

**JUDGING UNDER POLITICAL PRESSURE:
AN EMPIRICAL ANALYSIS OF CONSTITUTIONAL
REVIEW VOTING IN THE SPANISH CONSTITUTIONAL
COURT^x**

**Nuno Garoupa
University of Illinois College of Law**

**Fernando Gomez-Pomar
Universitat Pompeu Fabra (Barcelona)**

**Veronica Grembi
Università Cattolica del Sacro Cuore (Milan)**

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ABSTRACT

In this paper we study the extent to which decisions by the Spanish Constitutional Court are explained by political variables. Our theory proposes that party alignment should play an important role in explaining the behavior of the Spanish constitutional judges, but with some limitations given the institutional constraints faced by the court. Therefore, we do not propose pure party alignment but a more sophisticated strategy model based on the interaction between the advancement of ideological goals with the limitations imposed essentially by the civil law tradition of consensual courts. Using a unique dataset of abstract review cases in 1980-2006, we conclude that the patterns of political influence in the Spanish Constitutional Court are complex and cannot be easily framed merely as the pure reflection of the attitudinal model, and of left/right alignment.

KEYWORDS: Constitutional Court, Spain, judicial independence, party politics, ideology.

I. INTRODUCTION

Constitutional courts have played a large role in the legal discourse on constitutional matters. More recently, constitutional courts are receiving increasing attention because the appropriate design of constitutional judicial review plays an important role in assessing and analyzing constitutional frameworks.¹ Moreover, empirical work seems to show that independent courts and constitutional review are factors that should be taken into account not only if the goal is to guarantee political freedom, but also to protect economic liberties and foster economic growth.²

The design of constitutional review involves critical choices, including centralization, standing, court size, the judicial appointment mechanism, and the extension of constitutional review (abstract versus concrete review, for example). These choices configure a certain response to the potential or expected problems faced by the constitutional drafters for the future.³

Judicial decision-making in a constitutional court, as in any court, is the result of personal attributes⁴ and attitudes (including policy preferences), peer pressure and intra-court interaction (a natural pressure for consensus and court reputation; a common objective to achieve supremacy of the constitutional court over other courts or other external actors), and party politics (loyalty to the appointer; prospect of a future career under political patronage) within a given constitutional and doctrinal environment.⁵ Constitutional judges (as opposed to traditional career judges in Continental Europe) are directly appointed by political actors, or by bodies with relevant political presence, and therefore are likely to be exposed to heavy influence by political parties. At the same time, constitutional judges are somehow interested in maintaining a certain detachment from political strife in order to maintain the prestige of the court.

Different theories have been developed in the United States to explain judicial decision-making in a constitutional court. We concentrate on the ongoing debate over whether judges are guided by the law or by personal ideology.

¹ A good introduction is provided by Ginsburg (2002).

² See La Porta et. al. (2004) and Feld and Voigt (2005), at 251 (although one of their findings is that constitutional review powers vested in the highest judicial instance reduce economic growth).

³ See Cooter (1992), Lutz (1994) and Ramos (2006).

⁴ For judicial preferences, see Posner (1993 & 2005).

⁵ For example, see the models developed by George and Epstein (1992) and Lax and Cameron (2007).

Formalists take the view that constitutional judges simply interpret and apply the constitution in a conformist view of precedents. In a completely different perspective, the attitudinal model sees judicial preferences, with special emphasis on ideology, as the main explanatory model. Finally, agency theorists recognize the importance of judicial preferences but argue that they are implemented taking into account political and institutional realities.⁶

Inevitably, the alignment of constitutional judges' decisions and opinions in conformity with identifiable political interests can be explained by many different reasons. For instance, given the political nature of constitutional judges' selection and appointment, it is almost natural to expect them to exhibit the same political preferences as the party that selects them (we have an ideological consensus as the explanatory factor in this theory). Further, it could also be that when constitutional judges do not have lifetime appointments, as is the case in the traditional Kelsenian constitutional courts, they might want to preserve a close relationship with the party that selected them either for future appointments to the court (if terms are renewable) or elsewhere (if terms are non-renewable). In both models, judges act under politically-biased incentives and are not fully insulated from political controversies, but the reason underlying the alignment to political parties significantly differs.

At the same time, important political and institutional constraints can foster consensus in the court where constitutional judges are willing to abdicate their ideologically preferred outcomes to forge significant majorities that enhance the judicial reputation of the court.⁷

Our hypothesis is that constitutional courts are politicized and ideology explains judicial voting. All these questions necessarily require empirical analysis. The proper response to many of the identified trade-offs cannot be convincingly provided without an adequate empirical assessment. The US Supreme Court has been the focus of much empirical attention by legal scholars and by political scientists.⁸ Empirical debate about other constitutional courts is an emerging

⁶ For discussion, see among others, Brenner and Spaeth (1988), Segal and Cover (1989), Epstein and Knight (1998), Segal and Spaeth (2002), and Hansford and Springgs (2006).

