The Political Determinants of Judicial Dissent: Evidence from the Chilean Constitutional Tribunal

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Draft: November 10, 2014

Abstract:
Many judicial scholars argue that judicial dissent stems from partisanship or political differences among judges on courts. Using the variation in political backgrounds on a constitutional court, Chile's Constitutional Tribunal, we examine this question using case-level and vote-level data from 1990 until 2010. We first find that the rate of dissent rises after major reforms to the powers and judicial selection mechanism of the Tribunal in 2005 and that the dissent rate corresponds to periods of greater partisanship on the court Further, decisions regarding the unconstitutionality of laws intensify the propensity to dissent at both the case and judge level. In further examination of variation across judges' voting records, we find that those who have identifiable partisan associations of any kind are generally more likely to dissent than those with no political background. We interpret these findings as consistent with the argument that ideological differences contribute to judicial dissent.

A judge's decision to publicly dissent and the emergence of conflict on a high court are politically important phenomena, both for high courts, their members, other political actors, and the public. When high courts review laws, they must directly confront disagreements inherent in the legislative process—a process requiring compromise among legislators to produce laws over which society may itself be deeply divided. In exercising judicial review, judges confront the same issues dividing legislators and their constituents. Although this may translate into disagreement among the judges that review these laws, it does not always translate into dissenting opinions. Indeed, in many nations, dissents against the majority opinion are not made public and even in those which publicize dissent, norms of consensus may make formalization of conflicting opinions infrequent (Laffranque 2003; Keleman 2013).

Dissent or disagreement also may significantly impact case outcomes. In cases where opinions are fairly evenly split between judges voting for the majority and those voting with the minority, just one judge's change in opinion could change the case outcome. Likewise, a single judge's dissent may form the basis for a majority opinion in the future. Scholars also suggest that non-unanimous decisions may ultimately undermine the law's legitimacy and the ability to enforce it. The interplay between case outcomes and disagreement is especially meaningful for the study of constitutional courts with judicial review powers to overturn laws enacted by directly elected legislatures. In other words, understanding what drives judges' disagreements may have significant implications regarding the content of a country's laws.

While much is known about the emergence of dissent on the U.S. Supreme Court (Pritchett 1948; Schmidhauser 1945, 1962; Ulmer 1970; Danelski 1986; Walker et al. 1988; Epstein and Knight 1998; Epstein, Segal and Spaeth 2001; Epstein, Posner and Landes 2011), few studies have analyzed

judicial dissent outside the United States.[1] Yet, these environments can provide considerable opportunity to obtain insight into theoretical concerns of the literature (Dyevre 2010). In this paper, we make use of the structure and change in the Chilean Constitutional Tribunal to examine the political and institutional determinants of judicial dissent. The Chilean Tribunal provides scholars with an opportunity to analyze the evolution of dissent patterns on a court with broad constitutional review powers in which judges are selected by a mixed appointment mechanism[2] during a period of rapid political change. We compare the behavior across Tribunal membership and across time with particular focus on constitutional reforms enacted in 2005, which gave the Tribunal additional powers and increased the number of judges appointed by political actors with their own distinctive origins. Using this context, we examine to what extent judges' votes of dissent are attributable to their political affiliations and divergent political preferences.

The paper proceeds with an overview of the extant literature dealing with the determinants of dissent. After describing the Tribunal's structure and changes related to the 2005 reform, we outline the empirical expectations consistent with political conflict explaining variation of judicial dissent. We examine both the changes in the case-level patterns of conflict before and after the reform and individual judges' dissents. Analyzing cases from 1990 to 2010, we find that the overall rate of dissent has grown considerably since reforms that led to an increased influence of partisan actors on the appointment process. Dissenting opinions are more common in the post reform era when non-partisan judges (defined as those not associated with political parties) comprise a smaller proportion of the Tribunal and where the membership is more politically divided. Looking at

[1] Important recent exceptions include Garoupa (2012), Smyth and Narayan (2004, 2006); and Songer and Siripurapu (2009); Garoupa, Grembi, Lin (2011); Hanretty (2012).

[2] A mixed appointment mechanism means a specific number of judges in a court are chosen by different actors rather than the same actor or actors choosing the entire court. See Autheman (2004) who describes the different appointment mechanisms relevant for constitutional courts.

judges' individual dissenting votes, we find that dissent tends to be associated with partisan backgrounds – especially those from the parties of the center-left.

JUDICIAL CONSENSUS AND CONFICT

A significant amount of research in judicial politics has focused on understanding why norms of consensus are developed on high courts and when they give way to overt displays of disagreement. Some work emphasizes that dissent may arise due to ideological and partisan differences amongst judges in certain circumstances (Schmidhauser 1962; Nagel 1962; Rohde and Spaeth 1976; Segal and Spaeth 1993, 2002; Brace and Hall 1993; Pritchett 1948). However, ideological differences may be constrained by strategic concerns ranging from job security and collegiality to a desire to reinforce the legitimacy of the court itself (Epstein and Knight 1998; Epstein, Landes and Posner 2011; Couso 2004; Garoupa and Ginsburg 2010).

Unanimous rulings are thought to be stronger in terms of their influence on lower courts and the public's support (Pritchett 1948; Danelski 1960; Swisher 1965; Frank 1961; Burns 2010). Both U.S. and comparative scholars have suggested that unanimous rulings may bolster the legitimacy of a court's rulings and stature, especially when a court is relatively young (Baum 2006; Couso 2004; Sadurski 2008; Garoupa and Ginsburg 2010; Pritchett 1948; Danelski 1960; Swisher 1935; Frank 1961; Keleman 2013, but see Salamone 2013).[3] O'Brien (2011) notes that with the institutionalization of separate opinion writing by New Deal era judges on the U.S. Supreme Court, disagreement over decisions invited "uncertainty and confusion about the Court's rulings, interpretation of law, and policy making" (p. 311). In general, dissents are thought to signal that there is not a single clear legal position that can be upheld (Garoupa and Ginsburg 2006), which may

[3] Such concerns may dissolve as high courts become more established and as the threat of undermining the legitimacy of the court's decisions declines (Grimm 1994; Garoupa and Ginsburg 2012).

be detrimental to the effectiveness and enforcement[4] of the decisions of these high courts and the underlying law (e.g. Gibson and Caldiera 2009; Gibson, Caldiera and Baird 1998; Milner 1971; Brenner and Spaeth 1988).

Others have argued that public disagreement among judges is an important part of representing minority views in democratic decision making (Morgan 1954) and is in line with the ideals of deliberative democracy (Guttman and Thompson 1996; Hicks 2002). These minority viewpoints in the judicial process may be highly influential at a later date (Schwartz 2000; Peterson 1981; Douglas 1948). As stated by former Chief Justice Hughes of the U.S. Supreme Court, "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed" (Douglas 1948, p. 153).

Empirically, dissent rates vary widely. On the U.S. Supreme Court, dissent was relatively rare until the 1930s when New Deal-era judges began to do so frequently (Pritchett 1948), recently reaching more than sixty-five percent among cases decided on the merits (Epstein, Landes and Posner 2011). Songer and Siripurapu (2010) show that dissent on the Canadian Supreme Court is much less frequent at 20 to 30% of cases. Garoupa (2010) shows that dissent occurs in about 33% of cases in the Spanish Constitutional Court and 65% in the Portuguese Supreme Court.[5] Finally, Garoupa, Grembi and Lin (2011) show that dissent rates of the Taiwanese Constitutional Court fluctuated between 20% to 50%, depending on the longevity of the country's democracy.

