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Ideological Voting on Chile's Constitutional Tribunal: Dissent Coalitions in the Adjudication of Rights

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In this article, we examine the relationship between judicial behavior on the Chilean Constitutional Tribunal and the political background of its judges since the constitutional reforms of 2005. We first examine judges' positions on rulings and find that some distinction has emerged among judges with different political backgrounds and between partisan members and nonpartisans. Notably, these distinctions vary across subject matter and case type. Second, we examine the judges' behavior in nonunanimous cases using a multidimensional scaling analysis and find that the pattern of dissent coalitions is consistent with a general separation between the judges with center-left and right backgrounds. Finally, we examine several cases to illustrate the patterns on the Tribunal in this period. We conclude that some ideological differences on the Tribunal have emerged while a broadly "political" pattern of judicial dissents has so far not occurred.

Scholars studying judicial politics have long been concerned with whether judges impartially apply the law or base decisions on their ideological preferences. Ideological behavior on a court entrusted with impartial interpretations may undermine a court's effectiveness, especially for high courts charged with constitutional review and the protection and enforcement of individual rights.[1] Yet, questions relating to the ideological content of judicial voting behavior have not been widely studied outside of American courts and particularly in specialized constitutional courts.[2]

Constitutional courts are typically delegated "enormous discretionary authority" to provide a check on government power (Stone Sweet 2000: 96). In addition to allowing them to determine if enacted laws are inapplicable because they have violated constitutional provisions within a specific case and controversy (i.e., concrete review), constitutional courts often have quasi-legislative functions allowing them opportunities to review laws prior to passage (i.e., abstract review). While these powers are expected to be executed

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impartially and apolitically, these powers in conjunction with constitutions laden with various rights provisions create a "mode of decision-making" where "it is the policy dimension that varies, not the law *per se*" (Stone Sweet 2000: 99, emphasis in original). It is therefore important to understand how patterns of behavior on these courts emerge and how they relate to political fault lines.

The Chilean Constitutional Tribunal (Tribunal) was created during the authoritarian regime of Augusto Pinochet and its role in the protection of rights before and after the transition has been a source of some controversy (Couso 2003; Hilbink 2007; Smith and Farrales 2010; Couso and Hilbink 2011). Since the transition, a myriad of reforms attempted to improve the authority and accountability of the Chilean judiciary. These efforts culminated in major constitutional reforms in 2005 that removed several vestiges of the authoritarian regime under its 1980 Constitution, such as revamping the Constitutional Tribunal to increase appointments from elected actors and to consolidate judicial review power.

In this article, we examine the relationship between judicial behavior on the Tribunal and the political background of its judges. We first examine judges' votes for unconstitutionality and find that while some differences emerged on the Tribunal among judges with different political backgrounds, these patterns do not reflect a clear partisan polarization in terms of their positions on cases. Instead, there is most consistently a separation between these partisan members and the nonpartisans, in that all members with party backgrounds have been more active in supporting the unconstitutionality of laws than those with no prior political affiliation (mostly appointed by the Supreme Court). However, we also find that for many cases, the center-left and right partisans do diverge somewhat in terms of their probability of supporting unconstitutional rulings in non-unanimous cases. Notably, center-left judges tend to support unconstitutionality more often than the right partisans in cases involving criminal law and judicial powers, while the right is the most likely in cases involving social welfare, economics, and property. For no set of cases are party-affiliated judges of either type less deferential than nonpartisans. Within the set of abstract review cases, however, there are no significant distinctions among judges of any kind.

Second, we examine the judges' behavior in non-unanimous cases in terms of the similarity in their voting. Using a multidimensional scaling analysis that estimates the "ideal points" of the judges, we find first that the pattern of dissent coalitions exhibits a regularized voting pattern consistent with what we would expect from ideological voting. The overall pattern is consistent with a general separation between the judges with center-left and right backgrounds. However, there are significant exceptions and many important cases are not predicted by this overall behavior pattern. In particular, some controversial cases thought to be decided on ideological lines are not typical of the general pattern that emerges in the data.

Finally, we examine several individual non-unanimous cases involving the protection of individual rights to illustrate the patterns so far exhibited on the Tribunal in this postconstitutional reform period. We conclude that a pattern suggesting some ideological differences on the Tribunal is beginning to emerge; though a broadly "political" pattern of judicial dissents has so far not occurred. We suggest that, although the number of members with partisan backgrounds has grown substantially, the overt political behavior has likely been mitigated by the diversity of appointment mechanisms and the fact that both government and opposition have a role in choosing many of these judges.

Attitudinal Voting, Politicization, and Their Normative Implications

In the study of US courts, a number of empirical studies have examined how politics or preferences of individual judges affect decision making. Most of these studies find that

the political preferences of judges, especially at the higher court level in the United States are a major determinant of case outcomes (e.g., Segal and Spaeth 1993, 2002; Carp et al. 2011). In the American judicial politics literature, judges' ideological preferences may reflect the party of the appointing president (George 2001) or they can be uncovered in patterns of voting similarity (Martin and Quinn 2002; Epstein et al. 2007). Many scholars of comparative politics have similarly theorized that judicial behavior is connected to the political backgrounds of judges, generally based on their appointers (Burbank and Friedman 2002; see also, La Porta et al. 2004; Feld and Voigt 2003; Moreno et al. 2003; Magaloni 2003). Although this is usually not tested empirically, these scholars generally conclude that a substantial degree of voting in courts outside the United States can be attributed to political factors.

Despite the dearth of studies on ideological voting outside the United States, several noteworthy studies have included empirical investigations of ideological voting on collegial courts. For example, Voeten (2008) has examined how potential judicial biases, such as culture or geopolitics, have influenced decision making on the European Court of Justice (see Humphrey [2010] for the work of international tribunals more generally). In his study, Voeten finds very little evidence that "judges systematically employ cultural or geopolitical biases in their rulings" (2008: 417); although he does find that a judge's country of origin and career incentives have some impact. Amaral-Garcia et al. (2009) find that on the Portuguese high court, a portion of Portuguese judges selected by the legislature prefer voting for the party of the legislators that appointed them. In another example, Westein et al. (2009) have determined that the Canadian Supreme Court exhibits unidimensional voting patterns, but that such patterns are not consistent across issue areas as in the United States Supreme Court. Finally, Sánchez, Magaloni, and Magar (2011) find evidence of ideological voting on the Mexican Supreme Court, noting both a left-right political spectrum that corresponds to political divisions in other branches of government and another dimension of more legalist versus interpretivist approaches (see Bailey and Maltzman 2008).

While determining the existence of ideological voting on a court is an empirical question, a more normative line of inquiry has focused on whether ideological voting is problematic to a court's legitimacy and democratic governance. These lines of critique relate to John Adam's (1780) concern that, in the extreme, a politicized judiciary would mean a state governed by men rather than laws. However, in the opposite extreme, too legalistic an approach may be problematic if judges become too detached from society or insist on applying an excessively textualist interpretation of the law based on their assumptions about deciphering its plain meaning (see Eskridge 1998).