⁷ See, among others, Epstein et. al. (2001) and Goff (2006). See also Merryman and Pérez-Perdomo (2007), discussing pressure for consensus in the civil law tradition.

⁸ See Brenner and Spaeth (1988), Segal and Cover (1989), George and Epstein (1992), Epstein and Knight (1998), Epstein et. al. (2001), Segal and Spaeth (2002), Goff (2006), Hansford and Springgs (2006), Lax and Cameron (2007).

literature, with notable applications in Europe and North America⁹, in Asia¹⁰ and in Latin America.¹¹

This paper's contribution is to test alternative theories of the determinants of judicial independence. It looks at the Spanish Constitutional Court and shows that political variables partially (but not fully) explain the behavior of constitutional judges. The paper closest to ours is Sala (2009). In her paper, she shows how political parties defer to the constitutional court decisions entailing high political costs. They strategize around predictable court decisions to shirk responsibility over contested policies, in particular with reference to the balance between national and regional powers. Our paper complements her observation by suggesting that predictability of the Spanish constitutional judges is due to the role of ideology in the court, hence their behavior is easier to anticipate by the relevant political actors. Sala also argues that the Spanish constitutional judges have diffused the conflicting interests between the two national parties and the regional or nationalist parties. Our paper, looking at how judges vote, also indicates that Spanish constitutional judges are less likely to vote according to party interests in the presence of strong regional or nationalist interests.

We provide evidence that Spanish constitutional judges are guided by ideology subject to some institutional constraints. On the one hand, we reject the formalist approach taken by traditional constitutional law scholars, in Spain and in other places. The personal ideology of the judges does matter. On the other hand, we recognize and provide evidence that there are certain institutional features creating (actually influential and not merely nominal) incentives for independence of the Spanish Constitutional Court from party politics (namely the lack of discretion in some particular contexts, the civil law tradition, and judicial reputation in front of the regular courts). Therefore, when ideological interests are not very strong or when there is little discretion left to the judges, unanimous voting prevails. In conclusion, the pure party alignment cannot entirely explain the behavior of Spanish constitutional judges in constitutional review.

⁹ On Canada, see Tate and Sittiwong (1989), Alarie and Green (2008), Green and Alarie (2009). On Germany, see Schneider (2005) and Vanberg (2005). On Italy, see Breton and Fraschini (2003), Fiorino et. al. (2007) and Padovano (2009). On Portugal, see Amaral Garcia et. al. (2009). On France, see Franck (2009).

¹⁰ On Japan, see Ramseyer and Rasmusen (2003), and in particular on the Japanese Supreme Court, see Ramseyer and Rasmusen (2006). On Taiwan, see Ginsburg (2003) and Garoupa et. al. (2010).

¹¹ On Argentina, see Chávez (2004) and Helmke (2004). On Chile, see Hilbink (2007). More generally, see Kapiszewski and Taylor (2008).

The paper goes as follows. An overview of the Spanish Constitutional Court is presented in section 2. Our model is introduced in section 3. Regression analysis is discussed in sections 4 and 5. Section 6 concludes the paper.

II. THE INSTITUTIONAL AND POLITICAL BACKGROUND OF THE SPANISH CONSTITUTIONAL COURT

The Spanish Constitution was enacted in 1978.¹² The Spanish Constitution was the result of a significant level of political consensus after the end of the Franco regime. Together with the severe restrictions to modification or amendment,¹³ this consensus may explain why the text has not been significantly changed since its adoption.¹⁴

In fact, the only part of the Constitution that has proven to be overtly and relevantly politically contentious has been the one governing the territorial distribution of powers, and the Spanish Constitutional Court's docket is very good proof of this. The Spanish Constitution sets a quasi-federal system, with a substantial (but, to some extent at least, complex and ill-defined) degree of political powers vested upon the regions. The political efforts to amend the Constitution have been mainly concentrated on this territorial dimension of the text. In turn, personal liberties and social and economic matters, as regulated in the Constitution, have not been essentially controversial and, with a few exceptions in the 1982-1985 period, governments of diverse political orientations have comfortably pursued their policies basically unworried about legal challenges at the constitutional level.

The Court is composed of twelve judges (*magistrados*), who elect a President among themselves.¹⁵ In terms of nomination of judges for the court, four

¹² A good introduction to the Spanish Constitutional Court in English is provided by Borrajo Iniesta (2004).

¹³ The normal amendment procedure requires a 3/5 majority in each chamber (eventually, if this is not reached in the Senate, but there is absolute majority, it can be approved by a 2/3 majority in the Chamber of Deputies), and a referendum if 10% of the members of any chamber so require. For some relevant portions of the Constitution, the procedure is even more exacting: 2/3 majority in each chamber, dissolution of Parliament with new elections, ratification of new chambers by 2/3 majority, and a referendum.