[4] Pritchett (1948) states that non-unanimous decisions "may affect compliance with and the implementation of Supreme Court rulings" (O'Brien 2011, p. 308). Dissent may also signal that decisions are weak, which may invite legislative overrides (Eskridge 1991) or undermine the decision's authority in lower courts (Peterson 1981; but see Jaros and Canon 1971). Furthermore, conflict may undermine "consensual norms" that courts often attempt to achieve (Epstein, Segal and Spaeth 2001; Caldeira and Zorn 1998).

[5] Additionally, Wood (2008) shows dissent rates that vary in four Commonwealth courts. The High Court of Australia has varied between 20% to 50% (1965-2001); the Supreme Court of Canada from 9% to 40% (1969-2003); the South African Court of Appeals, less than 15% (1970-2000); and, the Law Lords from 0 to 35% (1970-2002).

Where allowed to do so publicly, the emergence of dissent at any frequency, at minimum, requires that judges are willing to voice their individual disagreements within a case opinion. Many arguments from the American courts literature emphasize that such dissent arises due to ideology and partisan differences (Schmidhauser 1962; Nagel 1962). From this perspective, dissent is seen as "the product of ideological disagreement among justices" (Brace and Hall 1993, p. 918) and is therefore exacerbated by the degree or amount of political polarization within the court (Epstein, Landes and Posner 2011). In this literature, judges' dissents are driven not only by their individual political preferences, but the fact that the court is composed of judges with policy preferences that differ from one another (Pritchett 1948; Segal and Spaeth 1993, 2002). These arguments have been applied both to the U.S. Supreme Court (Pritchett 1948; Segal and Spaeth 1993, 2002) and to U.S. courts of appeals (Van Winkle 1997; Cross and Tiller 1998; Hettinger, Lindquist, and Martinek 2004). Hurwitz and Lanier (2004, p. 429) argue that with regard to the U.S. Supreme Court there is a "systematic interrelation between the justices' policy preferences and their issuance of nonconsensual opinions." Reinforcing this interpretation, where dissents are common (as in the U.S. Supreme Court), the voting differences themselves are even interpreted as a proxy for ideology (Segal and Cover 1989; Segal and Spaeth 1993, 2002; Martin and Quinn 2002; Giles Hettinger and Peppers 2001).

As a result, the political origins of a court's members are key to understanding dissent. For example, Boyea (2007) argues that cross sectional variation in consensus is a function of ideological diversity on courts, while the overtly political background of elected judges in the U.S. has been found to encourage dissenting opinions because of the incentives to maintain allegiance to partisan positions (Brace and Hall 1993). A similar phenomenon is noted with regard to higher rates of dissent for Spanish Constitutional Court judges with strong party ties (Garoupa et al. 2011) and judges with party allegiances on Portugal's Constitutional Court (Amaral-Garcia et al. 2009).

An extension of this literature, as yet only applied to the American state context, suggests that elected state judges dissent more than appointed judges and they even disagree more with individuals of their same party (Choi, Gulati, and Posner 2010). It has been suggested that this is due to the fact that elected judges have more firmly established preferences and a need to reveal them to the electorate.

In sum, previous literature on judicial behavior on high courts suggests that judicial dissent, while constrained by many potential collective and individual costs, is often associated with either the partisan affiliations of judges or diversity of ideological backgrounds on a court or both. Therefore, dissent should arise more frequently when judges have ideological preferences or when a court is composed of judges whose ideological preferences in fact differ substantially over policy outcomes. [6]

THE CHILEAN CONSTITUTIONAL TRIBUNAL: CONTEXT

Political Context of the Tribunal

We review the work of Chile's Constitutional Tribunal for the period after Chile's return to democracy in 1990 until 2010. Prior to this, authoritarian leader General Augusto Pinochet staged a violent coup against elected Socialist president Salvador Allende in 1973. After the return to democracy in 1990, Chile's political landscape was roughly divided between two coalitions of parties, the *Concertación* made up of several parties of the center left including Christian Democrats and Socialists and the Center Right or Allianza consisting of the National Renewal and Independent Democratic Union parties. The *Concertación* held power in the country continuously from 1990

[6] It should be noted that several important studies on Latin American high courts (Scribner 2011; Helmke 2002, 2005; Iaryczower et al. 2002; Kapieszewski 2012; see Kapieszewski and Taylor 2008 for an overview) suggest court outcomes and policy influence reflect the political leanings of members, but they are not interested directly in the frequency of dissent. In these studies, the judges' ideology is usually defined in terms of the judges' alignment with the sitting president (rather than political affiliations). Helmke (2002, 2005) analyzes executive decrees and Iaryczower et al. (2002) analyze decrees and congressional laws. Scribner (2011), who also focused on case outcomes, codes Latin American judges on a liberal/conservative continuum, but only for a limited number of cases.

through 2010. The first president in the democratic era, President Patricio Aylwin, created the Commission for Truth and Reconciliation or the Rettig Commission to investigate human rights abuses under Pinochet. Besides exposing gross human rights abuses, the Commission was especially critical of Chile's judicial system, particularly holding Chile's Supreme Court responsible for these abuses due to its extreme deference to those in power. While Aylwin was unsuccessful in pushing through many judicial reforms, his *Concertación* successor, President Eduardo Frei Ruiz-Tagle was more successful in his reforms, which mainly focused on the supreme court and criminal law reforms, but leaving reforms to the Constitutional Tribunal largely untouched.

Not until 2005, were major constitutional reforms enacted under President Ricardo Lagos (Socialist of the *Concertación*) which allowed for the removal of authoritarian elements from Chile's constitutional order as well as substantial changes to the Tribunal itself (discussed more below). The 2005 constitutional reforms made sweeping changes to other political institutions, such as the Senate in which long-time life appointees were no longer able to participate. To many, the constitutional reforms represented the final phase of Chile's transition to democracy, which had been stymied by remnants of the authoritarian era embedded in the constitution as well as the Center Right's failure to agree to such reforms for over a decade after the resumption of elected government in 1990 (See Montes & Vial 2005; Heiss & Navia 2008 for an overview). Some scholars suggest that the 2005 reforms were only possible after the center left or *Concertación* acknowledged that it would soon lose power to Chile's Center Right, which it did in 2010, for the first time since Chile's return to democracy. In this year, Chile elected its first Center Right president since 1990, Sebastian Piñera.

Description of Chile's Constitutional Tribunal

While Chile's Constitutional Tribunal operated for only a short period in 1973 prior to the coup, it is unusual in that it was recreated under an authoritarian regime in 1980 (See Barros 2002

for a description of the Tribunal's work during this period). In the democratic period, beginning from 1990 onward the Tribunal had two distinct periods which are the subject of this analysis and are divided by the Constitutional reforms in 2005 which came into effect in 2006.

Judicial Selection prior to the reforms

Unlike Chile's Supreme Court,[7] Chile's Constitutional Tribunal employs a mixed appointment system for selecting judges. Such a selection system allows several different political and non-political actors to select different Tribunal judges, which in turn provides an additional means by which diverse preferences can arise within the same court and ultimately influences the lawmaking process.[8] Prior to the reforms (under the 1980 Constitution), the Supreme Court selected three of the Tribunal's members from among the ministers of the Supreme Court. Couso (2004) points out that these members tended to be particularly apolitical "bring[ing] to the court the deferential habits of the regular judiciary" (p. 87). The remaining four members were selected as follows: the president nominated one, the Senate (by absolute majority) selected one, and the military-dominated *Consejo de Seguridad Nacional* (CSN) selected two.[9] This pre-reform Tribunal largely consisted of judges who were associated in some way with the Supreme Court and thus non-partisan as well as several judges who were appointed during Pinochet's authoritarianism and thus representative of those era's preferences. Under this pre-reform selection method, only about thirty percent of Tribunal judges were appointed by elected politicians.