Deviation from legalistic behavior produces a range of normative concerns. Attitudinal voting implies that judges vote their preferences on given issues (Segal and Spaeth 1993, 2002). These preferences are taken to be political preferences or preferences for policy outcomes (Baum 1994) but just as easily could be preferences for particular legal doctrines or interpretations (Hilbink 2007) or for the demonstration of the court's proper role in society (Provine 1980). While these patterns reflect a consistency in decision-making behavior, they are distinct from an overtly "politicized" court in which "judicial decisions appear to be politically motivated" (Ferejohn 2002: 66). In such a court, we would expect decisions to be divided across party lines most of the time and potentially controlled by a single political force. This would mean strong predictability of case outcomes based on the judges' political proclivities and a lack of impartial use of the law and application to the case facts.

Even short of such politicization, some scholars see ideological voting as fundamentally negative for individual rights' protection, while others believe that a complete lack of political preferences renders a judge too detached from the society in which he or she is

making important decisions. In a classic work on the topic, Pritchett (1941, 1948) notes that the judges' identity and their alignment with judges of similar attitudes determine the outcome of decisions. For Pritchett, ideological voting leads to politicized outcomes and distorts the law as intended by Congress. Further, overt ideological voting can mean that judges are not acting impartially (Shapiro 1981).

Although many scholars suggest that too much ideological voting can lead to a biased application of justice, some scholars focusing on Chile have actually had the opposite concern. Correa Sutil (1993, 1997), Hilbink (2007), Couso (2005), and Couso and Hilbink (2011) each suggest that during Chile's authoritarian period and the early years of its transition to democracy, the Supreme Court (which until 2005 was responsible for concrete constitutional review) and the Tribunal were so detached from society and international norms that their often mechanical application of laws failed to respond to human rights violations.

In the context of Constitutional review, it should be noted that a mechanical application of the law without regard to one's preferences may simply not be completely practical. Voeten notes that "[d]isputes over how to interpret abstract individual rights in concrete instances cannot always be resolved by mere reference to statutes or treaties" and thus judges reveal their personal preferences "to find their preferred solutions within the broad constraints defined by the law" (2008: 422). Peretti (2001) goes even further, indicating that ideological behavior is actually preferable. Peretti finds that political voting (on the US Supreme Court) is often beneficial because it allows for the "expressions of pluralist principles of redundancy and diversity of political representation" (2001: 6). That is, the Court is properly representing the views of the elected officials that appointed them.[3]

Based on the above scholarship, our inquiry focuses specifically on the extent of ideological voting on the Tribunal and whether it results in politicized decision making of the extent to which Pritchett finds so worrisome. Prior to the empirical analysis, a description of the Tribunal's historical context, powers, and appointment methods is provided.

The Chilean Constitutional Tribunal

Chile's Constitutional Tribunal was created in 1980 under the authoritarian regime of Augusto Pinochet. Chile's judiciary under this regime was seen as complicit in human rights' violations according to the Rettig Commission's Truth and Reconciliation report issued after the country's return to democracy. While many would argue that the Tribunal provided Pinochet with legitimate cover to impose his authority (see Ginsburg and Moustafa [2008] more generally on courts under authoritarianism), the Chilean Tribunal often appeared to make decisions against Pinochet's interests. As some scholars argue, the Tribunal's assertiveness during this period appeared to be due to political fragmentation within the military junta itself (see Barros 2002, 2008; more generally on fragmentation Ferejohn 2002). Barros (2002) argues that the Tribunal itself was instrumental in creating a legal environment allowing for the plebiscite and democratic election that ushered in Chile's transition to democracy.

After the return to democracy, the Tribunal was still described as hesitant to use its powers to protect individual rights (Couso 2005; Hilbink 2007) despite that its powers and appointment mechanism were significantly different than the existing Supreme Court that was seen as entirely inactive in the area of human rights under the authoritarian regime (Barros 2008) and after Chile's return to democracy (Hilbink 2007). Unlike the Supreme Court, the Tribunal had broad abstract review powers to review legislation prior to Congressional enactment. The Constitutional Tribunal also had a distinctive appointment

mechanism in which seven judges with eight-year terms were appointed through a mixed appointment mechanism. Until reforms in 2005, the Supreme Court chose three judges, the president chose one judge, the Senate by majority vote selected one judge, and the Consejo Nacional de Seguridad (CSN; an agency created under Pinochet which includes some members of the armed forces) selected two judges. Not only were the majority of judges not appointed by political actors who had been popularly elected themselves but a majority of the judges had been on or affiliated with the nonactivist Supreme Court (Couso and Hilbink 2011). Despite the influence of the Supreme Court, a mixed appointment mechanism where *different* political (and sometimes nonpolitical) actors are involved in appointing a certain number of judges to the constitutional court is supposed to lead to the selection of judges who are more professional and representative of democratic values (see Ríos-Figueroa 2010; Ferejohn and Pasquino 2003). In other words, this selection mechanism should lead to less polarization on the court than a mechanism where the same appointer or appointers select all judges and the choices turn on who is in power at the time of selection.

In 2005, the Chilean government enacted significant constitutional reforms to eliminate many of the authoritarian vestiges under the 1980 Constitution, such as life-appointed senators. The 2005 reforms that came into effect in early 2006 significantly altered the powers and appointment mechanisms of the Tribunal. The significance of the constitutional reforms of 2005 was not a change in the overall scope of judicial review, but rather in the transfer of the Supreme Court's jurisdiction over *recursos de inaplicabilidad por inconstitutcionalidad* to the Constitutional Tribunal. By stripping the Supreme Court of its concrete judicial review function and placing it with the Tribunal, the Chilean Supreme Court is currently a court of highest review for lower court decisions, while the Constitutional Tribunal has both concrete and abstract judicial review powers.

The postreform court continued the mixed-appointment method, but the majority of judges is now appointed by political actors and no longer has extensive professional connections to the Supreme Court (Carroll and Tiede 2011). Although the reforms no longer allow for appointment by the CSN, two judges—Cea and Colombo—who were appointed by the CSN prior to the reform remained on the Tribunal until 2010 and thus are part of our analysis. They were replaced by two presidential appointees—one by Bachelet prior to the end of her term and one by Piñera, the first democratically elected president from Chile's right since its return to democracy (see Table 1). The reforms also allow two judges to be appointed by two-thirds of the Senate and two judges to be appointed by the Chamber of Deputies with two-thirds Senate approval. The supermajority requirements for these candidates as well as the needed agreement of two bodies of the legislature for Chamber appointees arguably render the resulting appointees compromises among the different political parties represented in the legislature.[4] As such, these appointees may be more likely to serve as a moderating force on the Tribunal among members with more extreme political attitudes.

