The Relationship Between Independence and Judicial Review in Post-Communist Courts

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Following the collapse of communist rule in Central and Eastern Europe and the former Soviet Union, constitutional designers codified rules establishing independent judiciaries. To what degree do these constitutional and statutory guarantees of independence reflect the actual behavior of courts? Our analysis demonstrates that official judicial power does not predict expressions of judicial review—overturning legislation in whole or in part. Rather, exogenous factors, including economic conditions, executive power, identity of the litigants and legal issues, influence the likelihood that courts will nullify laws. Our findings should caution both scholars and institutional designers. Both formal and informal factors create the parameters in which courts operate. Although courts have become more powerful institutions in the post-communist era, they face a diverse set of constraints on independent action.

Although independent judiciaries are important actors in democratic consolidation, how expressions of judicial independence evolve in transitional societies remains unclear. Ideally, courts review legislation and government decisions under the rubric of constitutionality. That is, the judiciary is able to declare laws and actions unconstitutional and serve as a check against excesses by other branches of government. A strong judiciary in newly independent countries helps the state break with its authoritarian past and develop a constitutional culture that teaches state actors that the legal system cannot be transgressed for political gain (Brewer-Carias 1989; Larkins 1996). However, the development of an independent judiciary can be constrained by a weak institutional legacy, limited training and support for judges, and the strength of other political actors. If the judiciary does not have the authority to make independent decisions, democratic progress

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may falter, potentially returning the country to "the darkness and chaos of a totalitarian and dictatorial regime" (Mohan 1982, 110).[1]

Despite the vital role of the judiciary in the development of democracy and the rule of law, scholars have rarely examined the judicial systems of fledgling democracies. A majority of research has formulated conclusions about judicial behavior based primarily on observations collected from the United States and mostly from studies of the U.S. Supreme Court.[2] Studies of democratic institutions and constitutional design overlook the judiciary or mention it primarily because of its relationship to other institutions (Elster, Offe, and Preuss 1998; Lijphart 1999; Lijphart and Waisman 1996).

While questions about judicial legitimacy, review, independence, and political/social impact are now being explored in a comparative setting, many scholars examine these questions using single case studies (Haynie 1994; Melone 1996; Ramseyer and Rasmusen 2001; Sabaliunas 1996; Tate and Haynie 1993). This research provides detailed information about developments within a single country, but is limited in its ability to evaluate general explanations of judicial behavior. This focus of comparative judicial research has left several important questions unexplored. How does judicial independence manifest itself in the behavior of courts and judges? Is independence related to judicial review, and if so, how?

Judicial Independence and Judicial Review

Understanding the relationship between independence and judicial review is essential to determining the role of courts in states emerging from decades of communist rule. Despite an almost universal consensus regarding its normative value, the evolution of judicial independence in new democracies has yet to be fully explored (Larkins 1996, 607). Scholars have posited the importance of judicial independence without investigating in detail how courts express independent behavior.

Complicating the study of judicial independence is the lack of a single, satisfactory definition (Boylan 1998). At its most basic level, independence is related to the impartial resolution of conflict by a neutral third party (Shapiro 1981). Embedded within the notion of neutrality is the belief that judges will not be influenced by exogenous factors during the adjudication of disputes. For the judiciary to be independent (and consequently perceived as impartial), it cannot be viewed as an extension of the political branches of government. The appearance of impartiality is necessary for the public to believe the judiciary is a legitimate component of a triadic structure, rather than a politically biased actor (Gibson,

[1] Olson (2000) notes that a judiciary controlled or strongly influenced by other political institutions will not be able to defend property rights, ensure that contracts are enforced, and resolve disagreements in the interest of society as a whole. Moreover, the lack of an independent judiciary facilitates the return of autocracy.

[2] See, for example, Segal and Spaeth 1993; Baum 1997; Epstein and Knight 1998.

