

EXAMINING THE DEVELOPMENT OF JUDICIAL
INDEPENDENCE

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Abstract

Even our best theories of judicial independence do not explain well how the institution develops within the state. Generally thought to be a type of insurance for regimes who fear their majority status is in jeopardy, recent research suggests that insurance theory does not offer an adequate explanation until states democratize. We agree and develop a multidimensional theory of judicial independence that focuses on the interplay of the constraints facing ruling elites that derive from the levels of political competition within the government, the potential for social competition within the state, and the state's regime type. We test our argument using a dataset of approximately 145 countries over 40 years, and our results support the argument that development of judicial independence is related to the political landscape encountered by the executive. Ethnic fractionalization in the state, political competition, and regime type each has a conditional effect on the observation of judicial independence.

Most individuals would agree that the ability of courts to provide legal checks against other branches of government without undue political influence is important; this judicial independence offers protections for minority rights and checks against abuses of power by the political branches of government. Indeed, it may be one necessary component for the development of democracy (for example, see Becker 1987; Larkins 1996; Melone 1996; Haynie 1997; Smithey and Ishiyama 2000; Hirschl 2001; Widner 2001; Helmke 2002; Iaryczower, Spiller, and Tommasi 2002; and Herron and Randazzo 2003) and for the protection of democracy against autocratic reversals (Gibler and Randazzo 2011). Nevertheless, despite this importance we actually know little about how judicial independence emerges and develops within the state.

Judicial independence may serve as a type of insurance for ruling regimes that expect turnover. In this framework, the courts guarantee protection for at-risk leaders who fear political reprisals following leadership turnover (Ginsburg 2003; Finkel 2005, 2008). However, while intuitively appealing initially, recent arguments suggest that the theory may have only limited utility beyond democratic states (see Rebolledo and Rosenbluth 2009) and that political competition, its primary causal mechanism, may sometimes counteract the development of judicial independence. As Popova (2010) argues, intense political competition may not make the courts referees; instead the courts themselves become spoils for incumbents to merely rubber stamp their policies.

We argue that part of the explanation for these mixed results involves the inadequacy of insurance theory as a complete explanation either theoretically or empirically across different political environments. Previous studies have also limited themselves either to specific cases or limited time spans. Together, this combination has

greatly hampered the generalizability of arguments about the development of judicial independence within the state.

In this paper we argue that the development of judicial independence is a multidimensional phenomenon conditioned by regime type, the level of political competition within the regime, and the potential for inter-group trust across society as a whole. We evaluate our argument by providing the first large-N statistical test of the predictors of judicial independence using a sample of approximately 145 countries spanning over 40 years. We find that judicial independence is more likely in democracies when the risk of political losses is greatest: when competition is high and when the potential for trust is low. These relationships reverse among non-democracies. We explain our logic in the next two sections—by first demonstrating how previous studies hint at these relationships and then by discussing why judicial independence is controlled by the state’s political and social environment. Our research design and empirical tests follow, and we close with a discussion of the implications of our study.

JUDICIAL INDEPENDENCE AS INSURANCE

Kapiszewski and Taylor (2008, 749) note that conceptual murkiness has hampered studies of judicial independence and led to conflicting results. For example, differentiating between the impartiality of judges during decision-making and the ability of lower court decisions to vary substantially from higher court rulings is essential when considering how institutions affect judicial behavior. Here, we focus on the institutional autonomy of the courts from influence by other branches of government. The power and assertiveness of the court system will be correlated with this type of independence, but

our theory and tests specify only the likelihood that any given ruling will be dispensed without undue influence from other institutional actors within the state.

The most prominent explanation for the development of judicial autonomy within the state involves conceptualizing the courts as potential insurance for politicians. Initially articulated by Landes and Posner (1975), ‘insurance theory’ argues that judicial independence relies on the extent to which those politicians currently in power expect to lose office in the future. Leaders have strong incentives to empower the courts with greater levels of independence when they are threatened politically or when they believe that they will no longer remain in power (see Ginsburg 2003; Ramseyer, 1994; Helmke and Rosenbluth 2009). Consequently, an independent court system, empowered with the authority to protect minority rights and promote the rule of law, forms a system of insurance for fearful leaders that makes *ex post* punishment more difficult.

By focusing on leaders’ expectations of removal from power, insurance theory is driven by the level of political competition within the regime. Finkel (2005, 2008) provides some of the best work on how political competition incentivizes leaders. For example, the PRI-controlled party system within Mexico found itself unable to easily influence local governments and faced increased doubts about its ability to maintain national offices during the early 1990s as opposition parties gained influence. As she points out, the immediate effect of this political competition was for the new president, Ernesto Zedillo, to introduce judicial reforms that would grant judicial independence to the courts. Previously, there was no need for such measures because of PRI’s political dominance, but, as opposition power grew, the PRI began to back judicial independence for two reasons. First, the acquiescence to judicial reforms allowed the PRI to push

through advantageous electoral changes. As importantly, though, the PRI began to see the concession as useful for protection of their interests should the opposition win and the party be removed from office. Political competition thus made judicial independence attractive for governing elites in both the short- and long-term by instituting electoral changes that would aide the PRI's electoral advantage and insure the party's interests should it lose office.

While the case evidence is strong for this theory, we believe the argument is incomplete, especially when the theory is ported to different types of political systems. First, political competition may not always relate positively to judicial independence. Popova (2010), for example, finds that political competition has undermined the establishment of judicial independence in Russia and the Ukraine by turning the courts into political spoils for the party in power; serving as rubber stamps for incumbents. Furthermore, insurance theory fails to account for the changing environment and leader incentives that potentially support a strong executive. Following the dissolution of the Soviet state, the newly elected president of Russia, Boris Yeltsin, clashed with leaders of the Russian parliament over governmental reforms that often came before the new Constitutional Court.¹ Yeltsin suspended the Constitutional Court in the fledgling democracy in October of 1993, dissolved the legislature, and ordered tanks to fire on the parliament building. The incentives to the leader in this case supported a strong executive hand, even if it risked challenging the institutional structure of the state, and this occurred within a political environment that was uncertain and unstable for Yeltsin.

¹ The Constitutional Court declared a number of presidential decrees to be unconstitutional. The president's decree merging the Ministry of Internal Affairs and Ministry of Security; components of three decrees declaring the Communist Party to be illegal; a decree banning the formation of the National Salvation Front; and a televised presidential address were all declared unconstitutional.

Hence, this a difficult case for relying solely on insurance theory to explain the development of an autonomous court.

Similarly, Rebolledo and Rosenbluth (2009, 4) suggest a curvilinear relationship between political competition and judicial independence. They argue that there is little benefit for politicians to advocate judicial independence when competition is weak, and intense competition often leads to judicial manipulation in order to preserve the ruling regime. Therefore, median levels of competition support judicial autonomy. Collectively, these studies imply the relationship between political competition and judicial independence is more dynamic than originally believed and is likely conditioned by other existing political institutions within the state.