As seen in Table 1, since the reforms, most judges have political backgrounds that associate them with political parties. Most judges are affiliated either with Chile's center-left, Concertación, or the "Right," the Alianza. Other judges have no distinct political affiliations. Concertación-affiliated judges include three appointed by Concertación presidents (Correa Sutil, Carmona, and Viera Gallo) as well as three with Concertación ties (Vodanovic, Fernández Baeza, and Fernández Fredes). Right-affiliated appointees include Bertelsen, Venegas, and newly appointed Aróstica. The rest of the judges (Colombo, Cea, Peña, and Navarro) make up a group of individuals who have not been affiliated with any political party. With the exception of Colombo, these judges are generally regarded as conservative.[5]

Table 1
Tribunal Ministers 2006–2010

Minister/Judge	Party Association	Appointment
Juan Colombo Campbell (2002–2010)	None	CSN
José Luis Cea Egaña (2002–)	None (Conservative)	CSN
Raúl Bertelsen Repetto (2006–)	Right (UDI)	Senate
Hernán Vodanovic Schnake (2006–)	Concertación (PS)	Senate
Mario Fernández Baeza (2006–)	Concertación (PDC)	Camara/Senate
Marcelo Venegas Palacios (2006–)	Right (RN)	Camara/Senate
Marisol Peña Torres (2006–)	None (Conservative)	Supreme Court
Enrique Navarro Beltrán (2006–)	None (Conservative)	Supreme Court
Francisco Fernández Fredes (2006–)	Concertación (PS)	Supreme Court
Jorge Correa Sutil (2006–2009)	Concertación (PDC)	Lagos
Carlos Carmona Santander (2009–)	Concertación (PDC)	Bachelet
José Antonio Viera Gallo (2010)	Concertación (PS)	Bachelet
Iván Aróstica Maldonado (2010)	Right (RN)	Piñera

Note. Party association refers to whether a judge was affiliated in any way with Chile's two main political divisions consisting of the parties of the center-left or Concertación, which included the Partido Socialista (PS) and the Partido Demócrata Cristiano (PDC), or parties of the right or Alianza that included the Renovación Nacional (RN) or Unión Democrática Independiente (UDI). This information came from the Tribunal website and other sources (see Tribunal Constitucional de Chile 2007b).

The political background of judges—such as judges with identifiable ties to Chile's right Allianza or center-left Concertación—provides predictability of outcomes for some cases. Yet, in other cases, the political background of judges may have no clear effect. Taken together, once identified, we expect the Tribunal to be defined by partisan or ideological conflict among judges of different political affiliations when cases deal with certain underlying issues.

Empirical Analysis of Political Background and Judge Rulings

The data for this analysis consist of all non-unanimous decisions since the constitutional reform came into force in 2006 until 2011 (see Tribunal Constitucional de Chile 2007a). For this part of the analysis, our main dependent variable is judges' individual votes for or against the constitutionality of laws—either as a dissent or in the majority. In this data, there were 2,853 votes across 356 cases. The main independent variables are binary indicating whether judges are affiliated with Chile's Concertación or the parties of the Right (i.e., Alianza). For the period analyzed, the Concertación-affiliated judges included judges Vodonovic, Fernández Baeza, Francisco Fredes, Correa Sutil, Carmona, and Viera Gallo, president Bachelet's final appointee to the Tribunal. These judges were all associated either with the Partido Socialista (PS) or the Partido Demócrata Cristiano (PDC) and all of these individuals were selected by appointers who were elected themselves except Fernández Baeza, a PDC-affiliated member of the Tribunal selected by the Supreme Court. Judges affiliated with the Right include Bertelsen, Venegas, and

Aróstica, the first judge to be appointed by Sebastian Piñera, Chile's first right-wing president since Chile's return to democracy. These judges were associated with two prominent right-wing parties, the Renovación Nacional (RN) and the Unión Democrática Independiente (UDI). The two independent variables (Concertación and Right) should be compared to a base group of judges who are classified as independents, who have no political affiliation. These nonaffiliated judges include Cea and Colombo, appointed by the CNS before the reforms, as well as judges Peña and Navarro appointed by the Supreme Court.

We employ a probit model to analyze voting behavior in several types of cases as well as a Wald test to determine if the coefficients for each affiliation are significantly different from each other. The regressions and tests are conducted separately for seven subgroups of cases, including only the category dummy indicated.[6] In the judicial politics field, many scholars, including Scherer (2004), George and Epstein (1992), Carp and Rowland (1983), and Segal (1987), have shown that the effect of judges' preferences is dependent on case types and subject areas. The first two groups are all abstract cases (rulings on the constitutionality of proposed laws from the current government) and all concrete cases (rulings on constitutionality of an application of established laws). The remaining substantive areas include cases involving criminal law, judicial powers, social issues, economics, and property. Criminal cases include those related to criminal process or rights and laws that expand or curtail the powers of courts, such as the law redefining the courts' jurisdiction under Chile's recent criminal law reforms. Many of these cases implicate the rights of defendants. Judicial powers include cases regulating the power and jurisdiction of courts and the rights implicated in the context of judicial process. Social issues include cases that deal with an element of social policy, such as those involving the public distribution of the morning after pill. Economic cases involve such matters as economic policy or banking laws. Finally, property includes cases involving public or private property.

The results for each regression are summarized by a separate row in Table 2 indicating the marginal effect on the probability of an unconstitutional vote for each party affiliation, relative to nonpartisans. The results indicate some variation in voting between the right and center-left, depending on the area analyzed.

Table 2
Marginal Effects of Party Affiliation on Probability of Voting for Unconstitutionality, Probit Estimates

Sample	Concertación	Right	Significant Difference	*n*
Abstract Review	0.19	0.15	NO	742
Concrete Review	0.81*	0.37*	YES	2111
Criminal Law	0.39*	0.19	YES	332
Judicial Powers	1.01*	0.06	YES	1395
Social Issues	0.40*	0.60*	YES	349
Economic Issues	0.36	0.88*	NO	86
Property Rights	0.84	1.55*	YES	68

*$p \leq .05$ significance.

First, we note that differences in voting behavior depend substantially on whether the ruling is in a case of abstract or concrete review. In the concrete review cases, compared to the group of nonpolitically affiliated judges, the Concertación is 81 percent more likely to vote for unconstitutionality and the Right 37 percent more likely—and the former is significantly higher than the latter. However, in abstract cases, there is not only no difference between the Right and the center-left but also no difference in voting behavior between the politically affiliated judges and the nonaffiliated judges.