[7] Chilean Supreme Court judges are largely selected by the Court itself, which prepares a list of five candidates who can be nominated by the President with Senate confirmation—a mechanism that has reinforced an insulation from politics. Indeed, Chile's Supreme Court judges have been regarded as mechanical appliers of law both before and after the transition to democracy, to the point of being criticized for insufficiently constraining the executive (Hilbink 2007; Correa Sutil 1993, Hilbink and Couso 2011). Senate confirmation of presidential nominees was added in 1997.

[8] Note that most other work on judicial voting, with the exception of Pellegrina and Garoupa (2013) and Hanretty (2012), is limited to high courts in which all the judges of a high court are chosen by the same political actor or actors.

[9] The CSN created under the 1980 Constitution was composed of the President of the Republic, the president of the Supreme Court, presidents of the Senate and Chamber of Deputies, heads of the armed forces and the Controller General.

Tribunal Powers prior to the reforms

The military regime's 1980 Constitution gave the Constitutional Tribunal the power "to make absolute binding decisions on questions of constitutionality at any phase of the legislative process" (Siavelis 2000: 38-39).[10] With this relatively broad power of abstract judicial review,[11] the Tribunal may find parts of proposed legislation to be unconstitutional and require the legislature to make modifications prior to enactment. The Tribunal automatically reviews all laws that involve a precept of the constitution, organic law, or treaty norms.[12] The Tribunal also reviews abstractly other laws that the President or either chamber (in its entirety or one-fourth of its members) refers for its review.[13] When exercising its abstract review powers, the Tribunal is generally reviewing whether laws of the government currently in power are constitutional or not. Further, as noted by Ríos-Figueroa (2011), abstract cases have *erga omnes* effects, which mean that the "effects [of the decision] are valid for everyone" (p. 41).

Judicial Selection after the reforms

After the reforms, elected politicians were given a much greater role in the appointment of Tribunal judges. With the constitutional reforms in 2005, the Supreme Court continued to select

[10] Chile is noteworthy in this respect, having established its abstract review process under its authoritarian regime. The 1980 reforms that created the abstract review power reflected the regime's desire to "protect private property and bolster parties defending the status quo" (Barros 2002: 323).

[11] *Control de constitucionalidad del proyecto de ley aprobado por el Congreso Nacional*

[12] CL. Const. of 1980, art. LXXXII § 1; and CL. Const. of 2005, art. XCIII § 1.

[13] These are known as *requerimientos de inconstitucionalidad presentado por senadores o diputados*. While most of Chile's abstract review cases involve policy changes that must be reviewed by the Tribunal due to their constitutional impact, these *requerimientos* are separately initiated by politicians. In practice, this process primarily allows the opposition in Congress to submit legislation or executive decrees for constitutional review over controversial issues such as the distribution of the morning after pill or financing Chile's controversial public transportation or Transantiago project. Prior to the 2005 reforms, *requerimientos* constituted 19% of all abstract cases before the Tribunal. The potentially broad powers, in conjunction with the political detachment of its authoritarian origins, led to questions about the Tribunal's legitimacy after the transition (Heiss and Navia 2007) and a pattern of judicial restraint that has been interpreted as necessary to protect its autonomy (Couso 2005). CL. Const. of 1980, art. LXXXII § 2; and CL. Const. of 2005, art. XCIII § 3.

three individuals for membership, but these judges are now required to be from *outside* the judicial branch and primarily have academic backgrounds. Also under the reforms, the President now chooses three members, the Senate chooses two members (by a two-thirds majority), and the Chamber of Deputies with Senate approval chooses two members. The Tribunal's size increased from seven to ten members and each now serves for a nine year non-renewable term.[14] After the reform, seventy percent of the Tribunal is appointed by elected politicians, with three members directly representing the president's preferences without the involvement of other actors.[15]

Tribunal powers after the reform

The constitutional reforms of 2005 were designed to remake the Tribunal as an institution of the democratic period. While the Tribunal maintained its abstract review periods after the reform, it also was given the additional powers of *concrete* review for certain types of cases (*recursos de inaplicabilidad*) previously heard, although with a slightly different understanding, by the Supreme Court among its other cases. The movement of these cases to the Tribunal was due to the unwillingness of the Supreme Court to confront the state on important issues and to make constitutional interpretation more uniform by allowing only one court to monitor the constitutionality of laws (Couso and Coddou 2010, p. 394-95, fn 22; Pfeffer 2005). Concrete cases are heard by five judge panels rather than the full court.

For concrete cases, the Constitutional Tribunal decides whether the application of legislation to a particular case is contrary to the Constitution in a given case or not (See Couso and Coddou 2010). According to legal scholars, the post reform concrete cases required an actual case and controversy which was not required when the Supreme Court heard these cases in the pre-reform

[14] Two ministers, Cea and Colombo, who were on the Tribunal after the reform, were originally appointed before the reform by the CSN. Both have been replaced since the end of the period under study.

[15] Partly as a result, this period has also been characterized by a more activist Tribunal (Couso and Hilbink 2011).

era. According to Couso and Coddou (2010) and Figueroa (2013), this difference caused quite a bit of confusion among the judges. Further, post reform concrete cases could now be filed by parties to the law suit or a judge who adjudicated the case at a lower level. Couso et al. (2011) claim that because the concrete cases may now be brought by ordinary citizens "[t]his increased accessibility and visibility strengthened the link between the citizenry and the Court while at the same time lowering the political cost of decision-making for the justices." (p. 126).

More generally, in concrete cases, the Tribunal predominantly reviews the applicability of currently enacted legislation of prior governments to a given case and controversy. Therefore, in these types of cases, the Tribunal may be reviewing laws enacted under the period prior to Pinochet, during Pinochet's regime, and various other laws of the democratic period. Unlike abstract review cases, these cases of concrete review do not render the law unconstitutional, but simply state that it is inapplicable in a given case. Without a system of legal precedent (Couso et al. 2011), the impact of individual rulings in the context of concrete review is more limited compared to abstract review.[16] In comparison to abstract cases, concrete cases have *inter partes* effects which means the decision is "valid only for participants in the case" (Ríos-Figueroa 2011: 41). Both types of judicial review practiced by one or more high courts is common, especially in Latin America (see Ríos-Figueroa 2011). Although there has been some theorizing about the impact of the two different types of review or case types (See Ríos-Figueroa 2011; Couso and Hilbink 2011; Sadurski 2008), there has been little or no statistical testing of whether the case type results in differential judicial behavior.

[16] However, the Supreme Court and Constitutional Tribunal have differed as to their approach towards these kinds of cases (Couso and Coddou 2010).

The reform also allowed for a new type of abstract review[17] allowing judges to find unconstitutional statutes already passed by the legislature.[18] These cases now have *erga omnes* or universal effects, but have occurred infrequently, only nine cases within the sample of cases we analyzed.

The reform, providing the Tribunal with responsibility for abstract cases and concrete cases, in essence put all judicial review functions under the control of the Tribunal. While the Tribunal has decided on average less than fifty abstract cases per year before and after the reform, the addition of concrete review has added approximately 150 to 200 cases to the Tribunal's annual docket. Post reform, abstract cases constitute 17% of the Tribunal's docket and concrete cases 83%.[19] All the Tribunal cases are publicly available on the Tribunal's website.[20] Decisions are reached by a majority voting rule. Each case includes the majority opinion and reasoning as well as the identity of judges who cast votes in each case. The cases also indicate if anyone was absent from the vote. Judges' separate or joint dissents and the reason for the dissent appear after the majority opinion. The dissents often provide lengthy reasons for disagreements with the majority opinion. In the following sections, we present implications and analysis for the emergence of dissent at both the case and vote level.

