.133 (0.108)	1.503	0.128 (0.106)	1.470	0.140 (0.103)	1.857
Constant	0.390 (0.337)	1.000	0.380 (0.338)	1.000	0.714 (0.434)	1.000
N	915		915		915	
-2LL	1162.729		1162.768		1161.465	
Model Chi Square	36.200		36.161		37.464	
Prob < Chi square	0.000		0.000		0.000	
Pseudo R square	0.053		0.053		0.055	
Null Model	50.00%		50.00%		50.00%	
Predicted Model	64.50%		63.90%		63.90%	
Reduction of Error	29.00%		27.80%		27.80%	

$\alpha = .10$; * $p < .10$; ** $p < .05$; *** $p < .01$; **** $p < .001$.

DV: Dichotomous measure of judicial Review (1 = legal norm/government action struck down)

Table 7.
Logit Results: Factors Affecting Judicial Review, continued
(Modified Replication of Herron and Randazzo 2003) – Original & Corrected Indices

Independent Variable	Original Index		Original Index (Calculations Fixed)		Corrected Index (Coding Fixed)	
	B (S.E.)	Wald	B (S.E.)	Wald	B (S.E.)	Wald
Judicial Independence						
Original S-I Index	0.012 (0.431)	0.001				
Index, Georgia Fixed			-0.168 (0.427)	0.155		
Corrected S-I Index					-0.671 (0.551)	1.482
Economic Conditions						
Change in GDP Growth (base year = 1990)	-0.123** (0.061)	4.020	-0.123** (0.061)	4.042	-0.126** (0.061)	4.219
Contextual Influences						
Presidential Power	-0.077*** (0.026)	9.175	-0.081*** (0.026)	9.656	-0.088**** (0.027)	11.003
Legislative Fragmentation	0.262**** (0.063)	17.375	0.257**** (0.061)	17.517	0.249**** (0.061)	16.681
Civil Liberties	0.099 (0.124)	0.644	0.113 (0.121)	0.871	0.118 (0.119)	0.991
Petitioner						
Individual	-0.188 (0.187)	1.013	-0.195 (0.187)	1.080	-0.209 (0.187)	1.247
President	1.247*** (0.437)	8.162	1.236*** (0.436)	8.035	1.218*** (0.436)	7.819
Administration or Legal Official (e.g. Ombudsman)	0.616** (0.310)	3.958	0.586* (0.309)	3.600	0.541* (0.307)	3.110
Members of Legislature	0.226 (0.237)	0.911	0.243 (0.239)	1.035	0.255 (0.238)	1.156
Constant	-0.133 (0.397)	1.113	-0.034 (0.400)	0.007	0.370 (0.520)	0.506
N		764		764		764
-2LL		962.366		963.708		962.366
Model Chi Square		53.944		54.099		55.441
Prob < Chi Square		0.000		0.000		0.000
Pseudo R Square		0.093		0.093		0.095
Null Model		50.00%		50.00%		50.00%
Predicted Model		64.90%		64.40%		63.90%
Reduction of Error		29.80%		28.80%		27.80%

$\alpha = .10$; * $p < .10$; ** $p < .05$; *** $p < .01$; **** $p < .001$.

DV: Dichotomous measure of judicial Review (1 = legal norm/government action struck down).

N.B. Smaller sample size results from missing data on petitioners in some cases in the dataset. Weights have been adjusted.

Table 8.

Logit Results: Effect of Distance from 'Peak' of Judicial Power on Judicial Review (Following Smithey and Ishiyama's [2002] Models)