Finally, both Rebolledo and Rosenbluth (2009) and Popova (2010, 1204) argue that judicial independence studies have been focused on democracies, and this limits their ability to explain courts that emerge during transitioning regimes. As Popova demonstrates, leaders in partially democratic states possess substantially different incentives due to the instability of the regime and the potential for wholesale replacement of those in power (2010, 1205).² Thus, when leaders face the increased risk of complete regime change they may be willing to grant small increases in judicial independence while remaining reluctant to allow substantial developments to occur. This will be especially true when the potential for retribution is highest.

Judicial independence can also evolve within non-democratic or even authoritarian regimes as court systems develop their own distinct identities that may not

² Popova (2010) labels these partially democratic states ‘electoral democracies’.

reflect the preferences of either the legislative or executive branches of government.³ As Carrubba (2009) demonstrates, strategically oriented courts can provide leaders with tools for enforcing regulatory compliance within the regime. This usefulness to the regime allows the court to create an identity and grow in power; as long as the leaders continue to benefit from this compliance, the regime will tolerate occasional defections from their preferred policies. Too much autonomy breeds sanction from the leadership, but, over time, small policy drifts over time toward increased autonomy lead to the development of distinct judicial independence within the state.

This outline of the literature reinforces both the utility and limits of insurance theory. At-risk leaders are likely to seek additional protections should political shifts occur, and this often includes imbuing the courts with power and autonomy. However, most leaders tend to face more nuanced incentives. As our next section argues, judicial independence can emerge in multiple ways, depending on the political and social environment confronting the regime.

POLITICAL COMPETITION, SOCIAL TRUST, AND REGIME TYPE

A fundamental feature of politics is that politicians pursue choices that maximize their potential to remain in office. This is true whether one examines members of the U.S. Congress (e.g. Mayhew 1974; Fenno 1977; Rohde 1979), the U.S. presidency (e.g. Simon and Ostrom 1988; Canes-Wrone, Herron, and Shotts 2001; Krause 2002; Canes-Wrone and Shotts 2004), or members of parliament across different countries (Browne, Frenreis, and Gleiber 1986; Warwick 1992; Lupia and Strom 1995; Tsebelis 1995;

³ Hilbink (2012) provides an interesting theory of judicial independence development that focuses on ideational factors within the state—professional judges take it upon themselves to instill institutional power into their courts as studies of Chile and totalitarian Spain show. We focus here on the instrumental interests of judges, but the effect we describe is likely to be strongest in cases where professional ideologies are emphasized.

Williams 2011). Leaders must similarly worry about what happens when their tenure is over—when they are voted out of office, are term-limited, or even overthrown. Both types of self-interest affect the likelihood and development of judicial institutions within the state, and self-interest will also condition whether those courts are independent from outside influences.

Courts can have multiple functions within the state, but we focus on two principally. First, insurance theory places primary importance on the role courts can have maintaining minority rights. The risk of political turnover provides incentives for leaders to think about the future and how they are treated when leaving office. Insurance theory assumes, then, that increased political competition prompts leaders to support independent courts that will protect these leaders and their interests from the opposition. While this limits the ability of those in office to extract from the opposition, judicial independence becomes a necessary hedge if political fortunes change.

The limit of this argument is its focus on democracies and stable governments. Turnover in democracies and mixed regimes tend to be ballot driven. However, in non-democracies and authoritarian governments, the potential for turnover rests in both the relative strength of those outside the political system and also how likely those outsiders are to seek revenge if they were to gain political power. This imposes the curvilinear relationship between judicial independence and competition suggested by Rebolledo and Rosenbluth (2009). When outsiders are weak, there is no need for judicial independence because there is no fear of turnover, but when outsiders are strong, and potentially hostile, the courts become yet another means of maintaining the power of the regime.

Court independence then becomes more likely when outsiders are moderately strong and not, especially hostile to the interests of the regime.

The second function provided by a strong court system is its role as legitimizer of the regime in power. In democracies, strong and independent judicial institutions allow political leaders to establish social control, bolster the regime's claim to legitimacy, strengthen administrative compliance, and facilitate trade and investment (Ginsburg and Moustafa, 2008). By investing the courts with adequate authority and independence, the executive establishes a viable institution capable of insuring the stability and performance of the regime. The loss in executive and legislative power to the independent courts is vastly outweighed by its state-legitimizing functions.

Meanwhile, autocratic leaders may sometimes change the nature of courts and use them as private goods in order to enforce compliance with the elite's regime. Carrubba (2009) demonstrates this formally when he shows that autocratic leaders can use the courts to overcome collective action problems within the state, enforcing common regulatory schemes. The *de jure* stamp of approval adds legitimacy to the regime but, even more importantly, provides a common salient focus for organizing the state around leader-preferred policies.

These different uses of courts create an interesting paradox. As the size of the winning coalition increases relative to the size of the electorate so too should support for an independent judiciary, and this is true in both autocratic states and among democracies, albeit for different reasons. In autocracies, the use of the court as a tool for compliance provides a wider dispersal of the private good, while in democracies the courts become a public good that provides stability as well as administrative and

economic performance. Thus, in either type of regime, **(H_{1a})** *the ratio of winning coalition to selectorate size will be positively related to support for higher levels of judicial independence in both democracies and autocracies.* But does this hold true in mixed regimes?

Given the differences in how courts are structured across regime types—private versus public goods systems—it seems unlikely that the effect of the ratio of winning coalition to selectorate size will remain consistent in mixed regimes. As the judiciary moves toward greater independence, encouraging a move toward consolidation of the democracy, it becomes a threat to elite interests, and support for judicial independence among the elites will wane. Thus, **(H_{1b})** *there should be a curvilinear relationship between the ratio of winning coalition to selectorate size and judicial independence in mixed regimes.*

The pool of potential challengers also matters for leadership survival. In some systems, even a poorly performing leader will survive because no alternative exists; or, a replacement leader may come from the same elite group and not really constitute a challenge to the regime or the elites. These are non-competitive political systems and pose little risk to leader survival. High-risk systems for the leader would include any system in which the pool of challengers is quite large or the makeup of the pool of challengers presents a threat to the policies of the leader's group. These competitive systems incentivize leaders to support judicial independence as a safeguard for their wellbeing and policies.