Second, in these substantive areas of the law, we find some variation in the degree of differences in voting behavior between judges of the right and center-left. The Concertación affiliated judges are more likely than either the right or the base group to vote against unconstitutionality in criminal cases and those involving judicial power. In criminal cases, the Concertación affiliated appointees are 39 percent more likely to vote for unconstitutionality in criminal cases and twice as likely in judicial powers cases, compared to the nonaffiliated judges. In these two subject areas, the Concertación affiliated judges' voting proclivities are significantly different than the Right, which does not differ from the nonaffiliated group. In social issues, both judges again affiliated with the center left and Right are more likely to vote for unconstitutionality as compared to the base group, but the Right judges do so slightly more (60 percent) than those with Concertación affiliations (40 percent). In cases involving economics and property, only the right differs from the base group significantly and only differs from Concertación affiliated judges in the area of property. The right is 88 percent more likely to vote for unconstitutionality than the base group in cases involving economics and 155 percent more likely for property cases. While such cases are not common, they seem to isolate areas the right is particularly willing to intervene—contrary to the broader pattern where they are less so (at least for concrete review). Note that none of the party effects are negative, meaning that the "nonpartisan" judges are never more likely to vote in favor of unconstitutionality than either group.

The fact that partisans are not distinguished from one another other or from nonpartisans in abstract review is consistent with some expectations from the small literature on the topic of review type. Decisions on concrete review, especially those decided in Latin America where *stare decisis* is not institutionalized, usually imply narrower political implications for judges (Finkel 2008). Concrete review in Chile occurs in the context of specific cases or controversies that are not binding to other cases. Therefore, it could be seen as involving fewer political costs for judges to rule against the application of enacted laws to a specific case. In contrast, abstract review involves judges' direct involvement in the policy-making process, potentially nullifying parts of legislation from the current government. Issues of a court's legitimacy are therefore particularly salient under abstract review precisely because judges are exercising their most political role and not their more strictly judicial function of dispute resolution between litigants (Stone Sweet 2000; Ferejohn 2002; Sadurski 2010). In other words, the environment in which political differences are most evident may be those where the political *role* of the Tribunal is least prominent.

Voting Similarity

Beyond the differences between judges on the substance of outcomes, we can also learn a great deal about their similarity by their tendencies to dissent together in relation to their political backgrounds. Here, we want to know if judges dissent with and against other judges in a predictable manner and consistent with expectations of their political background. To analyze these patterns, we make use of each judges' set of choices to join the majority or dissent on a given point and examine them using multidimensional

scaling. This investigation follows the same spirit of classic studies of vote correlations such as done by Pritchett (1948) when deciphering the voting pattern of judges on the US Supreme Court during the Roosevelt administration. To determine that voting patterns were not random, Pritchett calculated the number of times that each judge dissented with each other judge on the Court. In this way, Pritchett could determine whether judges, based on their backgrounds and voting patterns, were forming coherent coalitions. For his study of the Court, he found that there were indeed "watertight" voting blocks (Pritchett 1948: 33) in which one "wing" of the court voted against the other.[7]

We use the Optimal Classification scaling technique (Poole 2000; Poole et al. 2009) to assess the latent patterns within the voting data. This method estimates locations[8] for judges as well as "cutting lines" (the estimated division lines between the majority and minority) that provide the best fit with a set of dichotomous choice data. For each vote, the algorithm estimates the cutting line dividing the majority and minority that best fits with the actual voting behavior. Based on the correct and incorrect predictions from that process across all votes, locations are adjusted until the best-fitting set of locations and cutting lines is obtained. The result is a set of positions that can be taken to identify the basic differences in a set of voting patterns, as well as a set of estimated locations of the cutting line for each vote. Among the advantages of this nonparametric method focused on cutting-line estimation is its suitability to small chambers where other methods can provide distorted results (Poole 2005).

With this technique, not only are the judges' locations in relation to other judges in a voting space apparent but the predictability of judges' voting behaviors on a given case is discernible. In other words, this allows a determination of the extent to which judges are voting according to a consistent set of coalitions that may, in turn, reflect their ideology or political background. In order to ensure that these patterns reflect agreement, we consider judges to have dissented together only when they have jointly endorsed the same dissenting argument.[9] We again limit our analysis at present to the postreform (2006–2010) period because the larger amount of postreform data provides a sufficient amount of variation in behavior and because of the consistency in the makeup of the Tribunal. The judges included their political affiliations, if any, and the method of their appointment is previously listed in Table 1. We include all cases—abstract and concrete review—where the former is separated into the parts of rulings on which the dissent variation occurs.

With this technique, we can get some leverage on the degree of complexity and consistency in the formation of majority and dissent coalitions. The notion of a court as impartial and legalistic suggests complex, multidimensional coalitions. If judges have no consistency in their behavior or emphasize only legal procedure rather than policy consequences, we might expect judges to behave in an unpredictable fashion. If the judges are more ideological or partisan, however, we would expect consistency in coalitions—that is, lower dimensionality—and we would expect judges' agreements to be consistent with their partisan backgrounds. More predictable judges are consistent with consideration of the policy consequences of decisions influenced by some form of underlying ideology.

In terms of dimensionality, the pattern of dissents is clearly not strongly one dimensional. On average, 92 percent of judges' votes are correctly predicted by a one-dimensional model while a two-dimensional model performs better, accounting for 96 percent of an average judge's votes.[10] This is reasonably low dimensionality in the context of a body with generally strong patterns of consensus and few incentives to deliberately vote in distinction from others. Additional dimensions produce negligible improvement.

Figure 1 presents a plot of each minister's estimated locations derived from the pattern of votes.[11] The closer two ministers, the more similar their pattern of behavior on one or

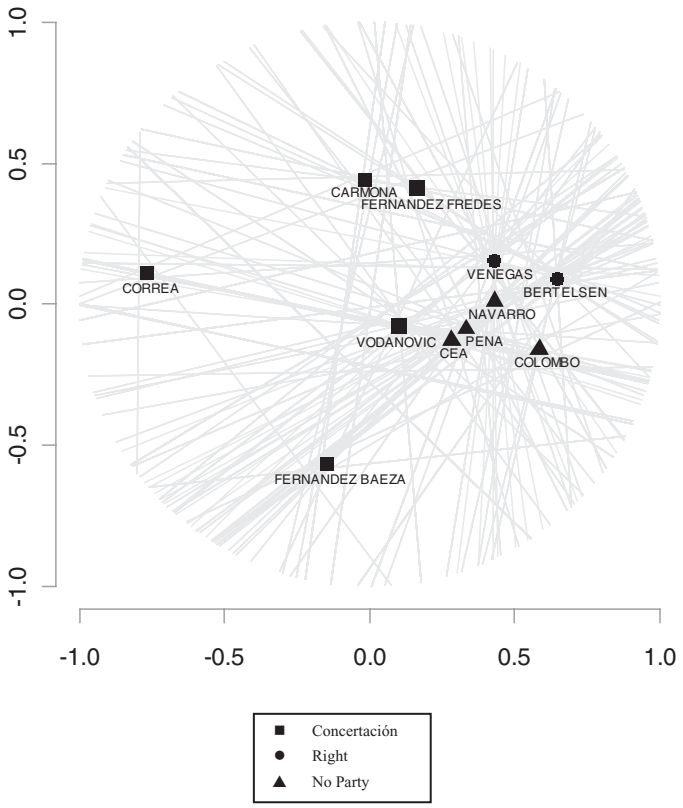

FIGURE 1. All Tribunal judge coordinates and cutting lines 2006–2010.

both dimensions. The gray lines indicate the estimated cutting lines from every decision on which there was conflict, representing the variety of coalition patterns emerging on the Tribunal during this time. The more dense areas represent the more common dividing lines between those majorities and minorities which were predicted. Squares represent judges affiliated with or appointed by the Concertación. Circles represent individual judges associated with Chile's right The triangles are the judges we have identified as not being overtly affiliated with any political party.