¹⁴ The Constitution (art. 13.2) was amended in 1992 to adjust to EU Law and allow citizens from other EU Member States (and eventually, other countries if there is a treaty to that effect) to vote and be elected in local elections.

¹⁵ The Constitution itself sets some conditions for being eligible as a constitutional judge: (i) to be a career judge or prosecutor, law professor, civil servant or practicing attorney; (ii) to possess at least fifteen years of professional experience; and (iii) to possess renowned competence (whatever this may mean) for the position. In practice, with very few exceptions

judges are nominated by each of the Chambers (Congress and Senate) with a 3/5 majority; two are nominated by the government, and the remaining two are nominated by the Judicial Council (*Consejo General del Poder Judicial*). They are nominated for a nine year non-renewable term. In the constitutional design there are several features that purport to insulate the Court from the movements and developments in the political sphere, and specially from short-term partisan politics: (i) the Court renovates by thirds every three years, a term that does not coincide with the legislative term (four years); (ii) a majority in the chambers that effectively requires a multi-party agreement for successful nomination; (iii) the intervention of the Judicial Council which is seen (formally, at least) as a self-governing body of judges independent of political disputes.¹⁶

The Spanish Constitutional Court has essentially three main powers: (i) review *ex post*¹⁷ the constitutionality of legislation approved by the national or the regional parliaments¹⁸ (*recursos* and *cuestiones de inconstitucionalidad*); (ii) remedy violations of individual liberties and rights committed by public bodies or courts against individual citizens (*recursos de amparo*); and (iii) resolve conflicts of competence between the state and the regions, and between regions (*conflictos de competencia*).

In this paper, we focus on abstract constitutional review. In this respect, the petition is initiated by political actors: (i) the Prime Minister; (ii) a number (50) of congressmen or senators; (iii) regional governments, or a majority of a regional parliament (only against national laws); or (iv) the state ombudsman (*Defensor del Pueblo*). Under this procedure, were the Court to find a discrepancy between the challenged law and the Constitution, the relevant portions of the law would become

(so far only three), constitutional judges have been either career judges or law professors since the Court was established.

¹⁶ As explained in section four, in the case of career judges appointed by the Judicial Council, they are not coded on the basis of the political majority in the Council at the time of appointment but rather their membership in judicial associations.

¹⁷ The only remaining *ex ante* review powers by the Court concern some international treaties. From 1980 to 1985 it also enjoyed *ex ante* review powers of some important laws. This power was eliminated through an amendment to the Organic Law of the Constitutional Court of 1979 (*Ley Orgánica del Tribunal Constitucional*) in 1985. With this amendment, the socialists, then in office, rejected the opposition's use of *ex ante* review to delay new legislation.

¹⁸ All courts are allowed to review the conformity with the Constitution of legal rules that do not emanate from legislative bodies, for instance, governmental (federal, state and local levels) or public agencies' regulations. Thus, the Spanish model of constitutional review is mixed: concentrated with respect to rules by legislatures, dispersed with respect to other rules.

null and void, and the state may be forced to compensate those who were harmed by the law now declared unconstitutional.

The major fraction of the Court's docket in matters of constitutional review has concentrated upon issues related to the Constitution's provisions on the powers of the state versus those of the regions (with respect to the entire workload of the Court, individual claims against violation of rights and liberties vastly outnumber other sources¹⁹). Most cases of constitutional review of law, thus, have been initiated by some regional governments against national laws, allegedly invading the competences of the regions as constitutionally designed, or, in reverse, by the national government (formally, the Prime Minister) against regional laws allegedly exceeding the powers granted to the regions by the Constitution.

In fact, this constitutional litigation is over-proportionally linked (notice that we do not affirm that it is "caused by") to the almost continuous political hegemony of nationalist parties in some Spanish regions. The dataset shows that a significant fraction of the Constitutional Court's caseload is filed or brought by regional political institutions (governments or parliaments) dominated by nationalist parties in Catalonia or in the Basque Country (and, to a much lesser extent, the Canary Islands) against national legislation, or conversely, challenges by the state to Basque and Catalan legislation sponsored by governments and adopted by parliaments controlled to a large extent by nationalist parties. It must be noted, however, that the level of constitutional litigation initiated in Catalonia and, even more, in the Basque Country diminished substantially since the 90s.

An early study²⁰ using basic cluster analysis showed how the judges who sided in favor and against the government (PSOE²¹, at the time) regarding the two most hotly contested issues decided in that legislative period by the Constitutional Court²² actually formed two clusters, liberal and conservative, in the sense of concurring significantly more often with judges of the same cluster, than with those of the other, in the period 1980-1985. This served to give support to the political labeling of constitutional judges, and implicitly (though the original paper itself is agnostic on this) to political dependence as a powerful explanatory factor of the actual voting by the members of the Court.