Caldeira and Baird 1998; Lane 1985; Shetreet 1985). Becker (1970) provides a useful definition of judicial independence:

> Judicial independence is (a) the degree to which judges believe they can decide and do decide consistent with their own personal attitudes, values and conceptions of judicial role (in their interpretation of the law), (b) in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and (c) particularly when a decision adverse to the beliefs or desires of those with political or judicial power may bring some retribution on the judges personally or on the power of the court. (144)

An independent judiciary will be free to exert its own judgment in legal disputes without fear of retribution, especially if the decisions are not viewed favorably by other political actors. However, as Stephens (1985, 529) argues, an independent judiciary should not interfere with the legitimate actions of the political branches, but neither should it feel compelled to uphold unlawful actions.

To rule on the propriety of government behavior, courts must rely on the ability to review legislation and actions under a higher authority, generally the constitution. The ability of courts to nullify laws and decrees serves as the check against the other branches of government, but judges often must be wary of exercising their authority. Judges in post-communist countries seem to frequently employ subtle strategies when reviewing legislation, similar to their colleagues in Western democracies.[3] Rather than declaring an entire statute unconstitutional, judges have struck down portions of the law as unconstitutional or unlawful or declared legislation unlawful for procedural reasons.

Judges in post-communist courts may employ these strategies because they do not have the prestige and legitimacy associated with judges in established democracies. These judges must do what Chief Justice John Marshall is credited with in the United States: "transform[ing] public policy disputes into questions of constitutional interpretation that can be decided by texts, procedures, principles, and rules that are generally accepted as legal and not political" (Schwartz 2000, 5). Given the potential political ramifications from an exercise of judicial review, determining the precise connection between this power and independence is essential.

Assessing the relationship between independence and judicial review is difficult because the concepts are interdependent. Previous analyses often treated the exercise of review as a proxy for independence.[4] Treating the two concepts as equivalent is problematic. First, as noted above, it is possible for an independent

[3] The U.S. Supreme Court, for example, adopted the principle of ruling on the narrowest grounds possible, allowing the Court to check the political branches without necessarily declaring a statute unconstitutional.

[4] For instance, Becker (1970, 214) argues: "I feel that the judiciary's independence is relative to the degree to which the power of judicial review is exercised—and that the power of judicial review is relative to the actual degree of independence (potential and actual) extant in that society. . . . All other things being equal, a *substantial exercise* of judicial review means that the highest level of judicial independence exists and that we can expect that judges in such a system are not easily cowed by cross glowers from police officials, bureaucrats, legislators, premiers, presidents, or potentates."

court to engage in judicial restraint. Second, in less democratic states, the judiciary may be used by political elites as a tool for legitimizing unlawful actions. For example, the presidents of both Azerbaijan and Belarus have manipulated the courts to overturn statutes that undermine presidential authority. When this occurs, the courts become extremely effective in reviewing and nullifying legislation. However, they are not independent.

To assess the relationship between independence and judicial review, we need to identify the characteristics important to the development of an independent judiciary and examine these characteristics along with additional influences on the exercise of judicial power. When attempting to model potential influences on judicial behavior, it is imperative to include a diverse range of indicators. We argue that three sets of characteristics influence the exercise of judicial review: the provisions for judicial independence, economic conditions, and contextual influences.

Judicial Independence

The formal judicial structure, outlined in constitutions and statutes, provides the primary foundation for judicial independence. Our main premise is that courts with greater guarantees of independence should be freer to exercise their own will and consequently should have more opportunities to engage in judicial review.[5] These guarantees involve certain features that could influence judicial behavior. For example, several scholars have argued that judges without life tenure are more constrained by political pressures than judges with life tenure (Helmke 1998; Tate and Vallinder 1995). Individuals whose judicial careers are not secure are more susceptible to outside influences and may consequently render decisions that are not impartial. Therefore, the tenure of a judge is often a crucial component of their independence from external influences.

Further, the number of actors involved in the nomination and confirmation process could affect review. In the literature on federal judges in the United States, affiliations to the appointing president are often used as surrogates for judicial attitudes (Feiock 1989; Songer and Haire 1992). The logic behind these surrogates is relatively straightforward: judges are nominated by presidents because the beliefs and attitudes of the former are perceived to coincide with those of the latter. We argue that similar logic can be used here, albeit not to the degree seen in studies on the United States. Some countries allow only for the president to nominate judicial candidates, whereas other countries allow the legislature and even the court to nominate individuals. As more institutions become involved in

[5] We recognize that this concept of independence involves measuring institutional components that promote or protect individual behavior, rather than directly measure actual behavior. However, we expect that increases in the institutional guarantees of independence correspond to increases of independent behavior by the judges, ceteris paribus.

judicial nominations, judges become less beholden to one institution, increasing their independence from any one branch of government.