TESTABLE IMPLICATIONS FOR CASE LEVEL PATTERNS OF DISSENT

Following the reforms of 2005, we may expect more dissent due to either an increase in the number of judges selected by elected politicians with partisan preferences or an increase in the diversity of judges' with opposing political origins. Just as judges' preferences are attributable to

[17] These are known as *Writ of inconstitucionalidad.*

[18] An example of the writ occurred when the Constitutional Tribunal was confronted with a series of similar cases involving Tax Code section 116 that allowed regional tax directors to make decisions regarding individuals' tax disputes. The majority found that the code section was unconstitutional because it violated individuals' rights to equal protection under the law. This group of tax decisions culminated in Case ROL #681 declaring Section 116 of the Tax Code unconstitutional creating the Tribunal's first precedent.

[19] *Requerimientos*, brought by politicians to the Tribunal, still constitute only a small portion (now 3%) of all cases.

[20] http://www.tribunalconstitucional.cl.

their appointers' preferences in the American (Cross and Tiller 1996; George 2001; Brudney, Schiavoni and Merrit 1999; Gottshall 1986; Carp, Manning and Stidham 2009, 2011; Rowland and Carp 1996; Brace & Gann-Hall) and comparative contexts (Domingo 2000; Magaloni 2003; Garoupa, Gomez-Pomar, and Grembi 2011), we expect the preferences of judges on Chile's Tribunal would likewise be related to their party affiliations. As a result, after the constitutional reforms, the Chilean Tribunal was made up of more judges with party influence on their appointments. This more politically diverse composition after the reform should lead to more disagreement among judges revealed through dissents, as more members of the Tribunal have stronger political preferences as well as more divergent political preferences.[21] Without either strong preferences or strongly divergent preferences, the opportunities for public dissents should be infrequent even without resistance to public dissents *per se.* In Chile, the reform of 2005 created a nearly fully renovated court of judges with diverse political and professional backgrounds, along with greater institutional legitimacy, which should lead to higher dissent rates among cases.

We note that the degree of controversy certainly varies across cases, but in particular would be likely to emerge in cases where the Tribunal's majority has either found a proposed law (under abstract review) unconstitutional or found an enacted law (under concrete review) inapplicable. Therefore, at the case level, dissent on rulings of unconstitutionality in abstract cases means that either judges, if voting their political preferences, disagree as to the policy outcome of the case or if not voting based on political preferences that judges disagree over the action of overriding legislative deference to the current or current and past Congresses in the case of concrete review (See Goff 2005). This intuition is related to Peress' (2009) finding that there are two dimensions of judicial conflict on another high court, the U.S. Supreme Court. According to Peress, the first dimension is

[21] By analogy, with the arrival of New Deal Judges on the U.S. Supreme Court, who institutionalized the writing of separate opinions, dissent emerged due to the divergence of preferences between Roosevelt appointees and sitting judges (Pritchett 1948; O'Brien 2011).

the traditional or political left/right dimension. A second dimension of conflict is based on a justice's willingness to overturn laws or "deference to legislative bodies" (p. 11) or its antithesis "judicial activism" (See also, Solum 2005). This second dimension may be especially important for judges trained in the civil law tradition, such as Chilean judges (Merryman and Pérez-Perdomo 2007). As a result, we would expect that there would be more dissent on cases where the ruling is for unconstitutionality or inapplicability because such outcomes highlight disagreements over the degree of legislative deference.

INDIVIDUAL VARIATION IN DISSENTS

As discussed above, much of the literature suggests that conflict on constitutional courts should be more likely to emerge on older courts when their institutional legitimacy is solidified (Keleman 2013; Couso 2004; Grimm 1994). Dissent may also occur due to two other circumstances involving individual judges. Dissent may emerge when judges are more partisan (See, Choi, Gulati, and Posner, 2010) or when there are judges on the court with opposing political ideologies or preferences (Epstein, Landes, and Posner 2011). To the extent that partisan origins indicate more consistent ideological preferences, judges may be more inclined to use dissents to represent their political viewpoint when analyzing the work of the legislature (Garoupa and Ginsburg 2012). Further, judges who are more political may want to act more politically especially when they have a veto in legislative policymaking. It also could be argued that more politically oriented judges may seek political careers after the bench and vocalizing their preferences in dissent may help solidify their reputations (See Magaloni 2003).

In the context of the Tribunal, judicial appointments by the president have the clearest potential to represent partisan views on the Tribunal. However, judges affiliated with a political party from the *Concertación* or the democratic-era Right are just as likely to have identifiable political

interests, even if they are not appointed by the president. In addition, those appointed by the authoritarian regime before the democratic transition might similarly differentiate from democratic era judges. The Chilean Tribunal also has a category of nonpartisan judges, who are predominantly chosen by the Supreme Court and have expressed no overt inclinations towards or work with a specific political party. Among these different types of judges' backgrounds, if we do not see such differences in the patterns of dissent, then judges might be less concerned with exposing ideology and more concerned about the collegiality and/or legitimacy of the court, which could be enhanced by unanimous decision-making (Baum 2006). Together, appointment by political actors and the political background of judges provides an ideological basis for why certain judges would engage in dissent more than others. Compared to those with non-partisan backgrounds, we expect that judges dissent more when they have backgrounds we would associate with political preferences.

DATA

Our data consist of cases decided by Chile's Constitutional Tribunal from its return to democracy in 1990 until March 2010 – from the democratic transition prior to the assumption of the presidency of Sebastian Piñera, the first President from the Right since the transition. We do not include cases decided during the Piñera presidency as this allows us to consider all abstract cases reviewed by the Tribunal as a review of legislation passed exclusively by the *Concertación*. Each case was reviewed and coded as to type of case (abstract or concrete), outcome, and the vote of each judge on the Tribunal. The analysis includes a review of 476 individual abstract review cases and 457 individual concrete cases. We analyze the data both at the case level, where the unit of analysis is the case, and the vote level, where the unit of analysis is the vote (i.e., to support the majority or

dissent) and which allows us to distinguish among judges. In our vote-level data, there are 3,136 abstract vote observations and 3,175 concrete vote observations across 933 cases.[22]

Our dependent variable at the case level is coded 1 if the case had at least one dissent and 0 if the case was decided unanimously. At the vote level, dissent is coded 1 if the individual judge dissented – voted against the majority – on each particular case (or in some abstract cases, separately reviewed paragraphs within the case).[23]

Our independent variables at the case level include: 1) whether the decisions occurred prior to or after the reform, 2) whether the case ruled a law or part of a law unconstitutional or inapplicable, 3) whether the reform interacted with case outcomes, and 4) whether the Tribunal was exercising its abstract or concrete review functions. First, we use *Reform* to test at the case level and to divide data samples at the individual vote level. Because the reform occurred in 2005, but was not effective until January 2006, we code *Reform* as 1 if the case occurred after January 1, 2006 and 0 otherwise. Outcomes are measured as a variable indicating whether the majority finding was that the law or proposed law in question was unconstitutional or in the case of concrete review the law being applied was inapplicable to the case at hand (*Unconstitutional Ruling*). The interaction term (*Reform*Unconstitutional*) combines reform with the case outcome. This interaction term is used to determine whether the effect of unconstitutionality varies between the pre and post reform period. As to type of review, we code cases as 1 if they involve concrete review and 0 if abstract review.