¹⁹ See for a quantitative descriptive analysis, Oubiña (2004).

²⁰ See del Castillo (1987).

²¹ Socialists (*Partido Socialista Obrero Español*).

²² A legislative expropriation of a failing industrial holding controlled by an entrepreneur (allegedly) opposed to the government and the de-criminalization of abortion.

A more thorough empirical study,²³ however, seems to question the validity of a model of the behavior of the judges sitting in the Spanish Constitutional Court that emphasizes overt and immediate political dependence of the judges. This study used the constitutional review decisions (apparently both court-initiated and politically-initiated cases) from 1980 to 2001. The study argues that the level of unanimous decisions, and the institutional constraints that individual judges face in the Court (non-renewable terms, later entry into the Court and, thus, shorter post-court careers that may be dependent upon partisan reward for loyal representation of party interest while in office), suggests that individual accountability of the judges *vis-à-vis* the appointing political parties is relatively weak.

Our analysis presents evidence of some degree of political influence. Given the political visibility of territorial issues in Spanish politics and constitutional law and practice and its importance on the docket of the Court, to disentangle the effects of political influence at the national and at the regional level seemed to us a crucial factor in the analysis. In fact, as will be shown later, that dimension appears to be empirically significant in the sense that politics at the national level (including constitutional conflict with regional governments controlled by nationalist parties) seem to matter much more than politics that take place at the regional level.

III. PARTISAN MODEL OF BEHAVIOR OF SPANISH CONSTITUTIONAL JUDGES

Our model is largely inspired by the attitudinal literature, given that we argue that the Spanish constitutional judges advance their ideological goals inside the Court, that is, given discretion in constitutional interpretation, they will rely on ideological biases to vote one way or the other in a specific case.

In the standard attitudinal model, we might expect such behavior in the form of ideological voting essentially due to four conditions: life tenure, no judicial superiors, docket control, and no career ambitions.²⁴ Only one of these conditions is satisfied in Spain (no judicial superiors). Therefore, we suggest that ideological voting takes place for different reasons. In that respect, the form of ideological voting in the Spanish Constitutional Court is likely to be less sincere and more strategic taking into consideration the judicial preferences and the institutional

²³ See Magalhães (2002).

²⁴ See Segal and Spaeth (2002).

incentives. Therefore, we explain party alignment, and not merely sincere ideological voting.

Our hypothesis that the behavior of Spanish constitutional judges is explained by ideology is supported both by preferences (sincere ideological voting) and incentives (strategic ideological voting). Judges are appointed to the Court through a mechanism that largely relies on the political influence of the two main national parties (UCD/PP²⁵ and PSOE) with the exclusion of other political interests (such as smaller parties and nationalist parties). These two national parties have no incentive to appoint individuals that differ significantly from their ideological preferences (since, as explained before, the appointment is based on a quota system implemented by different political institutions). Moreover, given the political importance of the Court, the two main political parties have a clear benefit in being careful in the selection of the judges they indicate, and avoid the mistake of appointing an individual with very different political preferences. Finally, the career judges appointed to the Court are members of largely politicized judicial associations.²⁶ We can therefore safely assume that there is a strong alignment between the preferences of the political parties and those of the appointed judges.

The second reason for our hypothesis is that constitutional judges have limited tenure in the Court (they only serve for nine years). Therefore, their future career is not insulated from the influence of the two main political parties. Law professors will typically want to be appointed to other high level jobs in the government, or to play an important role in consultancy to lawmaking in the future. Career judges depend on the balance of power within the Judicial Council which is dominated by the two main parties (through the relevant judicial associations).

The third reason for our hypothesis is that there are significant ideological differences concerning the largest bulk of cases in abstract review considered by the Court. They are related to the difficult balance between national and regional legislative competences in Spain, which for some ultimately will affect the continued existence of Spain as a unitary State. These questions have clear and significant implications with distinct ideological repercussions. The right and the left in Spain differ historically and ideologically in how to address the political powers of regional

²⁵ Center-right parties, *Unión de Centro Democrático* (collapsed in 1982) and *Alianza Popular/Partido Popular*.

²⁶ Namely APM (conservative), FdV (moderate), and JpD (socialist). There are a few other smaller and less active associations, albeit they have not been able to place any member in the Spanish Constitutional Court.

governments, in particular the Basque Country and Catalonia. This profound ideological difference contributes to our hypothesis.

As a consequence of their ideology as well as of the party system, the two main parties (UCD/PP and PSOE) have had practical agreements with nationalist parties both in order to form stable majorities in the national parliament (in particular, in the absence of a one party majority, in 1993-2000 and since 2004), and to build coalitions in regional parliaments and governments (Catalonia, the Basque Country, Galicia, Navarre and Canary Islands mainly). Inevitably, the cases raised before the Court touching the balance between national and regional powers have serious implications for the stability of these political understandings and coalitions.