We conceptualize political competition in two distinct ways. First, we consider the level of potential social competition within the state, and we do so with measures of

ethnic fractionalization. High levels of ethnic fractionalization may lead to lower levels of trust within society, which impairs the ability of regimes to coordinate and cooperate in an effective manner. This has long been assumed in the literature on inter-ethnic cooperation (see, for example, Fearon and Laitin, 1996), and, recently, the connection between exposure to diversity and political distrust has been confirmed at the individual-level, using Danish survey data (Dinesen and Sønderskov, 2015)

More important for our argument is that leadership turnover will be more consequential if the challenger represents groups not currently in power. Ethnic fractionalization increases both the number of potential challengers and the importance of maintaining office for the leader's supporters since leadership turnover is likely to yield substantial policy changes. Hence, leaders face a higher risk of turnover in democracies, where the regime's inclusion of social groups enables diverse (and regularized) competition. We suspect, therefore that, **(H_{2a})** *when all groups within society have the potential to provide state leaders, there will be a positive relationship between ethnic fractionalization and the level of judicial independence.*

We provide the caveat of democratic governance for **H_{2a}** (all groups can provide leaders) because, again, the courts act differently in non-democracies. In non-democracies, courts serve the ruling elites by increasing compliance with the elite's regime. Additionally, in autocracies, and even partial democracies, there will be at least one group that is excluded from the elites governing the state, and, therefore, the ruling elites will not support a judicial independence that might encourage rights for politically excluded groups. In other words, judicial independence poses more risk to the non-democratic ruling elite in that the court may facilitate increased political competition

and/or the threat of potential regime and elite change. Therefore, **(H_{2b})** *there will be a negative relationship between ethnic fractionalization and the level of judicial independence in non-democracies.*

Our second source of political competition considers the level of contestation within the institutions of government. As before, we argue that higher levels of political competition within the government will add to leaders' fears about turnover, and this incentivizes the leadership to develop judicial institutions as protection following a change in leadership. Investing the judiciary with adequate levels of independence provides added insurance during times of increasing uncertainty. Recall, though, that private-goods judiciaries may help enforce elite power, and, in non-democratic systems, a more powerful judiciary will not help leaders or their policies following a successful challenge. In other words, independent courts will not protect the ousted leadership in non-democracies since courts serve the ruling elite interests; hence, leaders have little incentive to grant independence for insurance. Thus, increased political competition in non-democracies will be associated with a decrease in the importance and independence of the judiciary. Together, in hypothesis form, we expect that **(H_{3a})** *there will be a positive relationship between political competition (within the government) and the level of judicial independence in democracies,* and **(H_{3b})** *a negative relationship between political competition (within the government) and the level of judicial independence in non-democracies.*

Together, these hypotheses suggest a complex relationship between the sources of political competition within the state and government and the likelihood of support for judicial independence. Our theory takes seriously the different uses of a judiciary within

the state and posits relationships that are conditional upon regime type. We begin tests of these arguments in the next section and outline the first large-N examination of the sources of judicial independence within the state.

RESEARCH DESIGN AND METHODOLOGY

We test our argument on a dataset of judicial independence that includes approximately 145 countries from 1960 to 2000.⁴ To our knowledge this represents the first large-N study focused on the development of judicial independence.⁵

The dependent variable is a composite index of *de facto* judicial independence developed by Linzer and Staton (2012). Using a Bayesian latent variable measurement model, Linzer and Station develop an indicator of judicial independence that ranges from 0 to 1 (independence). The indicator leverages data from several popular identifications of judicial independence, each of which has been limited in scope or temporal range.⁶ Grouping these data as a latent-variable analysis assumes a common characteristic of *de facto* judicial independence unites the indicators, which could prove troublesome if there is substantial conceptual slippage across indicators. However, the trade-offs from this unifying assumption are mitigated by the wide spatial and temporal coverage available when using all indices. The latent-variable measure also minimizes the theoretical and empirical problems associated with coverage boundedness and missing data. As Linzer and Staton (2012, 27) demonstrate empirically, this new index provides ample variation

⁴ Citation to data omitted to protect author identification.

⁵ Gibler and Randazzo (2011) examined a similar number of states across the same time span, but their focus was on the effects of judicial independence, not its establishment or evolution.

⁶ These data include Tate and Keith (2009), Howard and Carey (2004), Cingranelli and Richards (2010), the measure of executive constraints (XCONST) from Polity (Marshall and Jaggers 2010), the Contract Intensive Money (CIM) score, Feld and Voigt (2003), the PRS measure of law and order (Rios-Figueroa and Staton 2010), and the Fraser measure of the rule of law (Rios-Figueroa and Staton 2010).

over time, covers a large number of countries, and does so with a measure that has strong face and content validity.

To examine the potential constraints facing the leader we use the Bueno de Mesquita et al. (2003) measure of the ratio of the *Size of the Winning Coalition* in relation to the size of the selectorate.⁷ This variable ranges from 0 to 1 with higher values associated with larger winning coalitions,⁸ and we expect larger winning coalition ratios to be associated with higher levels of judicial independence.

Our *Ethnic Fractionalization* measure captures one aspect of the degree of heterogeneity and socio-political competition within a society. We use the Fearon and Laitin's (2003) measure of the population share of the largest group in the country. Inverted for the sake of presentation, the variable ranges from 0 to 1 with higher values depicting greater heterogeneity within the population. We expect increased heterogeneity to decrease political trust and hamper calls for judicial independence within the state.⁹

⁷ These data along with the other primary independent variables were obtained through the Quality of Government dataset (Toerell, Samanni, Holmber and Rothstein 2011) maintained by the University of Gothenburg.

⁸ To avoid any potential problems with circularity or endogeneity we lag all independent variables by one year ($t - 1$).

⁹ An anonymous reviewer rightly noted that the ELF measure has been criticized extensively for its use as a proxy for ethnicity. Nevertheless, we are trying to discern the base likelihood of finding interpersonal trust among citizens—our argument is that, with trust, judicial independence is more likely. Chandra and Wilkinson (2008) have one of the most damning critiques of ELF when used for identifying ethnicities, but their critiques of the measure do not necessarily relate to our use of the statistic and, potentially, conservatively bias our tests in favor of the null hypothesis. For example, Chandra and Wilkinson (2008, 527-536) argue that neither the data nor the measure match the concept of ethnicity well because there is, among many other possibilities, a strong likelihood of not being able to capture the overlapping identities or non-activated identities in any given country. Importantly for our study, alternatives like the Ethnic Imbalance (ECI) measure or the ethnic vote measure, both advanced by Chandra and Wilkinson (2008, 536ff.), have the potential to be influenced by political institutions within the state—either institutions like the army or bureaucracy for ECI or the party system and electoral process for EVOTE. As Chandra and Wilkinson (2008) themselves point out, ELF is a measure of diversity that is prior to ethnic activation and, we believe, represents a conservative proxy for the potential for trusting another citizen based on how likely that citizen is to be described as different.

We identify the level of political competition within the government using Vanhanen's (2011) *Index of Political Competition*. This index calculates the percentage of votes gained by smaller parties in parliamentary and/or presidential elections—a simple subtraction from 100 of the largest party's vote share, multiplied by the percentage of the population who voted. Higher values are associated with greater levels of political competition within the state that should increase pressure for judicial independence.

We also control for several state- and international-level factors that may affect levels of judicial independence. For example, since external threats to the state often reduce the number of institutional veto players and dampen internal political competition (Gibler 2010), we control for the level of external threat that targets the regime, and we do so in multiple ways. First, we include the *Index of Civil Unrest* from the Major Episodes of Political Violence (MEPV) data, 1946-2008 (see Marshall 1999); it ranges from 0 to 10 and sums the magnitude of civil violence, civil war, ethnic violence, and ethnic war. The second variable, *Militarized Neighbor*, identifies the highest level of state militarization—percentage of the population in the military—among all bordering states (see Singer, Bremer, and Stuckey 1972). Finally, we include a dichotomous measure for the presence of a *Territorial Rivalry* based on Thompson's (2001) list of strategic rivalries; these rivalries indicate an explicit desire by bordering states to negotiate the division of territory between the two states.