For our vote level analysis, the judges' partisan backgrounds are key variables. *Concertación affiliation* refers to all judges who are reported to be affiliates of a party within the governing center-left *Concertación* alliance (in practice, the Christian Democratic Party or the Socialist Party) or

[22] Following Staton (2010), we do not separately consider cases in which an identical case was considered under concrete review multiple times in succession with the same outcome, using only the first instance as the unique case.

[23] Concurrences are coded as votes with the majority.

appointed directly by the three *Concertación* presidents: Aylwin, Lagos, or Bachelet.[24] The variable *Authoritarian appointee* indicates that a judge was appointed prior to democratization in 1990 by either Pinochet, the military junta, or the military-dominated CSN. These judges exist on the Tribunal only in the pre-reform period and thus applicable only to the sample with those cases. *Right affiliation* refers to judges who are associated with Chile's right-wing parties or Allianza – the National Renewal (RN) or the Independent Democratic Union (UDI) – who formed the opposition during this period. These judges exist on the Tribunal only during the post-reform period. Those judges with no direct political affiliation or not appointed by either a *Concertación* president, the authoritarian regime, or affiliated with the Right are considered non-partisan and are used as the reference category below. Generally, these non-partisan judges are associated with the Supreme Court due to their appointment by or prior work with the Supreme Court and are generally associated with a more conservative approach to the application of law (Hilbink 2007). Nonpartisan does not refer to judges' ideology, but rather the nonpolitical nature of their appointment by the Supreme Court or non-elected politicians such as the CSN. Table A-1 in the Appendix lists all of the judges, their appointers, background and coding as described above.

CASE-LEVEL ANALYSIS

In Figure 1, we depict the political composition of the Tribunal in two distinct time periods divided by the constitutional reforms. The two pie shape graphs in Figure 1 show the proportion of the Tribunal's votes coming from judges with political backgrounds: Pinochet/junta regime appointees and *Concertación* party affiliates in the pre-reform period and Center-right and *Concertación*

[24] *Concertación* President Frei Ruiz-Tagle, who followed Aylwin, did not select any Tribunal judges.

affiliates in the post reform period.[25] The remainder of the both pie graphs represents generally non-partisan judges, mostly appointed by the Supreme Court, with neither a direct connection to political parties nor the Pinochet regime. As seen in Figure 1, in the pre reform era, the majority of votes in the Tribunal come from nonpartisan judges. Votes from Pinochet/junta and *Concertación* appointees constitute a very small portion of the votes on the court before the reform. It is noteworthy that the *Concertación* votes in this period come from just two judges who served in different years. As a result, the pre-reform Tribunal should not be very partisan by the reasoning stated above. In the post-reform period more votes come from judges with political affiliations, this time from judges affiliated with the *Concertación* and center Eight. Votes from non-partisan judges now make up a much smaller portion of the decision-making process in the Tribunal.

In accordance with our expectation that political affiliation or polarization drives dissent, the dissent rate for the entire pre-reform period is quite low, just 17%. In the post-reform period, the dissent rate for the entire period has increased sharply to 44%, corresponding to a court which has judges from the major political forces in the nation--the *Concertación* or the Right. Nonpartisan judges constitute a much lower percentage of the Tribunal's composition as compared to the pre-reform period. In other words, the post reform Tribunal is made up of more judges affiliated with political parties and as such may be more polarized between parties. A higher dissent rate observed after the reform coincides with a Tribunal with a higher proportion of justices with distinct political backgrounds and a smaller amount of judges who are designated as non-partisan.

In Figure 2,[26] we compare the predicted probabilities from probit regressions of case-level conflict--cases with at least one dissenting vote—on our binary variable for post-reform rulings, a

[25] Party affiliations were determined by official biographical information or news sources confirming such affiliation. This includes all direct presidential appointees. Other judges were confirmed as unaffiliated.
[26] The regression results which generated Figure 2 are found in the Appendix 2, Table A-2.

binary variable for unconstitutional or inapplicable rulings, an interaction term, and a variable for case type (ie. a binary variable for "concrete review"). The specification is as follows:

$$Probit\ \{Pr(Y=1)\} = B_0 + B_1 reform + B_2 unconstitutional + B_3 reform*unconstitutional + B_4 concrete + \varepsilon$$

We test for whether the reform, the case outcome (constitutional or unconstitutional), and the type of review have statistically significant effect on the propensity of a case to involve disagreement. As seen in Figure 2, the growth in the average rate of cases with dissent after the reforms is striking. Pre-reform, abstract cases overall have a much lower predicted probability of dissent than both categories of post reform cases. Dissent is more frequent in all types of cases (abstract and concrete) where proposed or enacted laws are found unconstitutional or inapplicable. In the pre-reform period, 38% of abstract cases that found proposed laws unconstitutional had dissent whereas only 11.6% did where the proposed law was found constitutional in this period. Similarly, 72% and 73% of unconstitutional or inapplicable rulings for post reform abstract and concrete cases have dissent, whereas only about 38% of both types of these cases had dissent when the outcome was constitutional/applicable.[27] It is noteworthy that the propensity to dissent is similar for both post reform abstract and concrete cases regardless of the case outcome suggesting that the alleged lower risk of decision-making in concrete cases, as suggested by Couso et al. 2011, does not affect the amount of cases with dissent that we observe. The overall patterns imply that the change in composition bringing a Tribunal with more politically affiliated judges and divergent interests coinciding with the reform was important. However, the above interpretation presumes that changes in the rates of conflict have occurred monotonically, yet more gradual changes to the makeup of the Tribunal occurred before the reform and affected the rates of dissent as well.

[27] To further investigate whether the reform break was indeed a natural one in the data, we also conducted a Clemente-Montañés-Reyes (1998) unit root test to determine the extent to which the reform provides a natural change point in the annual time series of non-unanimous cases. The test determines both whether a statistically significant structural break exists in the yearly time series conflict rates and whether the "optimal break" occurs at or near the expected time of the reform. This test reveals that a statistically significant and optimal breakpoint in 2005, the year when the reform was enacted.

{Insert Figure 2}

VOTE-LEVEL ANALYSIS

The above analysis determined that cases are more likely to be non-unanimous for the post reform period and for cases where the outcome changes the status quo with outcomes of unconstitutional or inapplicable. However, as stated from the outset, our main inquiry is whether the divergent political affiliations of judges drive their propensity to dissent. To test our predictions above regarding individual dissents, our data is disaggregated to the individual vote, which will allow us both to examine judge-level variation and to distinguish those factors from the effects of case-level variables. To do this, we employ a probit regression on individual dissents. Because there is unmeasured case-level variation in the probability of dissent that influences the interdependent judge-level observations for each case, we use a probit model with random intercepts at the case-level. We analyze three separate samples. The first sample includes all pre-reform abstract cases and the second all post reform abstract cases. The final sample is for concrete review cases which have existed only in the post reform period.[28] For each sample, the regression specification is as follows:

$$\text{Probit } \{\Pr(Y_{ij}=1)\} = B_{0j} + B_1 \textit{Concertacion affiliation} + B_2 \textit{Authoritarian or Right affiliation} + \varepsilon.$$

Figure 3 reports the marginal effects of partisanship and the results which generated Figure 3 are found in Appendix 3, Table A-3. The plotted points in Figure 3 represent the magnitude of change in the probability of a dissenting opinion relative to the non-partisan baseline group (i.e. the vertical line in each diagram).

{Insert Figure 3}

[28] In Appendix 4, we provide a separate analysis of how the outcomes of the cases and judges' political affiliations affect the propensity to dissent at the judge level.

