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VIALE INSTITUTIONS, JUDICIAL POWER, AND POST-COMMUNIST CONSTITUTIONAL COURTS

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ABSTRACT OF DISSERTATION

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The Graduate School

University of Kentucky

2009

VIABLE INSTITUTIONS, JUDICIAL POWER, AND POST-COMMUNIST
CONSTITUTIONAL COURTS

ABSTRACT OF DISSERTATION

A dissertation submitted in partial fulfillment of the
requirements for the degree of Doctor of Philosophy in the
College of Arts and Sciences at the University of Kentucky

By
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Lexington, Kentucky

Co-Directors: Dr. Bradley C. Canon, Professor of Political Science
and Dr. Kirk A. Randazzo, Professor of Political Science

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In pursuing their goals, newly-created constitutional courts of Eastern Europe and the former Soviet republics are affected by their institutional setting and capabilities. Yet, previous studies did not explore how constitutional courts develop over time and what noteworthy implications for politics and society result from their institutional growth. To address this gap in the literature, I measured a variety of organizational characteristics and constructed an index of institutional development for the twenty eight constitutional courts in the post-communist countries from the initial year of their transitions through 2005. I argued that high values on this measure (which I labeled the judicial viability score) should enable constitutional court judges to satisfy their policy objectives and improve public and elite perceptions of the judiciary's role in new democratic systems. To demonstrate this empirically, I tested a series of statistical models of judicial influence to show that the level of court's institutional viability has profound implications on its legal, political, and social impact.

My analyses indicated that the level of the constitutional court's institutional viability is, indeed, an important determinant of the constitutional court judges' ability to actively shape public policies and render decisions which are independent of, and in opposition to, the preferences of dominant political actors and government institutions. Additionally, the results demonstrated that the level of constitutional court's viability significantly affects the perceptions of the ordinary citizens and business elites—ordinary citizens and business owners and managers are more likely to express confidence in the national legal system in countries with relatively institutionalized constitutional courts than citizens living in countries with weakly institutionalized constitutional courts. Thus, my research highlights the importance of studying the evolutionary process by which courts acquire institutional viability and, in doing so, contributes to our understanding of the factors shaping the development of democracy, the rule of law, and constitutionalism in the post-communist societies.

KEYWORDS: Post-Communist Constitutional Courts, Institutional Development, Judicial Activism, Public and Elite Trust in Courts, Comparative Judicial Politics

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I consider an alternative hypothesis: if and when the legislature appears as a respondent in a case adjudicated by the CC, the court will be less deferential and more willing to invalidate the statute. While legislatures can retaliate against the courts for negative rulings, the parliamentarians are able to do so only to the extent that they are sufficiently coherent as a group to amass the majorities necessary for retaliation against judicial salaries, terms of office, or jurisdiction. Legislative counterattacks are thus relatively costly and time-consuming responses, and the CC judges should have additional flexibility in deciding the case in accordance with their own understanding of the constitutional law or their own policy goals.⁴³

Fifth, I hypothesize that CCs will be particularly active in ruling against the ordinary judiciary when one of the lower courts appears as a respondent to a case. As Schwartz (2000: 236-237) indicates, general courts in many post-communist states are either unaware of, or deliberately indifferent to, both the constitution and CC rulings (on the Russian case, see also Trochev 2005). Incompetence is also widespread; ordinary judges often misinterpret and incorrectly apply statutes and codes, violating citizens' constitutional rights in the process (see Anderson and Gray 2007). Thus, CCs have many opportunities to review and reverse decisions originating in the ordinary judiciary. Moreover, ruling against the lower courts presents no threat to a CC; ordinary judiciary cannot retaliate against unfavorable rulings (although the possibility of non-compliance remains large). In sum, I expect a greater probability of activism in cases where a lower court is a respondent.

Finally, and for reasons similar to those outlined in regard to the ordinary judiciary, I expect that CCs are more likely to rule against bureaucratic agencies (local and national) and electoral commissions when those appear as respondent before the constitutional courts.⁴⁴

⁴³ Additionally, I already posited that when presidents and individuals appear before the courts as appellants, the CCs will be more likely to rule in their favor. In many cases where presidents and individuals appeal, the legislature appears as a respondent. Therefore, this hypothesis naturally flows from my previous arguments.

⁴⁴ By aggregating administrative agencies and electoral commissions into a single *Bureaucratic Agency* litigant variable, I follow the conventional approach in the bureaucratic delegation literature which views the central/national and regional/local electoral commissions as regulatory and administrative agencies (e.g., see Estévez and Rosas 2008; Lopez-Pintor 2000). These agencies register political parties and candidates, verify candidates' residency and other eligibility requirements, distribute state-provided campaign funds, collect and disseminate election results, disseminate information about electoral rules and

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