The results of this analysis show that the Concertación appointees do indeed tend to vote with each other consistently. Further, the relative proximity of Concertación appointees to one another also means that as a group these judges are voting distinctly different than the other two groups. Judges affiliated with the right and nonaffiliated judges appear as a distinctly different group from the Concertación judges, but there is no other discernible pattern between the nonpolitical judges and the judges from the right who overlap on the diagram. With the exception of Colombo, this is generally consistent with the reputation of these judges who, while lacking party connections, are usually characterized as conservative (noted in Table 1).

It should be noted that, although Concertación-affiliated judges are more likely to vote together than other judges, the separation between them results from the fact that *all* Concertación judges do not typically vote together as a group. Rather, combinations of two or three Concertación judges often dissent together,[12] with other Concertación appointees alongside other judges in the majority. As they are fully separated on the first dimension,

this is consistent with a basic underlying dimension separating the Concertación judges from the others. However, the variation within the Concertación group is inconsistent with routinely partisan block voting.

Case Studies

To illustrate the types of cases driving and diverging from this general pattern, we describe several cases representing both typical (i.e., well predicted by spatial voting) and atypical (i.e., poorly predicted) voting behavior. Each case study highlighted here involves the protection of individual rights in some way. First, we examine examples of voting coalitions that are typical in that they are well predicted by these two dimensions and generally consistent with the divide between Concertación-affiliated judges and other groups of judges. Second, we examine cases in which judges' locations in the general preference space (i.e., their typical behavior) did not predict the majority and dissenting coalitions that formed. These involve situations where the Concertación-affiliated and either the right-affiliated or nonaffiliated judges vote together. Diagrams for each case with the predicted cutting line appear in Figure 2, with the case number referenced in the text at the top of each. In these diagrams, only members actually voting on the case are shown, with dissenters indicated with gray markers.

Well-Predicted Voting Coalitions

Liberty and Security. A typical example of a case illustrating the overall pattern observed was one implicating individual rights of liberty and security under Article 19(7) of the Chilean Constitution. The case involves revisions to monumental criminal law reforms that had been enacted between 1997 and 2001 and implemented between 2000 and 2005 (see Tiede forthcoming, for an overview). The original criminal law reform, referred to as the "reform of the century" (Mohor and Covarrubias 2007: 75), converted Chile's inquisitorial criminal law system to one that was more adversarial allowing for oral trials and the contestation of facts and law between prosecutors and defense attorneys. Another significant part of the original criminal law reforms and in fact one of its main motivations was to limit the amount of time that pretrial defendants were detained in prison. After the return to democracy, Chile's Truth and Reconciliation Commission (the Rettig Commission) specifically called on the government to change the constitution as well as criminal law and procedure to ensure that international human rights standards related to criminal defendants and prisoners be incorporated into Chile's domestic law.

Prior to the criminal law reforms, defendants could be held for long periods of time while the judge investigated the case (Riego 2006). Under the reform, decisions regarding the pretrial detention (*prisión preventative*) of defendants must be decided in an adversarial manner with both the defense and the prosecutor presenting evidence before a single judge (*juez de garantía*[13]) on this issue (Venegas and Vial 2008: 45). The *juez de garantía* is then limited as to when he or she can impose pretrial detention by the requirements set out in the Criminal Process Code, which was enacted as part of the reform package. As initially drafted, pretrial detention was only to be used when other measures of personal restraint were insufficient to complete the proceedings and pretrial detention was not allowed when it would be disproportionate to the seriousness of the underlying crime.

After the reforms were in place, public outcry from citizens, concerned about their security and the release of pretrial detainees who might commit further crimes, led the government to create various expert commissions to draft reforms to the original criminal

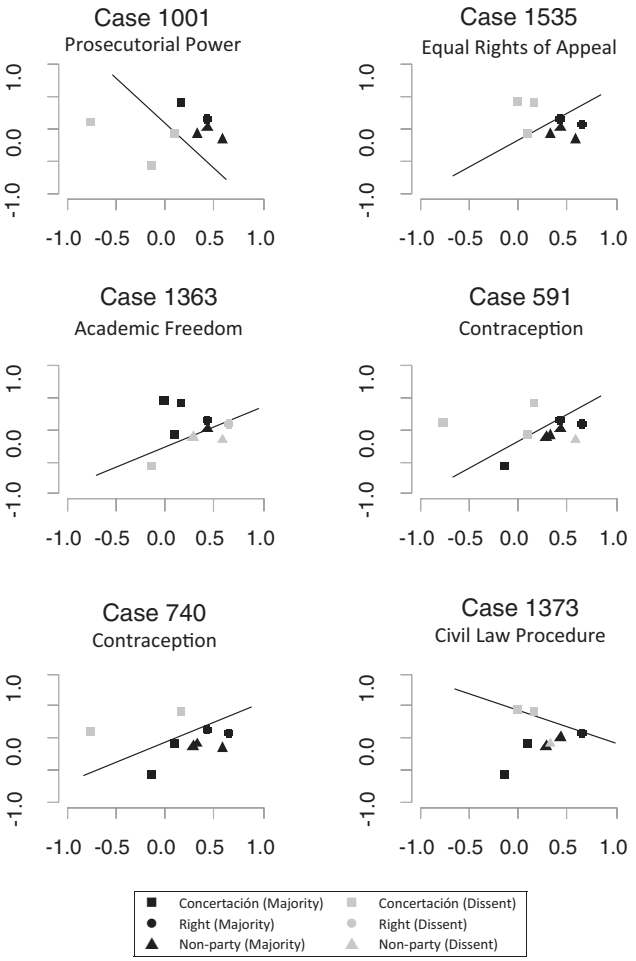

FIGURE 2. Votes and predicted cutting lines on select cases.

law reforms (Duce and Riego 2009). The Tribunal's review of one of these additional reforms occurred in 2008 in Case #1001. This case predominantly focused again on the rules concerning pretrial detention that had previously undergone some revisions. In general, the revisions left in place the practice that pretrial detention should be authorized in only exceptional situations that involved danger to the defendant or society or would make the completion of the investigation difficult. However, the modifications, introduced in 2008, provided more specific direction of when detention would be warranted. One of the provisions in the law allowed the public prosecutor to request pretrial detention for certain crimes on appeal despite the *juez de garantía*'s prior decision to release the individual. The Tribunal overall held that the general reforms and this provision in particular were constitutional. In this case, the majority included Vengas, Colombo, Peña, Navarro, and Fernández Fredes.