Independent Variable	Model 1				Model 2			
	Distance from Peak		Distance from Peak, Controlling for Access		Distance from Peak		Distance from Peak, Controlling for Access	
	B (S.E.)	Wald	B (S.E.)	Wald	B (S.E.)	Wald	B (S.E.)	Wald
Distance from 'peak' of Judicial Independence	-3.402 * (1.945)	3.059	-3.632 * (1.971)	3.395	-3.524 * (1.869)	3.555	-3.740 ** (1.887)	3.927
Accessibility of Courts			-2.116 (2.321)	0.831			-2.362 (2.209)	1.143
Number of Sub-tiers	-0.968 **** (0.259)	14.010	-0.955 **** (0.259)	13.589	-0.281 (0.206)	1.855	-0.282 (0.206)	1.875
Rights Index	5.896 * (3.070)	3.689	4.935 (3.260)	2.291	12.478 **** (3.732)	11.177	10.902 *** (4.017)	7.366
Popular Trust in Courts					0.034 **** (0.010)	11.582	0.032 *** (0.010)	9.704
Legislative Fragmentation	0.425 **** (0.099)	18.363	0.411 **** (0.100)	16.803				
Constant	0.155 (0.444)	0.121	0.572 (0.639)	0.801	-0.629 (0.604)	1.084	-0.095 (0.787)	0.014
N	414		414		397		397	
-2LL	500.192		499.366		476.488		475.350	
Model Chi Square	27.817		28.644		26.479		17.617	
Prob < chi square	0.000		0.000		0.002		0.003	
Pseudo R square	0.080		0.080		0.057		0.061	
Null Model	50.00%		50.00%		50.00%		50.00%	
Predicted Model	69.50%		69.50%		68.70%		68.70%	
Reduction of Error	39.00%		39.00%		37.40%		37.40%	

$\alpha = .10$; * $p < .10$; ** $p < .05$; *** $p < .01$; **** $p < .001$

DV: Dichotomous measure of judicial Review (1 = legal norm/government action struck down)

N.B.: Smaller sample sizes (414 and 397, respectively) result from unavailability of data for Smithey and Ishiyama's Hungary, Poland, or Slovenia, and in the case of Model 2, popular trust score for Georgia.

Table 9.

Logit Results: Effect of Distance from ‘Peak’ of Judicial Power on Judicial Review (Following Herron and Randazzo’s [2003] Models)

	Without Controlling for Petitioner		Controlling for Petitioner	
	<i>B (S.E.)</i>	<i>Wald</i>	<i>B (S.E.)</i>	<i>Wald</i>
Distance from ‘peak’ of Judicial Independence	0.352 (0.539)	0.427	-0.217 (0.621)	0.122
Contextual Influences				
Legislative Fragmentation	0.202 **** (0.050)	16.064	0.260 **** (0.061)	18.176
<i>Presidential Power</i>	0.144 (0.109)	1.750	0.085 (0.124)	0.473
<i>Civil Liberties</i>	-0.090 **** (0.025)	12.496	-0.073 *** (0.028)	6.639
Economic Conditions				
<i>Change in GDP Growth (base year = 1990)</i>	-0.148 *** (0.054)	7.422	-0.123 ** (0.061)	3.979
Petitioner				
<i>Individual</i>			-0.195 (0.188)	1.082
<i>President</i>			1.254 *** (0.436)	8.255
<i>Administration or Legal Official</i>			0.639 ** (0.310)	4.245
<i>Members of Legislature</i>			0.225 (0.235)	0.913
Constant	0.251 (0.285)	0.776	-0.090 (0.340)	0.071
N		915		764
-2LL		1162.453		963.742
Model Chi Square		36.477		54.065
Prob < Chi square		0.000		0.000
Pseudo R square		0.054		0.093
Null Model		50.00%		50.00%
Predicted Model		64.50%		65.00%
Reduction of Error		29.00%		30.00%

$\alpha = .10$; * $p < .10$; ** $p < .05$; *** $p < .01$; **** $p < .001$.

DV: Dichotomous measure of judicial Review (1 = legal norm/government action struck down).

N.B. Smaller sample size results from missing data on petitioners in some cases in the dataset. Weights have been adjusted.

Table 10.
Logit Results: Effect of New Measures of Judicial Independence on Judicial Review Following Smithey and Ishiyama's (2002) 'Model 1'