Economic Conditions

The second characteristic potentially influencing judicial review is economic performance. When economic conditions deteriorate, the political branches of government are potentially more inclined to constrain opposition, even from the courts. Haggard and Kaufman (1995) suggest that poor economic performance and slow reform processes have encouraged post-communist chief executives to use their decree powers and avoid challenges from other political institutions. In this environment, courts may restrain the exercise of judicial review, especially if the other branches of government are actively hindering opposition.

On the other hand, it is possible that the courts may increase the exertion of judicial authority during periods of poor 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 (Bugaric 2001; Tate and Vallinder 1995).

Additionally, government officials are more likely to accept monetary bribes under difficult economic circumstances. Judges have not remained insulated from an increase in government corruption (Reitz 2001; Widner 2001). Furthermore, in many post-communist countries, parliamentary officials have overlegislated in several areas, often enacting contradicting legislation. This "paradox of overlegislation," combined with a depressed economy, facilitates judicial manipulation by parties interested in avoiding technical violations of constantly changing laws (Halverson 1996, 95). Based on this possibility, one could expect an increase in the application of judicial review.

Regardless of the direction of influence, appropriate controls for economic conditions are essential. Becker (1970, 215) concurs with this assessment: "A cross-cultural index and measurement must be developed in relationship to many factors, including history, stage of economic development, and the like, before quantitative adjectives reflect anything more than the bias of American researchers."

Contextual Features

The final set of characteristics captures country-specific factors that are not included in measures of judicial institutions or economic performance. The first feature is the level of civil liberties. As Epp (1998) noted in his examination of rights revolutions, the presence of a support structure for civil rights influences the behavior of courts. We argue that the extension of civil liberties grants the courts more flexibility in adjudicating decisions on behalf of individual litigants (many of whom name governmental parties as respondents). Therefore, courts will be more likely to engage in judicial review when the country formally extends higher levels of civil liberties to its citizens.

Second, the structure of the executive system may also influence the degree of judicial review. Countries where power has been consolidated within the executive may experience inter-branch conflict, which adversely affects the judiciary's ability to regulate intragovernmental relations (Schwartz 2000, 230). Additionally, if the executive has concentrated political power, then he may be less likely to provide the courts with enough latitude to systematically exercise judicial review. Therefore, we expect courts in countries with a powerful, centralized executive will be less likely to apply judicial review.

Finally, political fragmentation within the legislature may also affect the application of judicial review. When parties must form broad coalitions to pass legislation, the resulting laws are generally less contentious than those produced by one dominant party (Stone Sweet 2000, 54). Statutes that have been crafted through compromise and coalition building are less likely to face court challenges because the policies satisfy a wider range of political actors. Thus, we expect that the likelihood of the application of judicial review will decrease as the legislature becomes more fragmented.

Extending Concepts of Independence and Judicial Review to Post-Communist States

Post-communist legal systems emerged from the socialist legal traditions developed in the Soviet Union. According to Marxist interpretations of the law, concepts such as justice, rule of law, and equality before the law were fictions (Smith 1996, 28). Law was considered an instrument of the government and was used as a coercive force. In the public sphere, law acted to maintain the existing political system and to quash unrest (Hendley 1996, 16). The judiciary in communist states was neither independent nor active.

The legal process was similar to continental European civil law systems. Rather than proceeding in an adversarial manner—as seen in Western common law systems—judicial process in the communist world operated under an inquisitorial system where the judge weighed the evidence and determined the veracity of testimony (Boylan 1998). Since there was no analogous concept of stare decisis, judges did not apply existing precedent to the resolution of cases. Instead, judges evaluated existing statutes and ordinances and applied those principles to the facts at issue in the specific case. According to socialist theories, the state was the embodiment of the people and a formal division of powers was unnecessary. Therefore, there was no need for the courts to apply the notion of judicial review to evaluate statutes (Utter and Lundsgaard 1994, 242).