Overall, political affiliations consistently have a positive effect on judges' decisions to dissent. Samples 1 and 2 represent abstract review cases pre and post reform. For the pre-reform abstract cases (sample 1), the results from the first model show that judges affiliated with the *Concertación* or the Authoritarian era dissent more in general, compared to the nonpartisan judges, though the coefficients are not statistically significant at conventional levels. From the case level analysis, we would not necessarily expect statistically significant differences here due to the fact that the Tribunal is not made up of a significant number of politically affiliated judges. For abstract cases in the post reform period (sample 2), *Concertación* and Right affiliated appointees dissent more than non-partisan judges, though the difference is not statistically significant for Right judges.[29]

Sample 3 includes only cases of concrete review, which occur after the reforms. These cases involve whether enacted legislation should be applied to a specific case and controversy. In other words, an inapplicable decision in these concrete cases means that the law should not be applied to an individual case even if the law itself is deemed constitutional. Such a finding does not affect the drafting or rewriting of legislation (at least immediately). For all concrete cases, dissent is more likely to come from judges affiliated with the Right or the *Concertación* political parties, with the latter being of striking magnitude.

[29] Further analysis confirms that in a sample of all abstract cases with unconstitutional outcomes, non-partisan judges dissent more after the reform as well. Prior to the reform, non-partisans dissented about 8% in abstract cases with unconstitutional rulings. After the reform the dissent rate of non-partisans on these cases increased to 25%. We further analyzed a sample of all abstract review cases for both time periods in which Pinochet regime appointees and post-reform judges from right parties were combined into a single dummy variable. In the results from this pooled sample of abstract cases, both *Concertación* and the combined Pinochet/Right dummy variable together have positive and statistically significant coefficients (at $p<0.001$ level and $p<0.05$, respectively).

CONCLUSIONS

The literature on judicial behavior in American courts has emphasized the importance of judges' political affiliations and ideological differences among judges in explaining the occurrence of dissent on courts. We know much less about dissent behavior in courts in other nations, where the norms of consensus and the influence of partisan appointments are less well documented. High courts around the globe provide an opportunity to examine these questions in contexts where the political role of the courts is rapidly changing. The Chilean Constitutional Tribunal in particular allows us to examine these propositions in an environment where both the degree of partisanship and political origins vary considerably.

Since its reforms, the structure of the Tribunal now favors the substantial involvement of elected politicians in the appointment of judges. For the continuing abstract review powers, changes in the makeup of the Tribunal appear to have coincided with a large increase in the overall probability of dissent on the Tribunal in the post reform period compared to the pre-reform period, regardless of the outcome of the case. The period when the Tribunal was composed mostly of judges with no political background, which characterizes most of the pre-reform period, had the lowest percentage of cases with dissent. The post reform patterns for abstract review are also similar to those of the Tribunal's concrete review functions, which began along with the other reforms.

Generally, our empirical analysis finds that judges affiliated with politics are more likely than non-partisan judges to dissent in most situations. This is especially true of those connected to the political center left, though there is weak support for this in the case of judges appointed by the Pinochet regime and judges associated with Chile's right-wing parties.

Importantly for the comparative study of judicial review, we further suggest that this pattern of conflict may reflect a representation of political views on the Tribunal. The overall increase in conflict after the 2005 reforms is consistent with the possibility that these judges may be more

inclined towards conflict as more political actors with different ideologies become involved in the appointments. This finding compliments Hilbink and Couso's (2011) observations that the Tribunal has recently become more politically assertive on several high profile cases.

A greater tendency toward conflict may also suggest an institutionalization of the Tribunal's role as a political actor in the policy making process. In the context of the historical inertia of Chile's judiciary, characterized by many scholars as politically detached, patterns of conflict on the Constitutional Tribunal would seem to reflect increasing political influence on the court, which in turn may have increased the possibility of politically-oriented disagreement. Because the Constitutional Tribunal has extensive judicial review powers and has a legislative veto when deciding most abstract review cases, the political origins of dissent may have consequential policy implications. More comparative research is needed to explore whether the findings in Chile emerge in other political and institutional contexts and whether outcome and case type as well as judicial attributes drive dissenting opinions.

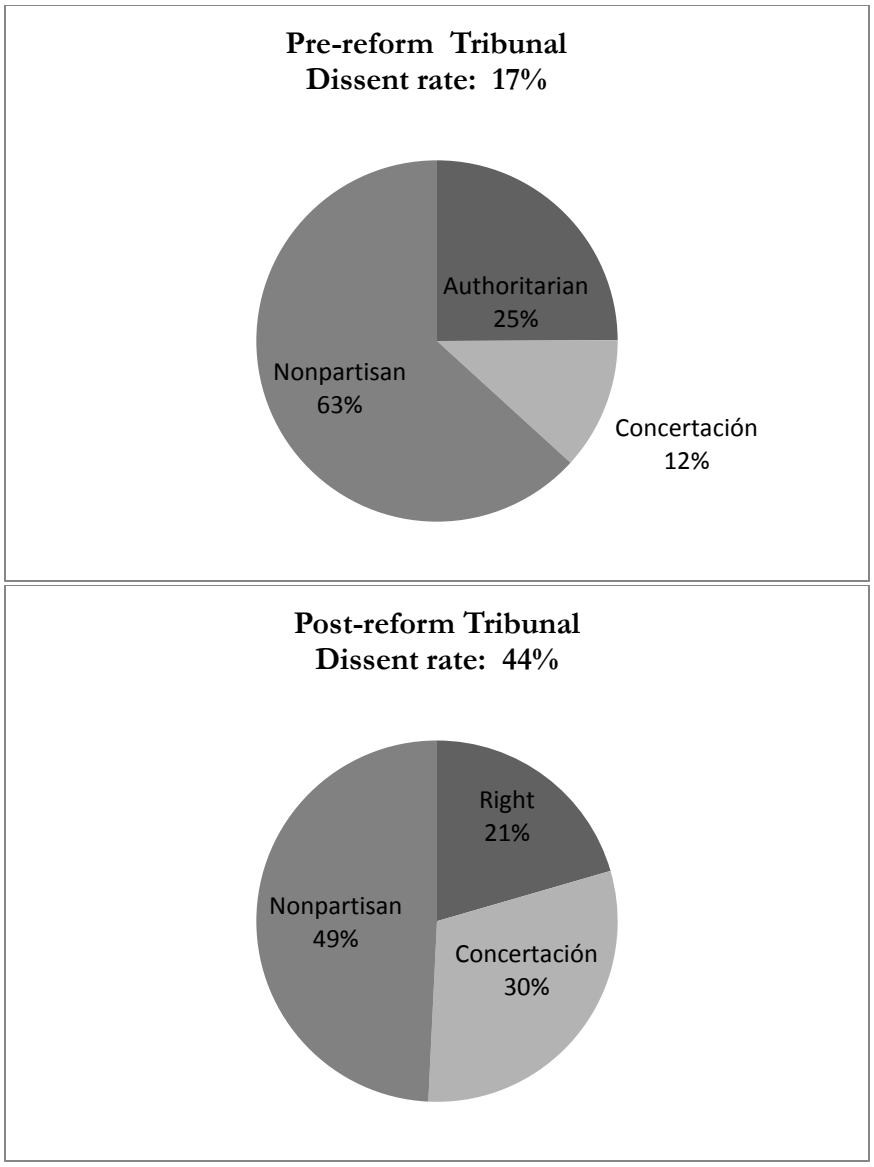


Figure 1. Composition of Tribunal by judges votes

Figure 2. Predicted Probabilities of Rulings with Conflict, by Decision Type, Pre and Post Reform