Independent Variable	1		2		3		4		5	
	B (S.E.)	Wald	B (S.E.)	Wald	B (S.E.)	Wald	B (S.E.)	Wald	B (S.E.)	Wald
Legislative Fragmentation	0.368 *** (0.142)	6.739	0.371 *** (0.138)	7.219	0.388 *** (0.122)	10.103	0.444 *** (0.100)	19.551	0.477 *** (0.109)	19.117
Rights Index	-4.886 (7.139)	0.468	-8.913 (8.487)	1.103	-10.231 (9.209)	1.234	-6.788 (7.911)	0.736	0.920 (4.557)	0.041
Federalism	-0.801 *** (0.273)	8.621	-1.166 *** (0.307)	14.458	-0.591 * (0.306)	3.724	-0.652 ** (0.295)	4.894	-0.777 *** (0.275)	7.985
Judicial Independence										
Access Measure	8.999 (6.053)	2.211								
Power * Access				57.588 * (34.391)	2.804					
Power * Insularity	1.443 (3.243)	0.198	-11.622 (10.281)	1.278						
Composite power and access measure					19.534 * (11.203)	3.040	15.001 (9.314)	2.594		
Composite power and access measure * Insularity									10.998 (8.942)	1.513
Insularity			1.855 (2.091)	0.787	-0.825 (1.062)	0.604				
Constant	-1.328 * (0.761)	3.050	-0.538 (0.932)	0.334	-0.047 (0.905)	0.003	-0.687 * (0.387)	3.140	-0.786 (0.480)	2.677

	414	414	414	414	414	414
N	414	414	414	414	414	414
-2LL	500.989	500.175	500.165	501.527	501.934	501.934
Model Chi Square	27.020	27.835	27.844	26.482	26.076	26.076
Prob < Chi Square	0.000	0.000	0.000	0.000	0.000	0.000
Pseudo R Square	0.088	0.090	0.090	0.086	0.085	0.085
Null Model	50.00%	50.00%	50.00%	50.00%	50.00%	50.00%
Predicted Model	67.30%	69.50%	69.50%	67.30%	69.50%	69.50%
Reduction of Error	34.60%	39.00%	39.00%	34.60%	39.00%	39.00%

$\alpha = .10$; * $p < .05$; ** $p < .01$; *** $p < .001$; **** $p < .0001$.

DV: Dichotomous measure of judicial Review (1 = legal norm/government action struck down)

Table 11.
 Logit Results: Effect of New Measures of Judicial Independence on Judicial Review Following Smithey and Ishiyama's (2002) Model 2.

Independent Variable	1		2		3		4		5	
	B (S.E.)	Wald	B (S.E.)	Wald	B (S.E.)	Wald	B (S.E.)	Wald	B (S.E.)	Wald
Rights Index	-20.765 (20.685)	1.008	-20.765 (20.685)	1.008	-17.336 (40.915)	0.180	-1.684 (7.667)	0.048	7.460* (4.062)	3.373
Federalism	-0.399 (0.279)	2.048	-0.399 (0.279)	2.048	-0.130 (0.658)	0.039	0.106 (0.254)	0.175	0.179 (0.277)	0.419
Popular Trust in Courts	-0.038 (0.061)	0.389	-0.038 (0.061)	0.389	-0.011 (0.132)	0.007	0.040**** (0.011)	13.697	0.057**** (0.017)	12.073
Judicial Independence										
Power * Insularity	-10.636 (11.349)	0.878	-10.636 (11.349)	0.878						
Access Measure	21.320* (12.652)	2.840	21.320* (12.652)	2.840						
Composite power and access measure					24.116 (17.052)	2.000	18.756* (10.037)	3.492		
Insularity					-3.860 (9.910)	0.152				
Composite power and access measure * Insularity									25.717* (13.544)	3.605
Constant	1.129 (2.929)	0.149	1.129 (2.929)	0.149	3.525 (13.754)	0.066	-1.825*** (0.688)	7.030	-3.079** (1.196)	6.628

	414	414	414	414	414	414
N	414	414	414	414	414	414
-2LL	500.989	500.175	500.165	501.527	501.934	
Model Chi Square	27.020	27.835	27.844	26.482	26.076	
Prob < Chi Square	0.000	0.000	0.000	0.000	0.000	
Pseudo R Square	0.088	0.090	0.090	0.086	0.085	
Null Model	50.00%	50.00%	50.00%	50.00%	50.00%	
Predicted Model	67.30%	69.50%	69.50%	67.30%	69.50%	
Reduction of Error	34.60%	39.00%	39.00%	34.60%	39.00%	

$\alpha = .10$; * $p < .10$; ** $p < .05$; *** $p < .01$; **** $p < .001$.