Three judges from the Concertación vehemently opposed allowing the public prosecutor to unilaterally decide the status of defendants' continued detention. Instead, they argued that the decision rested with the *juez de garantía*. For the dissent, judges Vodanovic,

Fernández Baeza, and Correa Sutil found that this particular provision violated Chile's Constitution Article 19(7)(3) that said that *a judge* could only allow pretrial detention if it was necessary to further the following goals: the investigation or the security of the defendant or society. In their dissent, these judges voiced their concerns as follows: "The contradiction of both norms [in the law reviewed and the Constitution] is glaring and the Constitution does not authorize that an accused under a judge's decision should remain in detention by the sole will of a prosecutor from the Ministerio Público" (Case 1001: 39).[14]

The diagram of this correctly predicted case is found in Figure 2 (Case 1001). The majority and minority opinions of this decision are separated by the predicted cutting line. The squares on the left side of the line represent the three dissenting judges favoring defendants' individual rights, while the majority appears on the opposite side of this line. This part of the case is well predicted because at least three of the Concertación-affiliated judges are upholding the rights of the accused in opposition to the rest of the Tribunal. As noted from the dissent, their opposition is based on the proposed laws attempt to violate well-established constitutional norms protecting personal liberty and security.

Equal Protection, Right to Defense, and Right to Presumption of Innocence. Another well-predicted case is Case #1535, which is a concrete review case involving the charges of homicide and parricide. The petitioner defendant requested that the Tribunal find Article 277 of the new Criminal Process Code unconstitutional as applied to her case. This code provision allows only the *Ministerio Público* or public prosecutor to appeal decisions by a *juez de garantía* regarding the exclusion of evidence prior to the case being allowed to move to the oral trial phase of the criminal proceeding. In this case, the *juez de garantía* had excluded two prosecution witnesses and other evidence. The public prosecutor then appealed the judge's exclusion decision. The case revolved around the petitioner's claim that the public prosecutor's exclusive right to appeal such decisions violated constitutional provisions requiring equality before the law, equal protection of the law, the right to a legal defense, and the right to a presumption of innocence.

In the overall decision, the Tribunal agreed with the petitioner and found that the part of Article 277 that gave the public prosecutor exclusive appeal rights should not be applied in this case. The majority, consisting of Vengas, Colombo, Bertelsen, Peña, and Navarro, stressed that the law unfairly gave the public prosecutor a right in a criminal trial that no other parties to the action had. The majority consisted of a mix of judges associated with the right or not affiliated with any political party.

The dissent in this case was made up of three judges affiliated with the Concertación, namely Fernández Fredes, Carmona, and Vodanovic. These three judges dissented on the grounds that the majority had given individuals unintended by the legislature the right to appeal issues regarding the exclusion of evidence. In other words, the dissent favored deference to the legislators' decision concerning who should have appeal rights.

The case is well predicted in that the dissent represents a coalition of three judges whose overall behavior is similar and each is associated with the Concertación. Despite the predictable nature of the voting coalition, note that the majority (made up of judges associated with the right or nonaffiliated) are arguing in favor of a more expansive interpretation of rights (here, appeal rights for criminals), while the dissent by Concertación-affiliated judges favors legislative deference. Thus, while Concertación judges tend to vote with each other, it is not necessarily along a dimension consistent with the liberal (expansive interpretation of rights) and conservative (limited interpretation of rights) labels used in US Court literature.[15]

Rights to Education and Academic Freedom. Other highly controversial but poorly predicted cases stemmed from changes under Bachelet's administration to Chile's antiquated education laws implicating constitutional rights to education (Article 19[10]) and academic freedom (Article 19[11]). As a result of student protests in 2007 and 2008, referred to popularly as the "penguin revolution," Bachelet urged Congress to pass a new education law to replace the Organic Constitutional Law on Education or LOCE enacted by Pinochet one day prior to his leaving office. The LOCE was severely criticized for decentralizing and privatizing Chile's education system by transferring the administration of public schools from the Education Ministry to hundreds of municipalities. On April 1, 2009, legislatures passed the Ley General de Educación or LGE to appease critics of the LOCE. Although criticized for not reversing the decentralized control of schools, commentators claimed that the new law redefined the right to education, required stricter conditions for subsidizing private education and created an agency to oversee the quality of education. One of the most contested features of the education bill was its change to the length of the primary and secondary school cycles. The LGE requires six years of primary education instead of eight years under the prior law and six years of secondary education instead of just four.

The law was sent to the Constitutional Tribunal to review in the abstract by senators from opposing parties. In Case #1361 (not shown in Figure 2), sponsoring senators Alejandro Navarro (PS) and Antonio Horvath (RN) as well as eight others from diverse parties asked the Tribunal to rule on the validity of transition provisions. These senators requested that the Tribunal reject the proposed six required years for primary education and return to the prior requirement of eight years especially to assist rural and remote schools. The Tribunal rejected the senators' request and found the proposed law was indeed constitutional, with only a lone dissent from Fernández Baeza, a member of the PDC (a party of the Concertación) since the 1960s.

In a subsequent case (Case #1363), the Tribunal considered the constitutionality of the LGE under abstract review. In general, the majority, composed of Colombo, Cea, Bertelsen, Vodanovic, Venegas, Navarro, Francisco Fredes, and Carmona, found most of the provisions of the proposed law constitutional, except Article 37 dealing with the incorporation of certain exceptions into the law. Fernández Baeza dissented on the constitutionality of the entire law, because it violated the constitutional rights to education and academic freedom.

Despite these general findings for constitutionality for most of the proposed law, groups of several judges filed several separate dissents, one of which provides an interesting example of a cross-partisan coalition that is perfectly predicted by the spatial model on the second dimension of conflict. In one instance, Bertelsen (right-affiliated), joined by Colombo and Cea (nonaffiliated judges) and Fernández Baeza (Concertación-affiliated), found Article 46 of the proposed law unconstitutional on the grounds that it established that only nonprofit and municipal organizations could be "sostenedores" or holders of the right to set up educational institutions in certain areas (see also Setterfield 2007).[16] Such public entities were to work exclusively in education and to receive funding from the government. The judges objecting to this provision of the project unequivocally found that the creation of such public entities violated the constitutional right to academic freedom. Under Article 19(11) of the Constitution, all people have the right to "open, organize and maintain educational establishments without other limitations except those imposed by morals, good customs, public order and national security" (Constitution Article 19[11]; Case #1363: 48). The dissenting judges went on to indicate that the establishment of these public entities as the exclusive decision makers for educational priorities and plans infringed on the guarantee of *all* people to academic freedom. The judges saw a contradiction between this provision

in the proposed law and the Constitution allowing individuals to decide how they want to exercise their academic freedom.[17]

Poorly Predicted Voting Coalitions

Right to Life and Equal Protection. Many decisions are not perfectly predicted by a spatial model of voting, even when two dimensions are considered. One such case was one of Chile's most high-profile and controversial recent decisions, involving the public distribution of the "morning after" birth control pill. These cases implicate the constitutional right to life (Constitution, Article 19[1]) and the right to equality before the law (Constitution, Article 19[2]) and were extensively covered by the media.