Our second set of control variables identify state attributes associated with judicial independence that could conceivably be related to our independent variables of interest. The level of democracy as measured using the 21-point, combined *Polity IV*

score, and we use this level of democracy measure as a base component for our interactive terms. We include a variable measuring the *Age of the Court* and its square, *Age of the Court Squared*; judicial independence may simply be a function of time, with higher levels developing as courts gained more legitimacy through the years. Finally, we include a measure of state wealth (*GDP*) and assume a correlation between wealth and the openness of the political environment; wealth is a notoriously good predictor of democracy and political decentralization and often accounts for a great deal of the variation in political processes within the state. Together, we believe our controls provide a strong null hypothesis that independent judiciaries are merely the products of time, wealth, and/or democracy.

EMPIRICAL RESULTS

Because of the potential for non-linear relationships within our argument, simple regression models are insufficient. Royston and Altman (1994) and Sauerbrei et al. (2004) demonstrate the utility of fractional polynomial regression models instead. As they demonstrate, “the traditional assumption of linearity may be incorrect, leading to a misspecified model in which a relevant variable may not be included because its true relationship with [the] outcome is non-monotonic, or in which the assumed functional form differs substantially from the unknown true form” (Sauerbrei et al. 2004, 3465). Additionally, they demonstrate the utility of fractional polynomial regression over simply including quadratic or cubic polynomials directly into the traditional regression framework. Consequently, we adhere to this advice and estimate a fixed effects fractional polynomial model that allows us to directly detect potential non-linearities in the data

while simultaneously control for unique idiosyncrasies related to specific states.¹⁰ The results of this model appear in Table 1. An F test (not reported in Table 1) indicates that this model better captures any unexplained variance attributed to the unbalanced nature of the panel data structure than a typical regression model.¹¹

Insert Table 1 Here

Examining the results from the fixed effects fractional polynomial regression reveals several interesting patterns. First, we examine the set of primary independent variables that focus on constituent influences facing the executive and observe that both are statistically significant. The variable *Size of the Winning Coalition* is significant and positive indicating that states with larger coalitions in the selectorate will possess higher levels of judicial independence. Additionally, the interaction term *Size of Winning Coalition * Polity* is also significant and positive indicating that the effect of coalition size becomes more prominent as countries become more fully established democracies.

The next set of variables measure the effects of social demographic characteristics, in particular the degree of ethnic fractionalization within a state. Here we observe that *Ethnic Fractionalization* alone does not exert a statistically significant influence on levels of judicial independence. Moreover, though the coefficient on the interaction term *Ethnic Fractionalization * Polity* is significant in Table 1, further examination reveals that the conditional effect of this interaction combined with its base constituent terms is not statistically significant.

¹⁰ We also ran a fixed effects regression utilizing squared terms of each independent variable and interaction term. These results are reported in Appendix A and largely conform to the fractional polynomial regression model.

¹¹ The F statistic (73.03) is statistically significant compared to an OLS model.

Finally, we examine the set of variables related to the amount of political competition within the legislature. Table 1 reveals that the variable *Index of Political Competition* is significant and positive indicating that states with larger numbers of viable political parties will possess higher levels of judicial independence. Additionally, the interaction term *Index of Political Competition * Polity* is also significant and positive indicating that the effect of political competition becomes more pronounced as countries become more fully established democracies.

Turning to the various control variables in the model, we observe some additional patterns of interest among the levels of conflict variables. First, the variables *Index of Civil Unrest and Militarized Neighbor* are both significant and negative. This indicates that states experiencing higher degrees of unrest or which have militarized neighbors are less likely to invest greater levels of independence in their courts. Finally, all of the remaining control variables are statistically significant and positive. Consequently, states with greater investments in democracy, older judiciaries, and larger amounts of wealth all experience higher levels of judicial independence.

SUBSTANTIVE IMPACT OF EMPIRICAL RESULTS

While the results listed in Table 1 reveal interesting patterns, it is difficult to identify the substantive impact and conditional (and potentially non-linear) relationships between judicial independence and the size of the winning coalition or political competition. Therefore, we graph the predicted levels of judicial independence against each independent variable and show the separate effects across levels of democracy as

well as the overall effect if one were to simply pool the data. Figure 1 reveals this graph for the size of the winning coalition in the state.

Insert Figure 1 Here

As the far right side of the graph reveals if one were to simply examine the pooled sample, and not condition the results on levels of democracy, one would observe a relatively pronounced linear relationship¹² between the size of the winning coalition and judicial independence. Thus, one might reach the incorrect conclusion that increases in the size of the winning coalition *always* lead to increases in judicial independence. However, once we condition this relationship based on levels of democracy, a starkly different pattern exists. Within fully established democracies we observe an initial decrease in judicial independence from approximately .520 to approximately .480 followed by a substantial increase to approximately .780. In states with partial democracies there is a monotonic increase from approximately .370 to approximately .420. However, in autocracies the effect is non-monotonic; their level of judicial independence starts near .200 and peaks around .250 after which it decreases to approximately .210. Taken together, these graphs indicate that executives encounter changing situations related to the size of the winning coalition. Leaders of established democracies have greater incentive to grant higher levels of judicial independence because the likelihood of losing office is high. Similarly, leaders in partial democracies have incentives to increase judicial independence, though these incentives are not nearly as pronounced as those for leaders of established democracies. But leaders of autocracies face a different political environment. Initially they can afford to increase levels of

¹² Though a small non-linearity appears for small winning coalitions, the majority of the figure demonstrates a linear relationship.

judicial independence because the likelihood of losing office is small. However, eventually they must be cautious about granting additional judicial independence because those courts could begin to strike down executive initiatives, which potentially leads to a change in leadership.

These results do not fully support our hypotheses (H_{1a}) that the ratio of the winning coalition to selectorate size will be positively related to support for higher levels of judicial independence in both democracies and autocracies. Instead, we find a nonlinear, concave relationship in democracies for this ratio. Yet, the initial decrease remains relatively small compared to the substantial increase in judicial independence overall. Similarly, we find a curvilinear, convex effect on judicial independence in autocracies contrary to our expectations. In partial democracies, we predicted (H_{1b}) that there should be a curvilinear relationship between the ratio of winning coalition to selectorate size and judicial independence. Yet, we discover a monotonic increase in judicial independence.

Insert Figure 2 Here

Examining Figure 2 reveals the effects of political competition within the government on judicial independence. Here we observe a linear relationship regardless of the levels of democracy within a state. Whether one examines the pooled sample, or separately looks at established democracies, partial democracies or autocracies the relationship remains consistent. As legislatures become more politically competitive this leads to higher levels of judicial independence. These results provide partial support for our hypotheses. Our expectation (H_{3a}) that there is a positive relationship between political competition and judicial independence in democracies is supported empirically.

However, our expectation (H_{3b}) for a negative relationship between political competition and judicial independence in non-democracies does not receive empirical support.