DV: Dichotomous measure of judicial Review (1 = legal norm/government action struck down)

	915	915	915	915	915
N	1162.238	1160.982	1162.817	1162.880	1162.881
-2LL	36.691	37.948	36.112	36.050	36.049
Model Chi Square	0.000	0.000	0.000	0.000	0.000
Prob < Chi Square	0.054	0.056	0.053	0.053	0.053
Pseudo R Square	50.00%	50.00%	50.00%	50.00%	50.00%
Null Model	63.90%	65.10%	63.90%	64.50%	64.50%
Predicted Model	27.80%	30.20%	27.80%	29.00%	29.00%
Reduction of Error					

$\alpha = .10$; * $p < .10$; ** $p < .05$; *** $p < .01$; **** $p < .001$.

DV: Dichotomous measure of judicial Review (1 = legal norm/government action struck down)

Access Measure	1.399 *	2.989							
	(0.809)								
Composite power and access measure			-0.012	0.000	-0.043	0.003			
			(0.749)		(0.748)				
Composite power and access measure							-0.318	0.057	
							(1.329)		
* Insularity									
Insularity			1.519	1.775	-0.614	0.890			
			(1.140)		(0.651)				
Constant	0.196	0.249	0.163	0.299	-0.118	0.106	-0.083	0.051	
	(0.393)		(0.641)		(0.587)		(0.361)	(0.371)	
N	764	764	764	764	764	764	764	764	
-2LL	959.401		957.678	962.969	963.860		963.806		
Model Chi Square	58.406		60.129	54.837	53.947		54.000		
Prob < Chi Square	0.000		0.000	0.000	0.000		0.000		
Pseudo R Square	0.100		0.103	0.094	0.093		0.093		
Null Model	50.00%		50.00%	50.00%	50.00%		50.00%		
Predicted Model	64.90%		65.10%	64.90%	65.10%		65.10%		
Reduction of Error	29.80%		30.20%	29.80%	30.20%		30.20%		

$\alpha = .10$; * $p < .10$; ** $p < .05$; *** $p < .01$; **** $p < .001$.

DV: Dichotomous measure of judicial Review (1 = legal norm/government action struck down)

Table 14.
Influence of Legal "Transplant Effect" on Judicial Review (Panel A)

Independent Variable	1		2		3		4		5	
	B (S.E.)	Wald	B (S.E.)	Wald	B (S.E.)	Wald	B (S.E.)	Wald	B (S.E.)	Wald
Judicial Independence										
Corrected Index	-0.828 (0.887)	0.871	-0.503 (0.509)	0.977	-0.876 (0.880)	0.989	-1.030 (0.892)	1.333		
Presidential Power	-0.044 (0.029)	2.230	-0.047 * (0.028)	2.722	-0.032 (0.029)	1.253	0.000 (0.036)	0.000	-0.032 (0.028)	1.267
Legislative Fragmentation	0.181 *** (0.059)	9.605	0.193 **** (0.053)	13.027	0.151 *** (0.056)	7.410	0.206 *** (0.069)	8.842	0.179 **** (0.049)	13.249
Civil Liberties	-0.110 (0.205)	0.289	-0.116 (0.205)	0.320	-0.037 (0.201)	0.033	-0.044 (0.200)	0.048	-0.092 (0.192)	0.229
Change in GDP Growth (1990 = base year)	-0.140 ** (0.057)	6.110	-0.141 ** (0.057)	6.187						
Federalism										
Adaptation	0.587 *** (0.224)	6.897			0.644 *** (0.221)	8.470	-0.306 (0.210)	2.119	0.674 *** (0.219)	9.450
Familiarity	0.813 (0.506)	2.580			0.909 * (0.503)	3.265	0.691 (0.528)	1.714	0.529 (0.327)	2.614
Receptive Transplant			0.609 *** (0.218)	7.788						
New Transplant	1.273 ** (0.527)	5.833	0.563 (0.357)	2.488	1.252 ** (0.525)	5.688	1.047 * (0.540)	3.755	1.130 ** (0.509)	4.920
Constant	-0.053 (0.546)	0.010	-0.509 (0.449)	1.284	-0.364 (0.524)	0.483	-0.231 (0.531)	0.189	-0.590 (0.473)	1.559

	915	915	915	915	915	915
N	1153.029	1153.229	1159.167	1157.037	1160.155	
-2LL	45.900	45.701	39.762	41.892	38.774	
Model Chi Square	0.000	0.000	0.000	0.000	0.000	
Prob < Chi Square	0.067	0.067	0.058	0.061	0.057	
Pseudo R Square	50.00%	50.00%	50.00%	50.00%	50.00%	
Null Model	65.93%	64.43%	64.73%	65.39%	61.89%	
Predicted Model	31.86%	28.85%	29.45%	30.78%	23.78%	
Reduction of Error						

$\alpha = .10$; * $p < .10$; ** $p < .05$; *** $p < .01$; **** $p < .001$.