Beginning in 1989, post-communist independent states developed new legal systems that diverged from the socialist model. The relative authority of government bodies was redefined, and the courts began to play a more prominent role in politics. Constitutional designers inserted clauses guaranteeing judicial independence in most states, and higher courts asserted their authority in some promi-

nent disputes. The judicial branch's willingness to demonstrate its independence, however, has not always been accepted by other political actors. Conflicts between the judicial branch and the executive branch have occasionally escalated to threats of violence[6] and actual violence.[7]

Research Design

We examine the legal systems of seven post-communist countries: the Czech Republic (1992–1996), Estonia (1993–2000), Georgia (1996–1997), Lithuania (1993–2000), Moldova (1995–2000), Russia (1995–1998), and Slovenia (1993–1995). We include cases from the constitutional courts of the Czech Republic, Georgia, Lithuania, Moldova, Russia, and Slovenia. Estonia's Supreme Court includes a smaller Constitutional Review Chamber that decides questions of constitutionality. Thus, Estonia's Supreme Court also functions like the constitutional courts of other countries.[8]

We selected these cases for both practical and substantive reasons. The constitutional courts of these countries have made case descriptions readily available, permitting us to code a large number of court decisions.[9] In addition, while progress toward democracy varies across these states, they have made commitments to democratic rule, allowing us to systematically examine variation in our dependent variable across comparable governments emerging from communist regimes.

Dependent Variable

The dependent variable for this analysis is the probability that the judiciary engaged in judicial review. Cases were coded 1 if the courts overruled, invali-

[6] In 1996, the president of Moldova demanded that the minister of defense resign even though it was not within the president's constitutionally defined mandate to force a resignation. Although the Court ruled in the defense minister's favor, the dispute escalated to the point that the president and defense minister both threatened to use force. The issue was resolved peacefully.

[7] In 1993, the Constitutional Court of Russia was suspended after it sided with parliament in a constitutional dispute that ended with the violent ouster of parliament by security forces. It was not reinstated until 1995.

[8] Detailed descriptions of cases for these courts are archived electronically at the following Web sites: the Czech Republic (http://www.concourt.cz), Estonia (http://www.nc.ee/), Georgia (http://www.constcourt.gov.ge), Lithuania (http://www.lrkt.lt/), Moldova (http://www.ccrm.rol.md/), Russian Federation (http://ks.rfnet.ru/), and Slovenia (http://www.sigov.si/us/eus-ds.html).

[9] It is important to note that our sample contains only published decisions. It is therefore possible that a number of unpublished cases exist that are not included in our analysis. While we do not know the precise selection criteria for publication by the courts, it is probable that the more politically significant cases receive higher rates of publication (similar to the patterns witnessed in the lower federal courts of the United States). We must therefore stress an important caveat: our conclusions are generalizable only to published opinions of the courts in our sample.

dated, or declared unconstitutional a statute or governmental action.[10] If the courts upheld the statute or governmental action, then the case was coded 0. Only those instances in which the courts reviewed actual cases or controversies are included in our sample. We exclude applications of abstract judicial review where legislatures request the courts to issue advisory opinions on legislation that has yet to be implemented as law. Scholars have commented on the difference between abstract and concrete judicial review in terms of judicial behavior (Rogers and Vanberg 2000; Smithey and Ishiyama 2000; Vanberg 2001). These studies indicate that judges enjoy a certain degree of additional flexibility when applying abstract judicial review. In some instances, the judges are viewed as an extension of the legislative process. However, once a law is implemented, it becomes more costly for courts to "undermine a law" through the processes of ordinary litigation (Stone Sweet 2000, 51). Our analysis, therefore, focuses on those instances in which the courts operate in their official judicial capacity for the resolution of concrete litigation.