CONCLUSIONS

What are the conditions under which states invest their courts with meaningful levels of independence? The most frequent theoretical explanation is that judicial independence serves as insurance to political leaders to protect them from potential abuses of power when they lose their majority status. While this theoretical argument possesses an intuitive appeal, the empirical evidence concerning its support is mixed. We argue that part of the explanation for these mixed results involves the inadequacy of insurance theory, in its current form, as a complete explanation either theoretically or empirically. Additionally, the previous studies seek to evaluate insurance theory either through examining a small number of countries or across a limited time frame.

Our paper reexamines the foundations of insurance theory and argues for a more nuanced version that incorporates potential non-linear relationships that are conditional across specific levels of democracy. We test our argument using a dataset of judicial independence in 145 countries from 1960-2000. Our empirical results indicate that the development of judicial independence is related to levels of political competition in the legislature and the political landscape encountered by the executive. Moreover, levels of democracy also conditionally affect the latter.

Additional research is necessary to better understand the underlying theoretical implications of these non-linear relationships. One possibility echoes Fearon's (2003) argument that increases in these components impairs the ability of governments to coordinate and cooperate in an effective manner. We speculate that an alternative

explanation may involve the ability of independent courts to shift their focus from ensuring compliance for regime policies in autocracies to expanding collective rights for minority groups or individual rights similar to courts in democracies. While leaders in autocracies and partial democracies may not feel threatened by the judicial protection of individual rights initially, the expansion of collective rights for minority groups may pose significant threats to political power. Consequently, leaders in these states may seek to reduce the independence of the judiciary.

Without additional research into these explanations our knowledge of the substantive implications for judicial independence will remain incomplete. We believe our large-N analyses have provided important clues about the composition of judicial independence. However, future research—especially case examinations of the mechanisms at work—is needed. We believe the identification of these structural predictors of *de facto* independence are an important first step in understanding cross-national and cross-temporal variations in institutional design.

TABLE 1: FRACTIONAL POLYNOMIAL REGRESSION ON JUDICIAL INDEPENDENCE

	Coefficient	Standard Error	t statistic
<i>Executive Variables</i>			
Size of Winning Coalition	.322***	.038	8.33
Size of Winning Coalition * Polity	.005***	.001	2.86
<i>Social Demographic Variables</i>			
Ethnic Fractionalization	.014	.158	0.09
Ethnic Fractionalization * Polity	-.003***	.001	-3.05
<i>Legislative Variables</i>			
Index of Political Competition	.001***	.000	3.00
Index of Political Competition * Polity	.001***	.000	8.65
<i>Levels of Conflict/Unrest Variables</i>			
Index of Civil Unrest	-.002*	.001	-1.89
Militarized Neighbor	-.015***	.003	-3.96
Territorial Rivalry	-.006	.005	-1.24
<i>Control Variables</i>			
Polity IV Score	.014***	.001	12.04
Age of the Court	.002***	.000	11.27
GDP (natural log)	.068***	.003	18.42
N	4223		
Number of Countries	145		
F	729.14		
Probability > F	.000		
R ² Within	.699		
R ² Between	.851		
R ² Overall	.844		

* p < .10 ** p < .05 *** p < .01

Note: The dependent variable is the level of judicial independence (range 0 to 1). All independent variables lagged by one year (t – 1). Coefficients represent the results of a fixed effects fractional polynomial regression.