DV: Dichotomous measure of judicial Review (1 = legal norm/government action struck down)

Table 15.
Influence of Legal “Transplant Effect” on Judicial Review (Panel B)

Independent Variable	6		7		8	
	B(S.E.)	Wald	B(S.E.)	Wald	B(S.E.)	Wald
Judicial Independence						
Power measure	21.457 *** (8.181)	6.879	19.035 ** (8.276)	5.291		
Insularity measure	7.220 *** (2.505)	8.311	9.419 ***** (2.739)	11.829		
Power * Insularity	-36.925 *** (13.170)	7.861	-40.481 *** (13.364)	9.176		
Access measure	-1.430 (1.516)	0.889	0.966 (1.926)	0.252		
Presidential Power	-0.066 * (0.034)	3.731	-0.082 ** (0.036)	5.181		
Legislative Fragmentation						
At time of decision	0.163 *** (0.059)	7.553	0.225 *** (0.070)	10.342		
At time of first election					0.126 ** (0.051)	6.120
Civil Liberties	-0.074 (0.203)	0.135	0.035 (0.215)	0.026		
Federalism					-0.242 (0.154)	2.471
Adaptation			1.333 ***** (0.315)	17.852	0.902 ***** (0.214)	17.770
Familiarity			0.283 (0.558)	0.257	0.625 * (0.327)	3.647
Receptive Transplant	1.216 ***** (0.311)	15.245				
New Transplant	0.868 ** (0.352)	6.074	1.468 ** (0.640)	5.255	1.090 *** (0.336)	10.548
Constant	-3.738 *** (1.391)	7.226	-5.633 ***** (1.612)		-0.770 * (0.435)	3.128

N	915	915	915
-2LL	1149.981	1145.895	1177.614
Model Chi Square	48.949	53.034	25.948
Prob < chi square	0.000	0.000	0.000
Pseudo R square	0.071	0.077	0.038
Null Model	50.00%	50.00%	50.00%
Predicted Model	64.72%	63.46%	61.80%
Reduction of Error	29.44%	26.92%	23.60%

Table 16.
Selected Composite Models of Factors Affecting Judicial Review

Independent Variable	1		2		3	
	<i>B(S.E.)</i>	<i>Wald</i>	<i>B(S.E.)</i>	<i>Wald</i>	<i>B(S.E.)</i>	<i>Wald</i>
Change in GDP Growth (1990 = base year)	-0.118 ** (0.056)	4.403	-0.098 * (0.055)	3.222	-0.105 (0.057)	3.319
Presidential Power	-0.257 **** (0.057)	20.430	-0.273 **** (0.055)	24.448	-0.353 **** (0.105)	11.374
Civil Liberties	0.436 *** (0.169)	6.652	0.368 ** (0.160)	5.318	0.641 *** (0.242)	7.037
Legislative Fragmentation						
At time of decision	0.173 (0.114)	2.309			0.198 * (0.118)	2.786
Inside Coalition	-0.693 **** (0.193)	12.827	-0.628 **** (0.187)	11.318	-0.602 *** (0.225)	7.177
Federalism	0.556 *** (0.205)	7.385	0.540 *** (0.201)	7.186	1.332 ** (0.658)	4.103
Judicial Independence						
Composite power and access measure *	-4.256 ** (1.669)	6.499	-4.774 *** (1.624)	8.644		
Insularity						
Power * Insularity					-8.002 (7.557)	1.121
Power * Access					0.026 (3.192)	0.000
Insularity					4.164 (3.518)	1.401
Constant	3.061 *** (0.991)	9.543	3.838 **** (0.846)	20.574	0.161 (2.457)	0.004

N	915	915	915
-2LL	913.872	916.371	912.546
Model Chi Square	39.603	37.103	40.929
Prob < chi square	0.000	0.000	0.000
Pseudo R square	0.072	0.068	0.075
Null Model	50.00%	50.00%	50.00%
Predicted Model	66.50%	64.60%	66.20%
Reduction of Error	33.00%	29.20%	32.40%