Judicial Independence

As a proxy measure for judicial independence, we adopt the Smithey and Ishiyama index (2000). This index measures six related components of judicial power, including whether decisions can be overturned, the presence of a priori review, the nature of judges' terms, number of actors involved in judicial selection, establishment of court procedures, and conditions for judicial removal. After assessing each component separately, the authors construct a cumulative scale ranging from 0 to 1, which provides a comparative measure of judicial independence. Our hypothesis is that courts with higher levels of judicial independence will more frequently engage in judicial review. Thus, a positive relationship should exist between our surrogate measure of independence and judicial review.

Economic Conditions

We control for economic influences on judicial independence by including change in GDP growth for all countries.[11] Higher values for change in GDP growth are associated with more robust economies. Since we can only speculate as to the precise relationship between economic conditions and judicial review, we rely on a two-tailed test of statistical significance for this variable.

[10] In practice, this measure also includes decisions against parts of statutes or other government declarations. In many cases, appellants did not challenge a statute in its entirety, but argued that a part of the statute was unlawful.

[11] The GDP growth statistic uses 1989 as the base year.

Contextual Features

While it is important to control for the influence of institutional features codified in statutes and the constitution, official statements of the judiciary's powers do not always accurately capture the full range of influences on independence. We add controls for numerous contextual factors that may undermine or bolster the authority of the courts.

CIVIL LIBERTIES. Our first contextual feature is the state's respect for civil liberties. We employ a measure developed by Freedom House.[12] Freedom House's concept of civil liberties includes individual freedom of expression and dissent, human and economic rights, as well as the rule of law. In short, civil liberties scores capture whether participation in forming substantive policies is concentrated in the hands of a few or dispersed generally in society.

The degree to which the political process is open to participation should influence judicial independence. Although the constitution and other statutes may grant the court a high degree of independence, constitutional guarantees may be ignored by powerful political actors. The measure of civil liberties serves as a proxy for the real diffusion of policy-making authority in society. We anticipate a negative relationship—courts will exhibit more independent behavior in countries that have greater levels of civil liberties.

PRESIDENTIAL POWER. To assess the relative power of the executive, we rely on a modified version of the presidential power score derived by Frye (1997).[13] The index of presidential power assigns scores for levels of veto power, decree power, budgetary authority, cabinet formation and dissolution, and other powers. We expect that courts located within countries dominated by more powerful presidents will be less likely to engage in judicial review. Thus, a negative relationship will exist between presidential power and the dependent variable.

FRAGMENTATION. Political fragmentation in legislative bodies may also influence the probability of activism. We measure fragmentation by calculating the effective number of parliamentary parties in the most recent elections. We use the Laakso-Taagepera index[14] and eliminate all independent legislators to calculate

[12] The scale is ordinal, with a 1 denoting the highest level of civil rights and a 7 denoting the lowest level. For detailed information about the rankings and methodology, see http://www.freedomhouse.org. While scholars have challenged the validity of Freedom House rankings, they are the best existing cross-national measure of civil liberties. See Munck and Verkuilen (2002) for a review of measures of democracy and their shortcomings.

[13] Appendix A of Frye (1997) compares presidential powers across all countries in the analysis. We have modified the index for use in the analysis. For another measure of presidential power in post-communist states, see http://www.wws.princeton.edu/%7Ejtucker/pcelections.html.

[14] The Laakso-Taagepera index for the effective number of parliamentary parties is: $1/\Sigma p_i^2$ where p is the proportion of seats allocated to each party.

the effective number of parliamentary parties. It is our expectation that legislative fragmentation will be negatively related to the frequency of judicial review.

Litigant Characteristics

We control for potential effects caused by particular litigants before the courts. This is necessary because judicial behavior may be affected when a certain party appears as a direct litigant before the court. Dummy variables are coded 1 when the litigant of interest appears and 0 otherwise. Specifically, we measure when the president appears as an appellant before the court. It is our hypothesis that judges will be more likely to invalidate legislative statutes when asked directly by the president through litigation. Second, we control for those cases in which individuals, businesses, or organizations (such as unions) appear as appellants. If judges view their role as protectors of civil liberties, then they may be more likely to engage in judicial review when presented a claim on behalf of these litigants. Finally, we include a variable to control for those instances in which the legislature appears as a respondent. This is necessary because judges may be less likely to invalidate a statute if the parliament is a direct litigant. Additionally, in several instances, minority factions of the legislature bring suit in the courts against the majority faction in order to strike down a law. In these cases, judges may be less likely to side with the minority faction (especially if abstract review had previously been applied to the specific legislation). In sum, we expect a positive relationship to exist for those cases in which the president or individuals appear as an appellant and a negative relationship for those instances when the national legislature appears as a respondent.