When Bachelet, a Socialist party member and physician, assumed the presidency she favored expanding rights for women. One of her initiatives was the distribution of the morning after pill in public clinics, including emergency contraception to women over the age of 14. Previously, the government had allowed the distribution of the morning after pill only in private clinics. Initially, the Health Minister filed a decree allowing for the distribution of the morning after pill in public health centers. In reaction to the decree, deputies of the right or Alianza (RN/UDI) brought an abstract review case to the Tribunal challenging the constitutionality of the public distribution of the morning after pill via a ministerial decree. In 2007 in Case #591, the Tribunal majority, made up of Cea, Navarro, Bertelsen, Venegas, Peña, and Fernández Baeza, found that the Health Minister's decree was indeed unconstitutional because it circumvented the legislative process. Concertación appointees Vodanovic, Fernández Fredes, and Correa Sutil dissented together along with independent Colombo. While Correa Sutil and Fernández Fredes often dissent together, as discussed above, the inclusion of Colombo and Vodanovic is consistent with the relatively liberal reputation of these ministers, despite that Vodanovic often joins coalitions with the right and Colombo consistently does so. Thus, Colombo was not correctly predicted by his overall behavior to have dissented in this case. This type of case may represent the underlying ideological tendencies with regard to individual rights (here, reproductive rights), perhaps influencing the second dimension in some cases, further indicating that the first dimension appears to involve factors separate from ideology.

Underscoring the ideological nature of the topic, a subsequent related 277-page decision (Case 740, heard in 2008), produced the same Tribunal majority (with Navarro absent) supporting the conclusion that the morning after pill was unconstitutional based on their belief that it was a form of abortion in violation of the explicitly antiabortion "right to life" provision in the constitution. Here, Correa Sutil and Fernández Fredes dissented together (as shown in Figure 2), an alliance that was itself correctly predicted, while Vodonovic and Colombo (who strained the predictive ability of a spatial interpretation of Case #591 above) individually dissented on separate points.

The morning after pill majority may indicate how the Tribunal would vote if the court were more consistently politicized. In these cases, on one side of the decision are judges affiliated with the Concertación or thought of as more liberal members of the court, such as Colombo, who vote together favoring women's access to birth control. On the other side of the decision, all judges who are either affiliated with the right or not politically affiliated but thought to be conservative, made use of the constitution's provisions regarding the rights of unborn children. In a highly politicized court, this voting pattern would likely be repeated more often. Instead, as indicated by the poor prediction, this coalition only appears in few cases. Furthermore, the high salience of the case[18] may have helped to drive the ideological divisions. In any event, the rarity of this particular voting coalition provides

additional evidence that the Tribunal is not typically politicized along this cleavage for the period analyzed.

Equal Protection. Case #1373 was decided under the Tribunal's concrete review powers. The voting pattern for this case is also poorly predicted by the two main underlying main dimensions of the voting pattern. This case implicates the Constitutional right to equal protection of the law (Article 19[3]). The case involved the constitutionality of Article 768 of the Civil Procedure Code that allowed judges to reach decisions implicating "special laws" without requiring that they list the factual and legal considerations that motivated the decision. The majority in this case (Cea, Bertelsen, Vodanovic, Fernández Baeza, and Viera Gallo) accepted the petitioner's argument that Article 768 of the Civil Procedure Code violated the litigant's constitutional rights to equal protection. In the majority opinion, the judges' finding was based on the belief that a judge's power is not "absolute" and for ethical reasons they must be required to state the reasons for their decision as required by Article 170 of the Civil Procedure Code. These judges also saw no rational reason why a litigant should be deprived of the reasons for the judgment just because the case was regulated by "leyes especiales."

The minority opinion written by Fernández Fredes, Carmona, and Peña argued that the petitioner's case should be rejected. These judges saw nothing wrong with having different procedures for general civil law cases and those involving special laws. Their argument repeatedly mentioned deference to the legislature in drafting the process by which civil cases were adjudicated.[19] The majority and minority coalitions in this case are poorly predicted by the dimensionality analysis because the emergence of an unusual dissent coalition of judges associated with the Concertación (Fernández Fredes and Carmona) and a nonpolitically affiliated judge, Peña, who was a Supreme Court appointee who normally votes most similar to the right and is considered conservative.

Conclusions

This article has focused on identifying patterns of ideological voting on Chile's Constitutional Tribunal. Our analysis established that judges affiliated with parties of the center-left or right are more likely to vote against unconstitutionality than judges who have no political affiliation and were generally appointed by governmental bodies with members who were not elected (the Supreme Court and CSN) and tended to have conservative or nonactivist reputations. Behavioral differences between appointees of the center-left and right, however, were conditionally present though not stark. Our analysis demonstrates that there are no clear differences in behavior among the three groups of judges analyzed in several areas. Most notably, the three categories have no systematic differences when deciding abstract review cases—the review of legislation that involves some of the most political cases reviewed by the Court. However, the probability of supporting a ruling of unconstitutionality did vary in certain areas by party affiliation. For example, Concertación-affiliated judges, compared to the other two groups, were more likely to vote against unconstitutionality in concrete review cases and the areas of criminal law and judicial powers. Judges associated with the right were more likely to vote against unconstitutionality compared to the other two groups in social issues, economics, and property rights.

While the first part of the analysis established that judges affiliated with political parties were more likely to vote for unconstitutionality than other judges, our scaling analysis demonstrated that Concertación judges were distinct as a group from both the right and nonaffiliated judges.

While the scaling analysis established this general tendency for center-left judges to vote together, the case studies provided a more nuanced interpretation of this general pattern. First, the case studies showed that while Concertación-affiliated judges tend to vote together and group on the left side of the scale, they did not often vote as a bloc. Rather, two and sometimes three judges from the center-left were more likely to agree in the minority together than they were with the other groups, meaning that the differences within this bloc are frequent. This is distinct from what we might expect from a highly politicized or polarized court. Second, the case studies showed that judges do not always vote in a predictable manner. In many of the high-profile cases, such as the cases involving the morning after pill and the overhaul of the education laws, judges' votes were less predictable. Finally, the case analyses demonstrate that for some cases the Concertación-affiliated appointees voting in the minority did not necessarily favor a more expansive (i.e., "liberal") interpretation of constitutional provisions favoring individual rights. In several instances we highlight, Concertación appointees voted against a majority that found that enacted or proposed laws unconstitutionally infringed on rights. This suggests that the main dimension of difference between the center-left and right cannot be clearly characterized as a conservative (rights' restrictive) and liberal (rights' expansive) dimension.