FIGURE 1: PREDICTED LEVELS OF JUDICIAL INDEPENDENCE BY WINNING COALITION SIZE

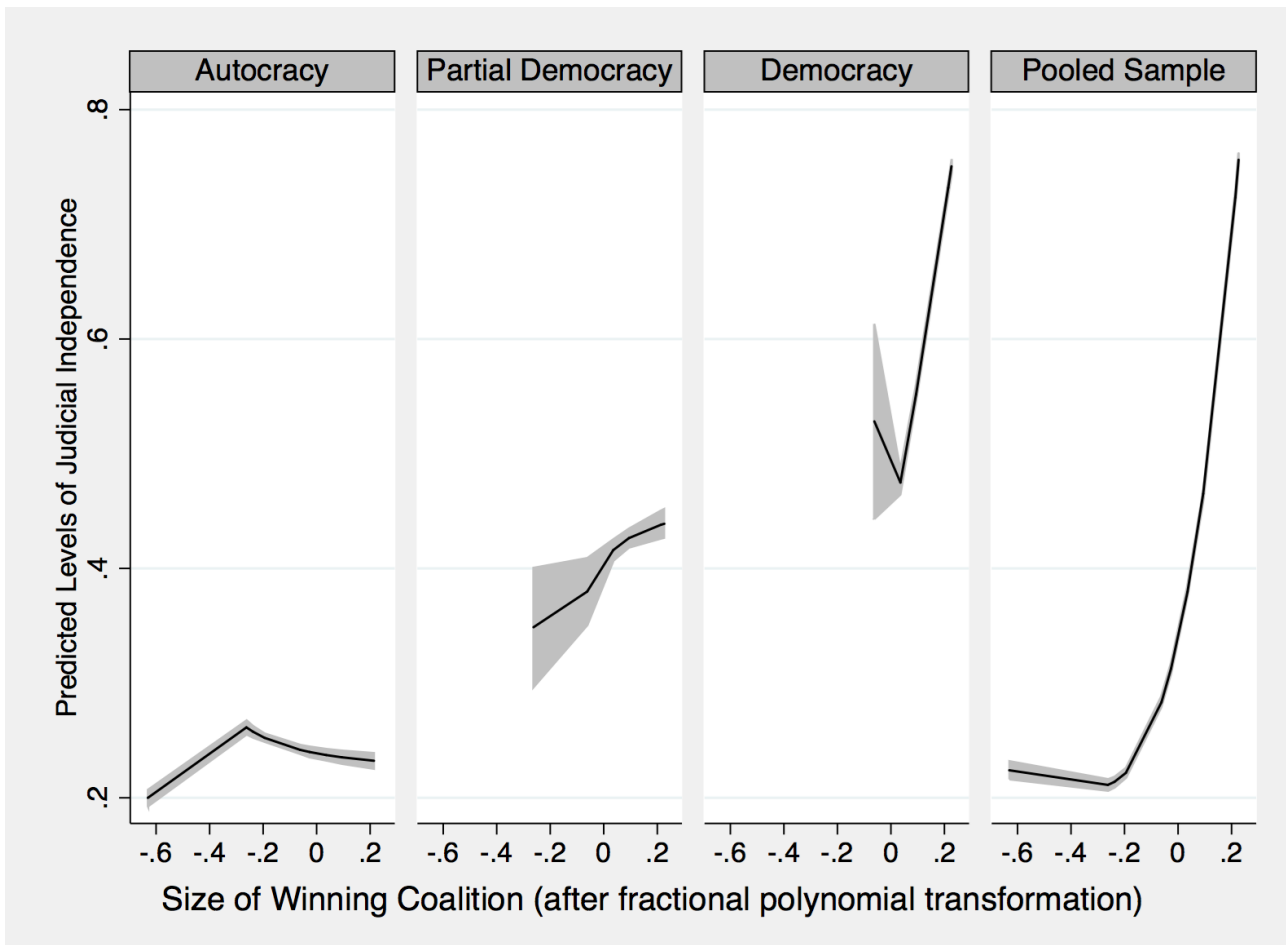


FIGURE 2: PREDICTED LEVELS OF JUDICIAL INDEPENDENCE BY ETHNIC FRACTIONALIZATION

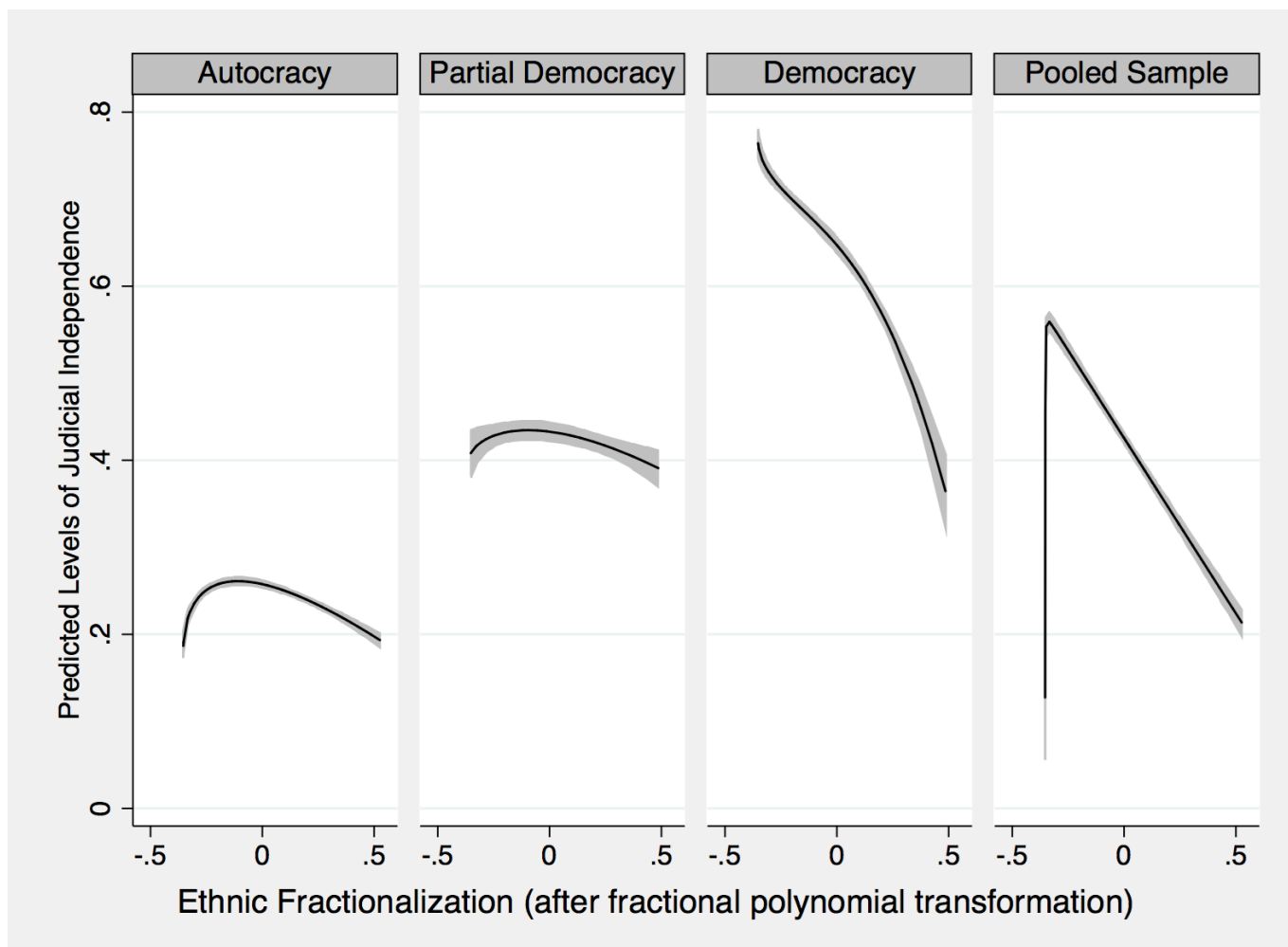
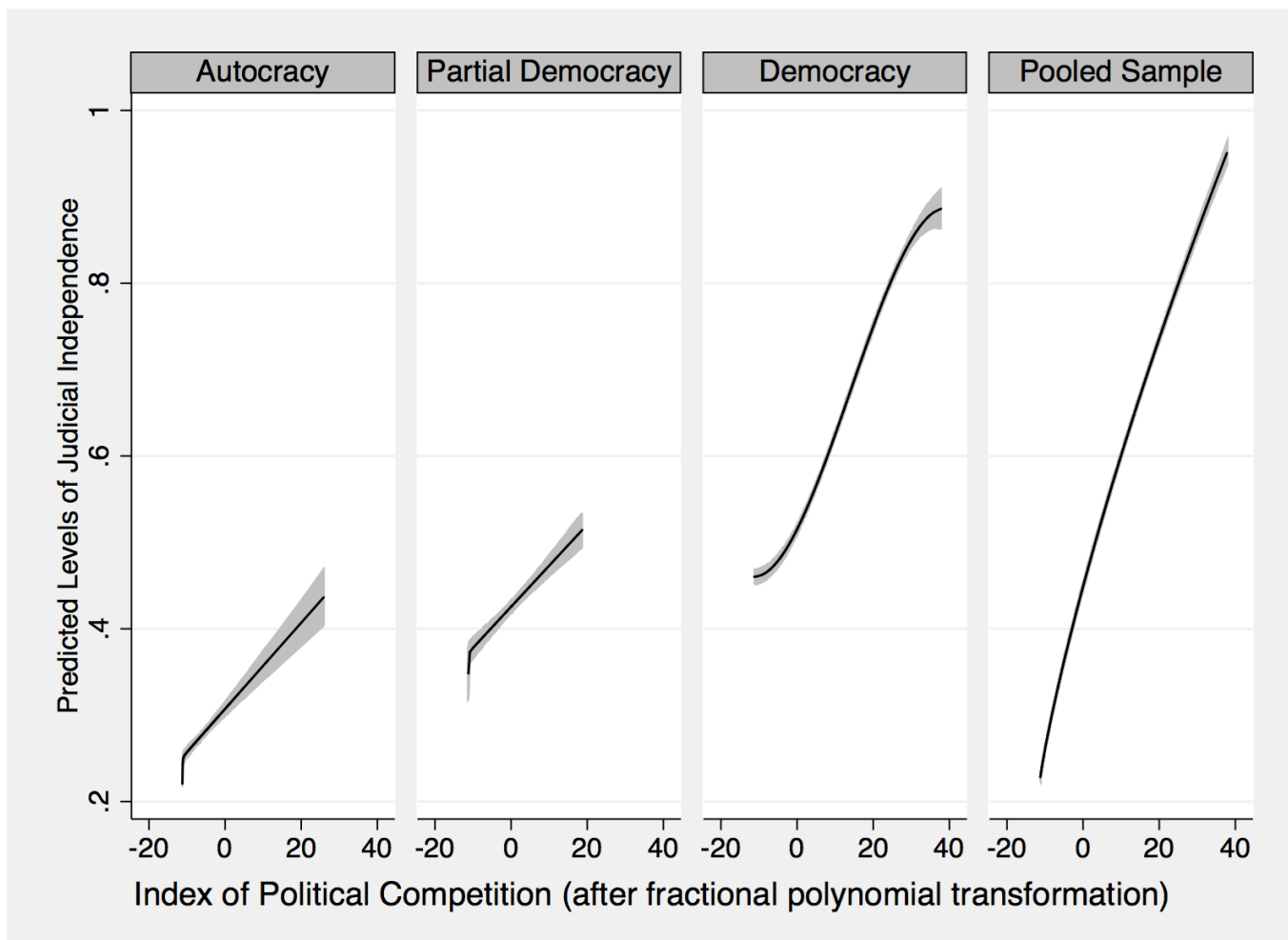