The fourth reason to support our hypothesis is that the questions addressed by the Court in abstract review are raised by political actors; the Court has no docket control. Unlike the United States, the most controversial cases in the Spanish Court are raised and entered by multiple political actors since they are the key players in the access to abstract review. As noted by Sala (2009),²⁷ if a conflict over federalism reaches the Court it is because politicians desire this to happen, not because of powerful lobbies or individuals. Constitutional judges in Spain have to decide a question of constitutionality precisely because political parties wish to have an answer from the Court, rather than providing a decision in spite of what political parties might want, like in the United States.²⁸ The consequence is that constitutional judges typically²⁹ have to decide because there are ideological differences and serious political interests at stake.

These four factors explain why ideology is important and should explain the behavior of Spanish constitutional judges, on the basis of the appointment mechanism, limited tenure, significant ideological and political differences concerning Spanish federalism, and political dominance in access to abstract review.

There are, however, some limitations as to how much ideological goals can be advanced by individual constitutional judges in Spain. Judges have a degree of dissent aversion, which can be justified for different reasons, including the additional work that dissenting requires, the difficulties of collegial relationships, or their

²⁷ See Sala (2009).

²⁸ *Id.*

²⁹ In cases raised by lower courts, partisan stakes are commonly much less of an issue.

detrimental effects on the workplace.³⁰ One immediate restriction is the nature of the case; the extent to which there is no discretion according to the Constitution. The second constraint is the civil law background that traditionally favors consensus and dislikes dissent in the bench.³¹ There is inevitably some pressure for consensus emerging from the ways of judicial demeanor in the civil law tradition; dissent hinders perceived legitimacy. The more complex limitation is derived from the interaction with other courts.³² Excessive political or ideological division in the Court reduces the prestige of the Constitutional Court *vis-à-vis* other courts, and therefore diminishes the influence of constitutional judges over the judicial ranks and, ultimately, the legal system overall. In particular, the respect for precedent remains important as the Court adopts rules of procedure similar to (traditionally consensual) ordinary courts.³³

In our model, constitutional judges want to advance their ideological goals, but they are restrained by a variety of factors. When these goals are very important, they will sacrifice other considerations and vote according to party interests. When these goals are less important, they might take the opportunity to enhance other goals (such as dissent aversion, influence over ordinary courts or adherence to the collegiality of the civil law tradition) and refrain from advancing ideology.

IV. A PRELIMINARY QUANTITATIVE EXPLORATION

Our paper applies regression analysis to a unique dataset collected and coded by the authors. We look at all constitutional review decisions, in cases initiated by explicit political actors (i.e., we exclude cases initiated by lower courts as *cuestiones de inconstitucionalidad*) from 1980 to 2006; a total of 3402 individual votes by constitutional judges in reference to 297 decisions taken by the Court. Of these 297 decisions, unanimous decisions were an important fraction: 192, of which 64% were unanimous decisions for constitutionality and 36% were unanimous decisions against constitutionality. This simple observation already points to the importance of the institutional restrictions that favor consensus and shows the limitations of a simple attitudinal model.

Table 1 summarizes the data. There have been forty-seven judges, mostly male and non-career magistrates. The 297 decisions we study can be divided into

³⁰ See Edelman, Klein and Lindquist (2010) and Epstein, Landes and Posner (2010).

³¹ See Merryman and Pérez-Pordomo (2007).

³² See Turano (2006).

³³ See discussion by Sala (2009).

eighteen decisions from 1981 to 1982 (UCD governments), 164 decisions from 1982 to 1996 (PSOE governments), eighty-four decisions from 1996 to 2004 (PP governments), and thirty-one decisions since 2004 (PSOE government). Therefore, all political cycles are fairly represented in the sample allowing us to conclude that our econometric results are not primarily driven by a certain particular political context.

<Table 1 insert here>

We start by looking at the vote for constitutionality and provide a simple quantitative exploration. We divide the 3402 individual votes into those for constitutionality (40%) and those against constitutionality (the remaining 60%), referring to 297 decisions by the Court. We identify the petitioner as the party of the judge at the national level, the party of the judge at the regional level (that is, a local branch of UCD/PP and PSOE), and other (including nationalist parties and *Defensor del Pueblo*). Table 2 shows that a vote against constitutionality is slightly more likely when the petitioner and the judge are of the same party. The effect seems weaker when only the 103 non-unanimous decisions are considered, in a total of 1216 individual votes, including those for constitutionality (38%) and those against constitutionality (remaining 62%). See Table 3.

<Table 2 and 3 insert here>

This contingency analysis suggests that, even though a significant number of decisions are unanimous, there is evidence to support our model as the vote for constitutionality seems to strategically respond to the identity of the petitioner.