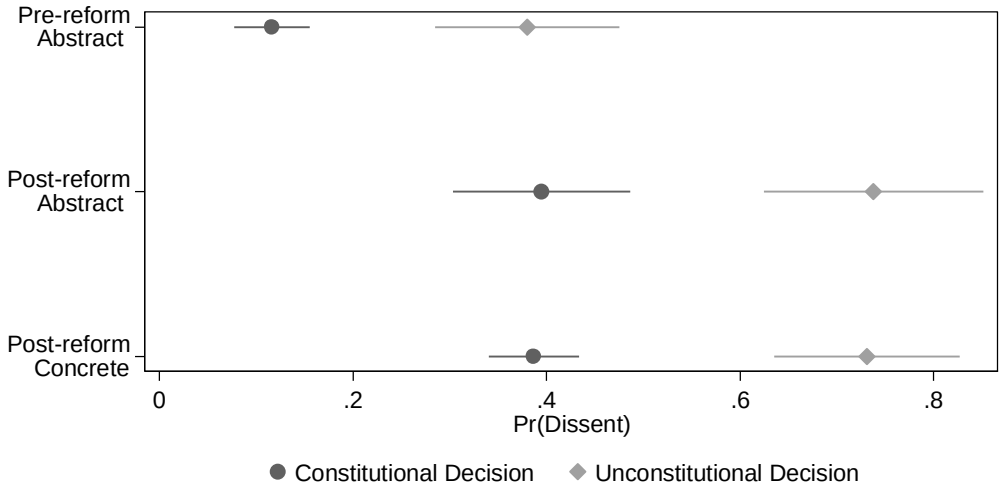
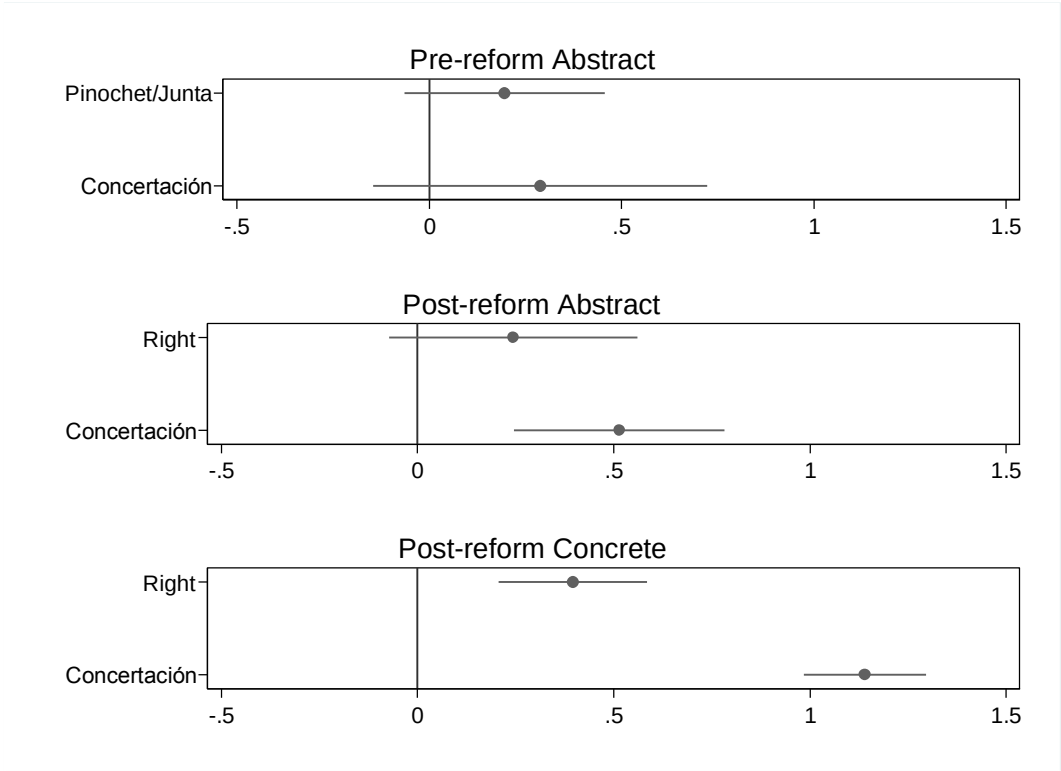


Figure 3. Marginal Effects of Partisan Judges on Probability of Dissent



Note: For each square, the vertical line represents the category of nonpartisan judges or the base group.

Appendix 1: Tribunal Minsters Coding

Table A-1. Tribunal Ministers 1990-2010 and Coding

Minister Name	Appointer	Background prior to Tribunal	Coding
Luis Maldonado Boggiano (1985-1991)	Pinochet/junta	Supreme Court judge	Authoritarian
Eduardo Urzúa Merino (1985-1991)	Pinochet/junta	Supreme Court abogado integrante	Authoritarian
Marcos Aburto Ochoa (1985-1997)	Supreme Court	Supreme Court judge	Non-partisan
Manuel Jiménez Bulnes (1988-1997)	CSN	Attorney	Authoritarian
Hernán Cereceda Bravo (1989-1993)	Supreme Court	Supreme Court judge	Non-partisan
Ricardo García Rodríguez (1989-1997)	Pinochet/junta	Foreign Secretary under Pinochet	Authortiarian
Luz Bulnes Aldunate (1989-2002)	CSN	Law professor	Authoritarian
Eugenio Velasco Letelier (1991-1993)	Pres. Aylwin	Supreme Court judge	Concertación
Osvaldo Faúndez Vallejos (1991-2001	Supreme Court	Supreme Court judge	Non-partisan
Servando Jordán López (1993-2002)	Supreme Court	Supreme Court judge	Non-partisan
Mario Verdugo Marinkovic (1997-2001)	CSN	Supreme Court abogado integrante	Non-partisan
Eugenio Valenzuela Somarriva (1997-2006)	Senate	Supreme Court abogado integrante, Tribunal minister	Non-partisan
Hernán Alvarez García (1997-2005)	Supreme Court	Supreme Court judge	Non-partisan
Juan Agustín Figueroa Yávar (2001-2006)	Pres. Lagos	Minister of Agriculture under Aylwin	Concertación
Marcos Libedinsky Tschorne (2001-2006)	Supreme Court	Supreme Court judge	Non-partisan
Eleodoro Ortíz Sepúlveda (2002-2006)	Supreme Court	Supreme Court judge	Non-partisan
Urbano Marín Vallejo (2005-2006)	Supreme Court	Supreme Court judge	Non-partisan
Juan Colombo Campbell (2002-2010)*	CSN	Tribunal abogado integrante (1991-2001); Law professor	Nonpartisan
José Luis Cea Egaña (2002-2010)	CSN	Tribunal Abogado integrante; law professor	Non-partisan
Jorge Correa Sutil (2006-2009)	Pres. Lagos	Professor; Subsecretary of Interior under Lagos	Concertación
Raúl Bertelsen Repetto (2006-)	Senate	Tribunal Abogado integrante (1997-2005). Ex rector of university;	Right
Hernán Vodanovic Schnake (2006-)	Senate	Professor; Senator 1990-94	Concertación
Mario Fernández Baeza (2006—2011)	Chamber/Senate	Minister of Defense under Lagos	Concertación
Marcelo Venegas Palacios (2006-)	Chamber/Senate	Attorney for President of Senate, Sergio Onofre Jarpa	Right
Marisol Peña Torres (2006-)	Supreme Court	Tribunal abogado integrante, Law professor	Non-partisan
Enrique Navarro Beltrán (2006-2012)	Supreme Court	Law professor	Non-partisan
Francisco Fernández Fredes (2006-)	Supreme Court	Attorney	Non-partisan
Carlos Carmona Santander (2009-)	Pres. Bachelet	Undersecretary general of president 1999-2000; attorney	Concertación
José Antonio Viera Gallo Quesnay(2010-	Pres. Bachelet	Attorney, academic, former deputy and senator.	Concertación

Source: The Chilean Constitutional Tribunal website and biographical information gathered by the authors from journalistic sources. This table lists the ministers serving on the Tribunal from 1990 to 2010. Judges below the thick horizontal line *served* on the Tribunal after the reform, including two (Cea and Colombo) whose appointment mechanism does not exist post reform. Judges below the thin horizontal line were *appointed* after the reforms.