FIGURE 3: PREDICTED LEVELS OF JUDICIAL INDEPENDENCE BY POLITICAL COMPETITION



REFERENCES

- Alesina, Alberto, Arnaud Devleeschauwer, William Easterly, Sergio Kurlat, and Romain Wacziarg. 2003. "Fractionalization." *Journal of Economic Growth* 8(2): 155-194.
- Becker, Theodore L. 1987. *Comparative Judicial Politics: The Political Functioning of Courts*. Chicago, IL: University Press of America.
- Browne, Eric C., John P. Frenreis, and Dennis W. Gleiber. 1986. "The Process of Cabinet Dissolution: An Exponential Model of Duration and Stability in Western Democracies." *American Journal of Political Science* 30 (August): 628-650.
- Bueno de Mesquita, Bruce, Alastair Smith, Randolph M. Siverson, and James D. Morrow. 2003. *The Logic of Political Survival*. Boston, MA: MIT Press.
- Canes-Wrone, Brandice, Michael C. Herron, and Kenneth W. Shotts. 2001. "Leadership and Pandering: A Theory of Executive Policymaking." *American Journal of Political Science* 45 (July): 532-550.
- Canes-Wrone, Brandice and Kenneth W. Shotts. 2004. "The Conditional Nature of Presidential Responsiveness to Public Opinion." *American Journal of Political Science* 48 (October): 690-706.
- Clark, Tom S. 2011. *The Limits of Judicial Independence*. New York, NY: Cambridge University Press.
- Dinesen, Peter, and Kim Sønderskov, 2015. "Ethnic Diversity and Social Trust: Evidence from the Micro-Context." *American Sociological Review*. Vol. 80 no. 3 550-573
- Fearon, James. 2003. "Ethnic and Cultural Diversity by Country." *Journal of Economic Growth* 8 (June): 195-222.

- Fearon, James, and David Laitin, 1996. "Explaining Interethnic Cooperation." *American Political Science Review*. Vol. 90, No. 4, December.
- Fenno, Richard F. Jr. 1977. "U.S. House Members and their Constituencies: An Exploration." *American Political Science Review* 71 (September): 883-917.
- Finkel, Jodi S. 2005. "Judicial Reform as Insurance Policy: Mexico in the 1990s." *Latin American Politics and Society* 46 (April): 87-113.
- Finkel, Jodi S. 2008. *Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s*. Notre Dame, IN: University of Notre Dame Press.
- Gibler, Douglas M. and Kirk A. Randazzo. 2011. "Testing the Effects of Independent Judiciaries on the Likelihood of Democratic Backsliding." *American Journal of Political Science* 55 (July): 696-709.
- Ginsburg, Tom. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. New York, NY: Cambridge University Press.
- Ginsburg, Tom and Tamir Moustafa, editors. 2008. *Rule By Law: The Politics of Courts in Authoritarian Regimes*. New York, NY: Cambridge University Press.
- Haynie, Stacia L. 1997. "Courts and Revolution: Independence and Legitimacy in the New Republic of South Africa." *Justice System Journal* 19 (2): 167-179.
- Helmke, Gretchen and Frances Rosenbluth. 2009. "Regimes and the Rule of Law: Judicial Independence in Comparative Perspective." *Annual Review of Political Science* 12 (June): 345-366.
- Herron, Erik S. and Kirk A. Randazzo. 2003. "The Relationship Between Independence and Judicial Review in Post-Communist Courts." *Journal of Politics* 65 (May): 422-438.

- Hilbink, Lisa. 2012. "The Origins of Positive Judicial Independence." *World Politics* 64(04), 587-621.
- Hirschl, Ran. 2001. "The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Israel's Constitutional Revolution." *Comparative Politics* 33 (April): 315-335.
- Iaryczower, Matias, Pablo T. Spiller, and Mariano Tommasi. 2002. "Judicial Independence in Unstable Environments, Argentina 1935-1998." *American Journal of Political Science* 46 (October): 699-716.
- Kapiszewski, Diana, and Matthew M. Taylor. 2008. "Doing Courts Justice? Studying Judicial Politics in Latin America." *Perspectives on Politics*, Vol. 6, No. 4 (Dec), pp. 741-767
- Krause, George A. 2002. "Separated Powers and Institutional Growth in the Presidential and Congressional Branches: Distinguishing Between Short-Run versus Long-Run Dynamics." *Political Research Quarterly* 55 (March): 27-57.
- Landes, William M. and Richard A. Posner. 1975. "The Independent Judiciary in an Interest-Group Perspective." *Journal of Law and Economics* 18 (Number 3): 875-901.
- Larkins, Christopher M. 1996. "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis." *American Journal of Comparative Law* 44 (Fall): 605.
- Linzer, Drew A. and Jeffrey Staton. 2012. "A Measurement Model for Synthesizing Multiple Comparative Indicators: The Case of Judicial Independence." Working Paper: Emory University, Atlanta, Georgia.
- Lupia, Arthur and Kaare Strom. 1995. "Coalition Termination and the Strategic Timing of Parliamentary Elections." *American Political Science Review* 89 (September): 648-665.
- Marshall, Monty G. 1999. *Third World War*. Lanham, MD: Rowman & Littlefield.