However, our preliminary quantitative exploration suggests that this effect is not very strong, partially because in the third category of petitioners (*other*) we have included the nationalist parties which, as explained in the previous sections, play an important role. A robust empirical analysis requires a more sophisticated regression exercise.

V. REGRESSION ANALYSIS OF THE SPANISH CONSTITUTIONAL COURT

In order to test our hypothesis, we look at the *vote according to party interests*; the dependent variable takes the value of one if the vote cast by a judge mimics the

interest of the judge's party: (1) if the law was approved by the national legislature (i.e., it is a national law), by voting the same way as the party did in the national legislature; (2) if the law was not approved in the national legislature (i.e., it is a regional law), (i) by voting for unconstitutionality when the judge's party requests the judicial review,³⁴ or (ii) by voting for constitutionality when the judge's party did not request judicial review and the judge's party either promoted the law at the regional level (government or parliamentary majority) or voted in favor of the law; or (iii) by voting for unconstitutionality when the judge's party did not request judicial review, but the judge's party strongly and openly³⁵ opposed the law in the regional legislature,³⁶ and zero if otherwise.³⁷

This dependent variable allows us to test our model directly by identifying which political variables explain the decision to agree or to defect from party interests. Out of 3402 individual votes, there are 1778 (52%) individual votes according to party interests and 1624 (48%) individual votes contrary to party interests. When only non-unanimous decisions are considered, the number is 556 (54%) and 660 (46%) respectively, for a total of 1216 individual votes.

Our econometric model includes the political variables to assess the extent to which they influence judicial behavior in the Constitutional Court. The political variables allow us to test our hypothesis plus the role played by other relevant actors (including nationalist parties). We discuss them below in detail.

Let us start by recognizing that strict legal formalism would predict that there is no systematic correlation between our dependent variable and political variables. Voting according to party interests should be random if judges behave as legal formalists think they do. Therefore, in a formalist model, the coefficients of the political variables should not be statistically significant. A simple partisan model that proposes ideology as the only explanation for behavior in the Court, and ignores the restrictions we have discussed previously, predicts that only those variables that capture ideology should be statistically significant. Our model contemplates that

³⁴ This can only take place at the national level, since against regional laws only national institutions (Prime Minister, parliamentary majority or minority) may challenge a regional law.

³⁵ We have characterized as strong opposition either a global initial objection to the law as such (*enmienda a la totalidad*) or amendments (that were not accepted) to the specific provisions of the law that were later challenged before the Spanish Constitutional Court.

³⁶ The underlying explanation here is that the judge's party was squarely against the law, but let the other party at the national level incur the political costs of mounting a constitutional challenge to the regional law, thus effectively free-riding on the effort of the latter.

³⁷ We are confident that the dependent variable captures very closely the political interests of both parties (UCD/PP and PSOE) for all decisions, and therefore it is not biased one way or the other.

both variables that capture ideology and institutional restrictions should be statistically significant. In summary, the predictions of our model are contrary to a legalistic or formalist model and only partially overlap with a simple partisan model.

Our regression analyses include the following immediate political variables:

Judicial review filed by the judge's party at the national level (JRNatLevel): if the intervention of the Court was requested by the judge's party at the national level, it gets a value a one, and zero otherwise;

Presumably, party interests are very relevant when the case has been entered by a party at the national level (UCD/PP or PSOE). Therefore, we hypothesize that constitutional judges are more likely to vote according to party interests (that is, for unconstitutionality) when the case has been raised by the party that appointed the judge (the petitioner requests a decision of unconstitutionality). The expected sign of the coefficient is positive.

Judicial review filed by the judge's party at the regional level (JRRegLevel): if the intervention of the court was requested by the party who appointed the judge, but at the regional level (either by the regional government or by the regional legislature) it gets a value one, and zero otherwise.

Under a simple partisan model, constitutional judges are more likely to vote according to party interests (that is, for unconstitutionality) when the case has been raised by the regional branch of the party that appointed the judge. Therefore, the expected sign of the coefficient would be positive.

However, we anticipate that party interests are less relevant when the case has been entered by a regional branch of a national party (UCD/PP or PSOE). First, regional branches have limited roles in the choice of constitutional judges (regional governments and parliaments played no role until the recent amendments to the legal structure of the appointment process, which still have not been put into practice, and which anyway allow for little regional influence upon the appointment process). Second, if the case is entered by a regional branch rather than by the national party, it usually means it is of little significance nationally (although it could be important for the local political establishment). As a consequence, this is the type of case for which a constitutional judge could be willing to sacrifice mere ideological goals to satisfy alternative goals. We expect the coefficient to be negative.

Law approved by the judge's party at the regional level (AppRegLevel): has a value equal to one if the law under review was approved by the judge's appointing party at the regional level (in the regional parliament), and zero otherwise.