*Colombo was appointed as a Minster of the Tribunal in 2002 by the CSN. Prior to this he served as an *abogado integrante* appointed by President Patricio Aylwin and serving from 1991 to 2001. In this capacity, as allowed under the Tribunal's organic laws, he voted on cases when a quorum was not possible. Due to his ultimate appointment by the CSN, we code him as a nonpartisan.

Appendix 2: Case Level Probit Analysis

Table A-2. Case Outcomes and Types as Determinants of Dissent

Reform	0.865***
	(0.158)
Unconstitutional	0.891***
	(0.163)
Reform × Unconstitutional	0.0211
	(0.228)
Concrete	0.0365
	(0.133)
Constant	-1.196***
	(0.102)
Observations	933

Standard errors in parentheses; *** p<0.01, ** p<0.05, * p<0.10.
Note: These results produce the predicted values shown in Figure 2.

Marginal effects from above analysis

Case outcomes	Pre-reform abstract	Post-reform abstract	Post-reform concrete
All	.1671	.4379	.4515
Constitutional	.1158	.3702	.3841
Unconstitutional	.3800	.7192	.7314

Appendix 3: Vote-level Multi-level Probit Analysis

Table A-3. Partisan Determinants of Dissenting Votes

VARIABLES	Pre-reform abstract	Post-reform abstract	Post-reform concrete
Concertación	0.288	0.515***	1.165***
	(0.222)	(0.139)	(0.0805)
Pinochet/junta	0.196		
	(0.133)		
Right		0.249	0.418***
		(0.163)	(0.0972)
Level 2 variance	0.159	0.326	-1.248***
	(0.258)	(0.280)	(0.248)
Constant	-2.416***	-1.915***	-1.960***
	(0.172)	(0.187)	(0.0821)
Observations (votes)	2,114	1,042	3,175
Groups (cases)	359	117	457

Standard errors in parentheses; *** p<0.01, ** p<0.05, * p<0.10.
Note: These results produce the marginal effects shown in Figure 3.

Appendix 4: Additional Vote-level Analysis Exploring Judges' Affiliations, Case Outcomes and Case Types.

In this appendix, we explore whether the outcome of the case and the interaction of the outcome of the case and judges' political affiliations affect individual judges' propensity to dissent. If judges choose to reveal their political preferences, we may expect the outcomes of these cases to provide the focal point of their political disagreements. In addition, unconstitutional or inapplicable rulings are against the position of deference to the governments that enacted the laws, which itself may vary across judges (Peress 2009; Merryman and Pérez-Perdomo 2007).

Empirically, if judges' political preferences play a role in their decisions to dissent, the outcome of cases should provide the context or meaning of the dissent as well. In abstract cases, unconstitutional rulings mean the Tribunal is finding a law or part of a law drafted, but generally not yet enacted, by the *current* government unconstitutional. In these abstract cases, given that the *Concertación* coalition controlled the government during the period of analysis, opposing preferences of government versus opposition-connected judges may be apparent in cases with unconstitutional rulings. Judges favorable to the *Concertación* may dissent more when laws enacted by *Concertación* governments face review. Conversely, judges affiliated with the Right or the Pinochet regime might reveal an opposite pattern. Although judges with no party association, which we again use as a baseline category below, may not variably interpret laws in terms of policy outcomes, they may have preferences with regard to the notions of legislative deference *per se* (Solum 2005).

We have less clear expectations about how case outcomes may interact with judges' political affiliations under concrete review. Unlike abstract cases, in concrete review cases, judges are engaged in adjudicating controversies between two parties. Further, because *stare decisis* is not institutionalized in Chile or other Latin American countries (Finkel 2003), concrete review rulings have narrower political implications for judges because they involve the review of legislation or

executive decrees in the context of a specific case or controversy and are only binding on the litigants to the action (ie. *inter partes* effects). In the Chilean context, Couso et al. (2011) claim that these considerations as well as the fact that citizens and lower court judges can bring these cases directly to the Tribunal make the concrete decisions less politically risky for the justices. As noted by Shapiro (2004), in concrete cases where laws are found unconstitutional (or inapplicable in the case of Chile), a court's "chance of direct confrontation with the legislature" is diminished "because the very coalition that initially passed the statute cannot be rebuilt some years later" (p. 17). As such, the dimension of the dissent in concrete cases may be based on concerns of legislative deference rather than overt political concerns.

The analysis follows that in the main text, but includes a variable for case outcomes and an interaction term combining *unconstitutional* with the judges' political affiliation. Again, we apply this to three distinct samples: Pre-reform abstract, post-reform abstract, and concrete.The results for this analysis are found in Table A-4 below. For the pre-reform abstract cases, it is clear that differences in voting behavior among judges' with different backgrounds are influenced by outcomes, which is not surprising given their relationship to the *Concertación* government at the time. Judges appointed by the Pinochet regime dissent more when the outcome of the case ruled for constitutionality in favor of the *Concertación* government's laws and dissent less when the outcome is unconstitutional or disfavors the *Concertación*. The interaction with *Concertación* is in the direction we would expect, but not statistically significant. In the post-reform sample when Right judges replace authoritarian-affiliated judges, the variables for Right affiliation and its interaction with case outcome have no apparent impact.

In concrete cases, for inapplicable rulings, *Concertación* justices are indistinguishable from non-partisans and judges affiliated with the Right dissent far *less* than the other two types of judges. The nonpartisans' propensity to dissent more in inapplicable rulings can be interpreted as

consistent with both Pfeffer (2005) and Couso and Coddou (2010) who claim that judges appointed by the Supreme Court may represent the Supreme Court's own historic preference to dislike findings of inapplicability. Although these results are open to interpretation they suggest that *Concertación* judges in particular, and to a lesser extent the other judges, have tended to have been more likely to dissent in most settings independent of case outcomes.

Table A-4. Partisan Determinants of Dissenting Votes, Multi-level Probit Analysis

VARIABLES	Pre-reform abstract	Post-reform abstract	Post-reform concrete
Concertación	0.193	0.512***	1.714***
	(0.344)	(0.160)	(0.122)
Pinochet/junta	0.479***		
	(0.183)		
Right		0.270	1.007***
		(0.190)	(0.170)
Unconstitutional	1.136***	1.014***	1.511***
	(0.221)	(0.362)	(0.18-)
Concert × Unconstitutional	0.168	0.0204	-1.406***
	(0.458)	(0.316)	(0.188)
Pinochet/junta × Unconstitutional	-0.600**		
	(0.267)		
Right × Unconstitutional		-0.0729	-1.897***
		(0.367)	(0.293)
Level 2 variance	-0.0241	0.137	-1.095***
	(0.270)	(0.289)	(0.242)
Constant	-2.778***	-2.051***	-2.537***
	(0.214)	(0.200)	(0.128)
Observations (votes)	2,114	1,042	3,175
Groups (cases)	359	117	457

Standard errors in parentheses; *** p<0.01, ** p<0.05, * p<0.10.

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