Issue Characteristics

Judicial review may also be influenced by the specific issues litigated. Judges may be more inclined to invalidate legislation in certain areas, such as those concerning private rights or governmental operations. Dummy variables are coded 1 when a case involves the issue in question and 0 otherwise. We argue that the courts may be more likely to invalidate statutes or decrees pertaining to separation of powers issues or issues of governmental authority. These issues often involve the distribution of political power at the national and local levels. Fearing potential abuse of power by public officials, courts may take a more active role to ensure lawful action of government. Additionally, the courts may be more active when resolving economic issues. These cases often involve private and public disputes over property rights. Since the distribution of property and reparations for economic losses after the collapse of communism are highly salient and controversial issues, the courts may be more inclined to act in order to preserve individual economic rights. Finally, we argue the courts will be less likely to overturn tax statutes. Due to the transitions from communism to capitalism and the problems inherited by the new democratic regimes (such as the collection and redis-

tribution of wealth and the apparent reluctance of affluent individuals to pay taxes), courts may be less likely to interfere with government revenue policies.

Empirical Results

Because our dependent variable is dichotomous, linear regression models are not sufficient (Long 1997). We therefore employ a multivariate probit analysis. Using pooled cross-sectional data, we construct three separate models utilizing different weighting mechanisms.[15] Our baseline measure is generated using an unweighted sample. However, some countries publish more decisions than others, increasing their relative impact on unweighted results.[16] The unweighted sample may produce distorted results because certain countries will have a disproportionate influence on the analysis.

Our second model accounts for this distortion through a system of proportional weighting. This technique measures the proportion of cases from each country and weights those cases by the inverse. Thus, if one country contains $^1/_3$ of the cases and another country $^1/_4$ of the cases, the former would have a weight of 3 and the latter a weight of 4. This technique ensures comparability across countries in terms of representation within the overall data set.

The final model clusters the data by country. Clustering assumes independence across countries but not within countries. Therefore, cases decided by the Estonian Supreme Court will not influence cases decided by the Constitutional Court of Moldova (though decisions within each country are not necessarily independent).

Table 1 displays the results of the three separate probit models. The null model for each sampling system is 50.0%. A comparison between the nonweighted and clustered data reveals a predictive accuracy of 60.1%, resulting in a 20.2% reduction of error. The proportional sampling weighted data possess a predictive accuracy of 62.2% resulting in a 24.4% reduction of error.[17]

We hypothesize that judicial independence is positively related to the likelihood of judicial review. Thus, those courts with greater independence are more likely to overturn legislation and governmental decrees. However, our variable measuring the index of judicial independence is not related significantly to judicial review.

We also argue that economic performance exerts an effect on judicial behavior. However, we did not hypothesize a specific direction of influence. The empir-

[15] The models were also run including certain fixed effects, such as dichotomous variables to control for specific country or temporal effects. While the index of judicial independence was negated by the fixed effects model (i.e., the variable was dropped due to perfect collinearity), the substantive conclusions for the other variables remained consistent.

[16] The specific numbers of cases per country are as follows: Czech Republic (n = 11), Estonia (n = 42), Georgia (n = 11), Lithuania (n = 103), Moldova (n = 228), Russia (n = 86), and Slovenia (n = 93).