This variable captures the influence of the judge's party at the regional level. Under a simple ideological model, the coefficient of this variable should be statistically significant. Our model suggests that the coefficient should not be statistically significant, because the position taken by the judge's party at regional level should not play a major role.

Judicial review filed by nationalist party (JRNationalist): has a value equal to one if the law was under review at the request of a regional government or legislature dominated by a nationalist party,³⁸ and zero otherwise.

Given the importance of the questions related to the balance between regional and national competencies, as we have explained above, our model proposes a negative coefficient. We expect constitutional judges to address the cases raised by the nationalist parties by looking more seriously at the interests of the judge's party. Following the thesis defended by Sala (2009),³⁹ we pose that Spanish constitutional judges are willing to mediate serious conflicts between the interests of the nationalist parties and those of the two main national parties (UCD/PP and PSOE). The Court has been systematically asked to referee conflicts of competence between the national government and regional governments, mainly those in Catalonia and in the Basque Country, in particular in the early years of the Court.

Law approved by nationalist party (AppNationalist): has a value equal to one if the law under judicial review was approved by a regional or autonomous government of a nationalist party, alone or in coalition, and zero otherwise.

Our model does not provide for an expected sign given the complex relationship between the interests of nationalist parties and national parties (UCD/PP and PSOE) as we have outlined before. A good fraction of laws approved by nationalist parties have been by governments or parliamentary majorities in coalition, or at least in agreement, with national parties.

³⁸ These are CiU (Catalan; centre-right), PNV (Basque; centre-right), CC (from the Canary Islands; centre-right), either by themselves or in coalition with other parties.

³⁹ See Sala (2009).

Judicial review filed by the *Defensor del Pueblo* (JRDPueblo): if the judicial review is requested by the *Defensor del Pueblo* it gets a value one, and zero otherwise.

Given the mixed political nature of the *Defensor del Pueblo* (which is appointed by the government, but could also play the role of limiting the discretion of the executive power), our model suggests that the coefficient should not be statistically significant.

Party in government: has a value equal to one if the party who appointed the judge is the party in government when the decision is taken, and zero otherwise.

This variable should capture any bias favorable or unfavorable to constitutionality derived from a particular political cycle; from the perspective of an attitudinal model, the expectation is that the coefficient should not be statistically significant.

Political affiliation (PSOE): we have grouped constitutional judges by left (PSOE⁴⁰) and right (PP and UCD⁴¹) according to the party that endorsed their appointment; hence, the coefficient measures the marginal impact of a judge being on the left as compared to a judge being on the right. For career judges appointed by the Judicial Council, we have used the membership in judicial associations to make the left/right characterization.

This variable should capture any bias favorable or unfavorable to constitutionality derived from a particular ideology. Our model does not provide any prediction in terms of the leftist judges (value one in the dummy) being more or less politicized than rightist judges (value zero in the dummy).

⁴⁰ In two cases (Fernando García-Mon y González Regueral, and Carles Viver i Pi-Sunyer), the judges were nominated by agreement of PSOE with a nationalist party (PNV and CiU, respectively), but we have ascribed them to the left given the role of PSOE in their appointment.

⁴¹ The UCD case is more complicated, given that the appointing party collapsed after the October 1982 general election which gave power to PSOE. Most relevant politicians in UCD ended up in PP, although the social democratic fraction of UCD entered into PSOE, and its former leader, Adolfo Suárez, created a new party, CDS, which only enjoyed significant political power in the Canary Islands. CDS later dissolved into PP, except in the Canary Islands, where the moderate nationalists of CC became its primary heirs. We have ascribed judges nominated by UCD to the right, with two exceptions. In the first Court, two judges were nominated by agreement of UCD and PSOE: Manuel García-Pelayo – the first president of the Court – and Francisco Rubio Llorente. Given this initial double nomination – which in the case of Rubio Llorente was repeated when he got an extraordinary extension together with Francisco Tomás y Valiente in 1989 – and given the findings of the analysis of their voting record (see del Castillo, 1987) we have opted to ascribe them to the left.

Several fixed effects were considered per judge and per court (although, we do not comment on them extensively because their statistical significance is known to be unstable in this type of econometric exercises). Due to the non-independence of the individual votes within decisions, we estimated the appropriate logit models correcting for the non-independence, in particular, with clustering by court decision.⁴² We have estimated these econometric models for all the 3402 observations and for the 1216 votes for non-unanimous decisions.

As a result, we produced several regressions that are reported on Table 4. Usually with these types of regressions, we should consider the sign and not the magnitude of the estimated coefficients. In other words, we do not assess quantitatively the marginal impact of each explanatory variable on the probability of a judge voting for constitutionality, but rather there is only a qualitative assessment (the sign of the coefficient).⁴³

<Table 4 insert here>

In order to interpret the logit coefficients, we provide guidance by reporting the predicted probabilities (with confidence intervals). In Table 5, we start by imposing the standard baseline (all independent variables are zero) and calculate the additional likelihood of a judge voting according to party interests (the dependent variable is one) when each independent variables varies from zero to one.⁴⁴

<Table 5 insert here>

Overall the regressions seem to support our model more strongly than simple party alignment as suggested by a pure partisan model. Clearly they reject the formalist model supported by mainstream Spanish constitutional law scholars.