- Mayhew, David R. 1974. *Congress: The Electoral Connection*. New Haven, CT: Yale University Press.
- Melone, Albert P. 1996. "The Struggle for Judicial Independence and the Transition Toward Democracy in Bulgaria." *Communist and Post-Communist Studies* 29: 231-243.
- Popova, Maria. 2010. "Political Competition as an Obstacle to Judicial Independence: Evidence from Russia and Ukraine." *Comparative Political Studies* 43 (Number 10): 1202-1229.
- Ramseyer, J. Mark. "The puzzling (in) dependence of courts: A comparative approach." *The Journal of Legal Studies* (1994): 721-747.
- Rebolledo, Juan and Frances Rosenbluth. 2009. "Political Competition and Judicial Integrity: The Case of Mexico." Paper presented at the Annual Meeting of the American Political Science Association in Toronto, Canada.
- Rohde, David W. 1979. "Risk-Bearing and Progressive Ambition: The Case of Members of the United States House of Representatives." *American Journal of Political Science* 23 (February): 1-26.
- Royston, Patrick and Douglas G. Altman. 1994. "Regression Using Fractional Polynomials of Continuous Covariates: Parsimonious Parametric Modelling." *Journal of the Royal Statistical Society, Series C (Applied Statistics)* 43 (Number 3): 429-467.
- Sauerbrei, W., C. Meier-Hirmer, A. Benner, and P. Royston. 2004. "Multivariable Regression Model Building by using Fractional Polynomials: Description of SAS, STATA, and R Programs." *Computational Statistics & Data Analysis* 50: 3464-3485.
- Simon, Dennis M. and Charles W. Ostrom, Jr. 1988. "The Politics of Prestige: Popular Support and the Modern Presidency." *Presidential Studies Quarterly* 18 (Fall): 741-759.

- Smithey, Shannon Ishiyama, and John Ishiyama. 2000. "Judicious Choices: Designing Courts in Post-Communist Politics." *Communist and Post-Communist Studies* 33: 163-182.
- Teorell, Jan, Marcus Samanni, Soren Hölmberg, and Bo Rothstein. 2011. The Quality of Government Dataset, version 6 April 2011. University of Gothenburg: The Quality of Government Institute, www.qog.pol.gu.se.
- Tsebelis, George. 1995. "Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism, and Multipartyism." *British Journal of Political Science* 25 (July): 289-325.
- Vanahen, Tatu. 2011. "Measures of Democracy 1810-2010." FSD1289, version 5.0 (2011-07-07). Tampere: Finnish Social Science Data Archive.
www.fsd.uta.fi/english/data/catalogue/FSD1289/index.html.
- Warwick, Paul V. 1992. "Rising Hazards: An Underlying Dynamic of Parliamentary Government." *American Journal of Political Science* 36 (November): 857-876.
- Widner, Jennifer. 2001. *Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa*. New York, NY: W.W. Norton & Company.
- Williams, Laron K. 2011. "Unsuccessful Success? Failed No-Confidence Motions, Competence Signals, and Electoral Support." *Comparative Political Studies* 44 (November): 1474-1499.

APPENDIX—TWO ROBUSTNESS CHECKS

We use the following two Appendix tables to provide additional robustness checks for the results listed in the fractional polynomial regression analysis described in Table 1. First, in Appendix Table A, we re-estimate the model using a specification that includes random effects across countries. We use this estimation change to determine whether our theory depends on pooling the sample of countries without regard to any inherent, country-specific effects in the data. We find, however, that our theory is not dependent upon estimation strategy. The findings in Appendix Table A remain substantively the same as those reported in Table 1 of the manuscript.

Second, in Appendix Table B, we substitute an alternate measure of democracy as the control variable for regime type. The Unified Democracy Score (UDS) we use is a latent-variable approach to regime measurement that incorporates the work of several different operationalizations of regime type, including Polity IV. In some ways this measure provides a richer definition of democratic government and provides an important robustness test for our results. Nevertheless, we again find no substantive changes when using the UDS measure. Our results remain robust regardless of the regime type measure we use.

APPENDIX TABLE A: RANDOM EFFECTS REGRESSION ON JUDICIAL INDEPENDENCE

	Coefficient	Standard Error	t statistic
<i>Executive Variables</i>			
Size of Winning Coalition	.025**	.011	2.34
Size of Winning Coalition Squared	.007**	.002	2.33
Size of Winning Coalition * Autocracy	2.103***	.510	4.02
Size of Winning Coalition * Autocracy Squared	-1.872***	.387	-4.83
Size of Winning Coalition * Partial Democracy	1.754***	.401	4.37
Size of Winning Coalition * Partial Democracy Squared	-1.489***	.273	-5.45
<i>Social Demographic Variables</i>			
Ethnic Fractionalization	-.177***	.046	-3.79
Ethnic Fractionalization Squared	-.342***	.068	-5.00
Ethnic Fractionalization * Autocracy	.123**	.058	2.09
Ethnic Fractionalization * Autocracy Squared	-.214**	.079	-2.68
Ethnic Fractionalization * Partial Democracy	.014	.104	0.14
Ethnic Fractionalization * Partial Democracy Squared	.162	.127	1.27
<i>Legislative Variables</i>			
Index of Political Competition	.008***	.001	8.22
Index of Political Competition Squared	-.001	.000	-5.44
Index of Political Competition * Autocracy	-.018***	.001	-10.51
Index of Political Competition * Autocracy Squared	.001***	.000	5.37
Index of Political Competition * Partial Democracy	-.021***	.002	-7.01
Index of Political Competition * Partial Democracy Squared	.001***	.000	4.15
<i>Levels of Conflict/Unrest Variables</i>			
Index of Civil Unrest	.001	.001	1.44
Militarized Neighbor	.019***	.003	5.14
Territorial Rivalry	-.034***	.004	-7.96
<i>Control Variables</i>			
Autocracy	-.278	.172	-1.61
Partial Democracy	-.314**	.152	-2.06
Age of the Court	.004***	.000	14.26
GDP (natural log)	.057***	.002	24.60
Polity IV Score	.036***	.001	30.64
N	4223		
Number of Countries	146		
F	1116.46		
Probability > F	.000		
R ²	.877		

* p < .10 ** p < .05 *** p < .01

The dependent variable is the level of judicial independence (range 0 to 1). Coefficients represent the results of a random effects regression.

APPENDIX TABLE B: FRACTIONAL POLYNOMIAL REGRESSION USING UDS MEASURE

	Coefficient	Standard Error	t statistic
<i>Executive Variables</i>			
Size of Winning Coalition	.126***	.015	8.47
Size of Winning Coalition * UDS	.099***	.013	7.58
<i>Social Demographic Variables</i>			
Ethnic Fractionalization	.005	.167	0.03
Ethnic Fractionalization * UDS	-.043***	.010	-4.29
<i>Legislative Variables</i>			
Index of Political Competition	.002***	.000	5.84
Index of Political Competition * UDS	.002***	.000	6.29
<i>Levels of Conflict/Unrest Variables</i>			
Index of Civil Unrest	-.001	.001	-1.01
Militarized Neighbor	-.028***	.003	-7.30
Territorial Rivalry	-.006	.005	-1.21
<i>Control Variables</i>			
UDS Mean	.097***	.009	10.82
Age of the Court	.002***	.000	8.17
GDP (natural log)	.068***	.004	17.85
N	4357		
Number of Countries	146		
F	622.44		
Probability > F	.000		
R ² Within	.658		
R ² Between	.836		
R ² Overall	.827		

* p < .10 ** p < .05 *** p < .01

Note: The dependent variable is the level of judicial independence (range 0 to 1). All independent variables lagged by one year (t – 1). Coefficients represent the results of a fixed effects fractional polynomial regression.