[17] The reduction of error is calculated using the formula provided by Hagle and Spaeth (1992).

$$\mathrm{ROE}(\%) = 100 \times \left[\frac{\%\textit{correctly predicted} - \%\textit{ in null category}}{100\% - \%\textit{ in null category}} \right]$$

TABLE 1

Institutional Influences on Judicial Review (Probit Results)

Variable	Coefficients in bold (with Robust Standard Errors) (Marginal Effects listed below with their standard errors) No Weights	Sampling Weights	Cluster by Country
Judicial Independence			
Index of Independence	**.879 (1.182)**	**–.477 (2.334)**	**.879 (.900)**
	.351 (.471)	–.190 (.928)	.351 (.359)
Economic Conditions			
GDP Growth	**–.019 (.008)****	**–.035 (.015)****	**–.019 (.004)*****
	–.008 (.003)	–.014 (.006)	–.008 (.002)
Contextual Influences			
Civil Liberties	**–.076 (.162)**	**–.298 (.249)**	**–.076 (.062)**
	–.030 (.065)	–.118 (.099)	–.030 (.025)
Presidential Power	**–.071 (.024)*****	**–.062 (.028)****	**–.071 (.005)*****
	–.028 (.010)	–.025 (.011)	–.028 (.002)
Legislative Fragmentation	**.219 (.168)**	**.058 (.301)**	**.219 (.142)**
	.087 (.067)	.023 (.120)	.087 (.057)
Litigant Characteristics			
President Appellant	**.373 (.284)**	**.635 (.335)***	**.373 (.312)**
	.146 (.108)	.233 (.107)	.146 (.118)
Individual Appellant	**.289 (.157)***	**.462 (.195)****	**.289 (.310)**
	.115 (.062)	.177 (.071)	.115 (.122)
Legislative Respondent	**–.111 (.118)**	**–.217 (.144)**	**–.111 (.114)**
	–.044 (.047)	–.086 (.057)	–.044 (.045)
Issue Characteristics			
Separation of Powers	**.252 (.163)**	**.254 (.195)**	**.252 (.182)**
	.100 (.064)	.100 (.076)	.100 (.072)
Economic	**.365 (.146)****	**.362 (.176)***	**.365 (.099)*****
	.144 (.057)	.143 (.069)	.144 (.039)
Taxation	**.483 (.249)**	**.822 (.319)**	**.483 (.272)**
	.189 (.091)	.289 (.090)	.188 (.099)
Constant	**.400 (1.856)**	**3.322 (3.827)**	**.401 (1.055)**
N	574	574	574
Log Likelihood	–378.133	–378.062	–378.133
LR/Wald χ^2	39.22	43.67	39.22
Prob < χ^2	.000	.000	.000
Pseudo R^2	.049	.047	.049
Null Model	50.0%	50.0%	50.0%
Predicted Model	60.1%	62.2%	60.1%
Reduction of Error	20.2%	24.4%	20.2%

*$p > .10$; **$p > .05$; ***$p > .01$.

ical results demonstrate that economic conditions are statistically significant and negatively related to the likelihood of judicial review. An examination of the marginal effects allows us to determine how much influence a particular coefficient has on the probability of the dependent variable registering a 1 instead of a 0. The interpretation of marginal effects is similar to OLS regression coefficients. They measure the slope of the line tangential to the probability curve at the point

where the dependent variable is most influenced.[18] According to the marginal effects for GDP growth, as a country's economic conditions worsen, the likelihood of judges engaging in judicial review increases by 1.4% (using sampling weights) or .8% (using clustering).

Our final set of key indicators includes contextual influences on court behavior. The first of these measures focuses on the level of civil liberties in practice. We argue that courts apply judicial review more frequently when the political branches of government formally recognize and permit the unfettered expression of civil liberties. However, the empirical data indicate that the recognition of civil liberties by the political branches is not significantly related to the likelihood of judicial review.

The second contextual influences pertained to the power of the executive branch. We hypothesize that courts would be less likely to invalidate statutes and governmental decrees as presidential power increased. The empirical evidence reported in Table 1 supports this claim. An examination of the marginal effects indicates that as presidential power increases, courts are 2.5% (using sampling weights) or 2.8% (using clustering) less likely to exercise their judicial authority.

Finally, we hypothesize that legislative fragmentation would be negatively related to judicial review. That is, as the number of viable legislative parties increased, courts would be less likely to overrule statutes, laws and governmental decrees. However, the empirical data do not support this claim. According to Table 1, legislative fragmentation does not exert a statistically significant influence on the likelihood of judicial review.