While the study has shown that some voting on the Tribunal can be interpreted as ideological, we suggest that this behavior has not strongly politicized nor polarized the Tribunal in the manner implied by Pritchett's "watertight" judicial blocks. In the case of Chile's Constitutional Tribunal, there neither exist rigid blocs nor do the Concertación appointees always support more expansive interpretations of individual rights on substance.

It should be emphasized that this analysis takes place in an early era of the postreform Tribunal where there has not yet been a sustained period of presidential appointees from both sides of the ideological spectrum and the number of nonpartisan appointees was still supplemented by individuals appointed before the reforms (two by the CSN). Thus, more consistent polarization between partisan appointees may well emerge. However, there are institutional safeguards designed to resist such a trend. The appointment method allowing for different political actors to select fixed numbers of judges ensures that the Tribunal has a diverse cross-section of individuals with different political affiliations and the nonpartisan Supreme Court. In addition, the judges appointed by the Senate and the Senate with the Chamber jointly require two-thirds approval in the former and two thirds of both chambers in the latter. Because of these voting rules, judges appointed by legislative bodies must be supported by a coalition reflecting a range of political views. As a result, Chile's Tribunal is equipped to avoid the perceptions of partiality that might arise from overt politicization or extreme polarization.

Notes

1. We use the term individual rights to broadly mean human rights (usually defined by international law) and civil rights (usually defined by domestic law).
2. For an important recent exception, see Sánchez et al. (2011).
3. Peretti asserts that the dangers are offset by safeguards against overly political courts; safeguards that may be present when courts are involved in statutory interpretation where Congress can change the law to counter the Court but may be absent when courts are involved in constitutional review where Congress would need to overcome the onerous process of amending the constitution to have the final word.
4. Dargent makes a similar assessment of the voting rule for appointing Peruvian judges to Peru's Constitutional Tribunal. He argues that judges selected by two-thirds majority of a unicameral Congress require "political negotiation" to reach an agreement (Dargent 2009: 266). He argues

that reaching such an agreement makes appointees more independent. We similarly argue that Chilean judges selected by the Senate and Chamber requiring confirmation by two-thirds of the Senate would make these judges more moderate and more independent from any one political interest in the legislature.

5. While Cea, Peña, and Navarro are regarded as conservatives by observers, it should be noted that all of these judges were appointed by either the CSN or the Supreme Court and therefore have been appointed by the mechanisms with the least direct connection to the political parties.
6. As the data are structured into individual-vote-level observations, we employ case-level random intercepts to account for factors affecting all votes on a case.
7. Based on his analysis for the Court, he finds "In only a few instances did a justice in one wing find himself dissenting in company with a justice from the other wing. This fact would seem to indicate that there were indeed 'underlying differences of gospel' in terms of which decisions in practically all of these controversial matters were given. . . . Locating the justices along a single attitude scale in terms of relative liberalism or conservatism would adequately account for the judicial disagreements manifested during that period" (Prichett 1948: 33). It should be noted that Pritchett's analysis is based on the 15 percent of non-unanimous decisions given by the Court during this period.
8. These types of coordinates are usually called "ideal points" (e.g., Martin and Quinn 2002).
9. This distinction is necessary only because a number of cases (generally, abstract review) have more than one set of dissents and these sets are not necessarily representing a similar perspective. Thus, such cases actually reflect more than one "vote" in the data structure for this section, allowing us to present these coalitions as substantive agreements.
10. Note that here we are including cases with only a single dissent—"lopsided cases"—that inflate the appearance of unidimensionality relative to numbers that might be more comparable to scaling larger voting chambers. The standard fit statistic Average Proportional Reduction in Error (APRE), which accounts for the bias of lopsided votes, is only 0.64 for a one-dimensional model, compared to 0.84 for a two-dimensional model. This indicates a substantial improvement in the predictive value. For comparison, the recent US Supreme Court produces an APRE of 0.76 and 0.89 (Poole 2005).
11. Note that all members are jointly scaled in this period and depicted on the graph as such, despite that one (Carmona) was appointed to replace another (Correa). Individuals appointed since 2010 are not included in this analysis due to insufficient data for scaling purposes.
12. For instance, the following combinations of Concertación judges appear most frequently together: (1) Correa Sutil, Fernández Baeza, and Vodanovic, (2) Correa Sutil and Fernández Baeza, (3) Correa Sutil and Fernández Fredes, and (4) Carmona and Fernández Fredes.
13. The *juez de garantía* was a judgeship created under the criminal law reform. A single judge or *juez de garantía* ensures that defendants' rights are well respected and decides issues relating to pretrial detention prior to transferring the case to another court for oral trial. The oral trial proceeds before a three-judge panel.
14. "La contradicción de ambas normas es palmaria y la Carta Fundamental no autoriza que un imputado puesto a disposición de un juez permanezca privado de libertad por la sola voluntad de un fiscal del Ministerio Público" (Case #1001: 39).
15. Another example of a well-predicted case where the Concertación appointees find against the protection of individual rights is Case #605. This case involved Chile's Tax Code section 116 that allowed regional tax directors to make decisions regarding individuals' tax disputes. Similar cases pervaded the Tribunal's docket after the constitutional reforms transferred concrete review cases to the Tribunal. The majority in Case #605 and similar cases (generally consisting of Colombo, Bertelsen, Vodanovic, Fernández Baeza, Peña, and Navarro) found that the code section was unconstitutional because it resulted in an improper delegation of judicial power to regional tax directors and because it violated individuals' rights to equal protection under the law. In this and related well-predicted cases, the dissent consisted of Correa-Sutil and Fernández Fredes who often dissent together. They argued that Section 116 was constitutional because it allowed the tax directors to undertake administrative not judicial functions.

This group of tax decisions culminated in Case #681 declaring Section 116 of the Tax Code unconstitutional creating its first precedent. As such, the Tribunal found inadmissible similar tax cases after the date of Case #681 on the grounds that this issued had previously been decided in the precedent-setting case.

16. The provision that was amended several times prior to the Tribunal receiving the law was drafted in an attempt to prevent private institutions from profiteering on education. Although not mentioned by the Tribunal, many teachers protested another provision of Article 46, which allowed university graduates who did not possess teaching qualifications to teach in areas related to their degree in secondary schools for up to five years (Estrada 2009).
17. Another poorly predicted part of this case involved the constitutionality of Article 10 of the proposed law dealing with the rights and duties of individuals involved in the education system. For this, conservative Bertelsen and more liberal Vodanovic joined to find this provision to be outside the Tribunal's abstract review powers. These judges believed that the Tribunal should not have made any findings as to constitutionality of this section.
18. The case received a great deal of national and international attention.
19. In a separate dissent, Navarro, who rarely dissents, also objected to the majority's finding of unconstitutionality.

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