An examination of the control variables reveals varying effects on judicial behavior. We hypothesize certain litigants would influence the application of judicial review. Specifically, we argue that when the president or an individual, business or organization appears as an appellant, the courts would be more likely to apply judicial review. Conversely, when the national legislature appears as a respondent, judges would be less likely to invalidate statutes. The evidence from Table 1 provides mixed support for our claims regarding the president and individuals as appellants and no support for legislatures as respondents. The data indicate that the method of weighting substantially affects the significance of these control variables. For example, the variable measuring the president as appellant becomes statistically significant only when one employs the proportional weighting technique (under this weighting technique, judges are 23.3% more likely to exercise judicial review). Analogously, the variable controlling for effects when individuals appear as appellants loses statistical significance if one clusters by country. Due to these inconsistencies, we can only conclude that the variables exert an influence under certain circumstances.

The second set of control variables pertain to specific issue characteristics. We hypothesize that judges are more likely to invalidate statutes governing separa-

[18] In the case of this model the dependent variable (Y) is most influenced at the point where Y has a .5 probability of being 1 or a .5 probability of being 0. Coefficients indicate the influence of a particular independent variable on Y, holding the other independent variables constant (in this case holding at 0).

tion of powers and economic issues. Conversely, our hypothesis indicates that courts will be less likely to strike down taxation statutes. The empirical data support our claims only as they pertain to economic cases. When judges review legislation involving economic issues, they are 14.3% (using sampling weights) or 14.4% (using clustering) more likely to invalidate these statutes. The remaining issue categories do not exert a significant influence on judicial behavior.

Conclusions

Although the judicial branch was the most impotent and least respected political institution during the communist era, powerful courts have emerged in some post-communist states. Constitutional engineers generally codified an independent judiciary, but court behavior often responds to factors unrelated to its constitutionally defined authority. In order to understand how courts exercise their new responsibilities, scholars must look beyond constitutional and statutory guarantees of independence. From our examination of post-communist courts, three conclusions emerge.

First, explanations of judicial behavior that focus on formal guarantees of independence are inadequate. Our evidence indicates that constitutional and statutory provisions designed to promote judicial independence are not significantly related to the exercise of judicial review. Therefore, to ignore other potential influences, or to equate independence with review, is not sufficient. Some courts have successfully exercised power beyond constitutional provisions; other courts seem unable to put into practice the independence formally promised to them.

Second, the data indicate that courts are more likely to invalidate legislation in countries with lower levels of economic growth. Unfortunately, our data do not provide a sufficient explanation for this phenomenon; additional analyses are needed to thoroughly explore the relationship between the economy and the exercise of judicial review. We can only speculate that this finding is related either to an increased opportunity for judges to resolve the "paradox of overlegislation" or is a function of increasing levels of corruption within the government.

Finally, our analysis demonstrates that the political power of the executive directly influences the exercise of judicial review in post-communist states. Strong presidents impose substantial constraints on judicial behavior, and courts may be affected by presidential power in two ways. On the one hand, judges are less likely to invalidate legislation or governmental actions in countries possessing strong presidents. Additionally, if the president appears before the court as an appellant, courts may be more likely to acquiesce to executive authority.[19] The

[19] Previous versions of this analysis included examinations of the authoritarian regimes of Belarus and Azerbaijan. When these two countries were included in the analysis, we discovered that presidents exert a substantial influence on judicial behavior when they appear as appellants. The results are less conclusive when these cases are removed. Future research is required to determine precisely how different types of authoritarian rule affect the judiciary.

patterns in these countries indicate that courts adjudicate presidential decrees differently than legislative statutes. However, our data only hint at this assertion. Additional analyses are required to determine if courts respond differently when asked to review legislative statutes versus presidential decrees.

While constitutions and statutes may promise courts a high degree of independence, judicial behavior is influenced by the interaction between institutional, economic and contextual features as well as case-specific characteristics. Our findings should caution both scholars and institutional designers. Both formal and informal factors create the parameters in which courts operate. Although courts have become more powerful institutions in the post-communist era, they face a diverse set of constraints on independent action.

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