Judicial review filed by the judge's party at the national level: the sign is positive as expected in all specifications. It provides strong support that constitutional judges respond to the strategic goals of political parties. When the petition is filed by the

⁴² We have used STATA 10.

⁴³ See Wooldridge (2003).

⁴⁴ We have used CLARIFY with STATA 10.

judge's party at the national level, the likelihood that a judge votes according to party interests increases by around 33% (22% to 44% when all decisions are included, and 21% to 50% when only non-unanimous decisions are considered).

Judicial review filed by the judge's party at the regional level: although as expected, the coefficient has a negative sign, it is not statistically significant. The prediction of the simple model is rejected. When the petition is filed by the judge's party at the regional level, the likelihood that a judge votes according to party interests decreases by around 20% (9% to 31% when all decisions are included, and 12% to 35% when only non-unanimous decisions are considered).

Law approved by the judge's party at the regional level: the coefficient has a negative sign in all regressions, but it is not robust to all regressions (only statistically significant when non-unanimous decisions are considered). Overall it seems to confirm the prediction of our model that this variable should not play a major role.

Judicial review filed by nationalist party: as expected, the coefficient has a negative sign and is statistically significant in all regressions. When the petition is filed by a nationalist party, the likelihood that a judge votes according to party interests decreases by around 16% (7% to 24% when all decisions are included, and 10% to 34% when only non-unanimous decisions are considered).

Law approved by nationalist party: the coefficient has a negative sign in all four specifications (but only statistically significant when all decisions are included).

Judicial review filed by the *Defensor del Pueblo*: as expected, this variable is not statistically significant (although the coefficient is negative in all regressions).

Party in government: the coefficient is positive in the first two regressions and negative in those specifications excluding unanimous decisions. It is not statistically significant.

Political affiliation: the coefficient is positive and statistically significant in two specifications (although, in the other two specifications, some of the coefficients for

individual PSOE judges are statistically significant when fixed effects are included). The judges from the left (PSOE) seem to vote according to party interests more frequently than the judges from the right (UCD/PP). Given the predominance of the left in the period we cover, both in terms of government (1982 to 1996 and since 2004) and in the influence on the Court (for example, all six Presidents and four out of eight Vice-Presidents have been appointed by the socialists, although the first one in agreement with UCD), the partisanship on the left could be statistically more significant than on the right.

Our theory proposes that ideology or party affiliation should play an important role in explaining the behavior of the Spanish constitutional judges, but with some limitations given the institutional constraints faced by the Court. Therefore, we do not propose a simple party alignment, but a more sophisticated strategy model where the advancement of ideological goals interact with the limitations imposed by the civil law mode of consensual and collegial courts. The econometric results provide strong support for our model while the simple partisan model and a formalist model do not find empirical confirmation.

VI. CONCLUSIONS

The Spanish Constitutional Court is a court of law, interpreting and enforcing a legal document, namely the Spanish Constitution, and employing typical legal methods and arguments to reach and justify decisions about the constitutionality of a given law challenged before it. But empirical analysis shows that the Court is not an empyrean, other-worldly interpreter or guardian of the Constitution. Party politics matter for how constitutional judges vote in constitutional review cases, although this influence presents itself in different and complex ways. Moreover, the evidence supports a complex version of advancing ideology subject to institutional restrictions that favor frequent unanimous decisions. We cannot fully determine whether this is the result of the power of legal arguments about constitutional meaning, more of a mundane concern about conformity, or path dependence inside a widely internalized legal culture of the civil law type.

As for the political influence, the vote for constitutionality seems essentially dominated by judicial review requested by the judge's appointing party at the national level. Our regression results confirm that political influence in the voting behavior of Constitutional Court judges in Spain is maximal when national party interests are directly involved. At the same time, the constitutional judges seem to

respond to the interests of nationalist parties. Such empirical conclusions seem consistent with the fact that most of the cases entertained by the Court are related to the difficult and unstable issue of the territorial balance of powers in Spain.

In general, our results are consistent with previous findings in similar environments.⁴⁵ The more general conclusion seems to be that there is little evidence to support the hypothesis of formalist behavior in constitutional courts as envisaged by traditional legal scholars. Party alignment exists, but subject to complex incentives and institutional influences. In that respect, our empirical results also suggest that it is mistaken the view that constitutional courts are mere additional parliamentary chambers that faithfully mirror their party composition. Our analysis has focused on the most political salient cases faced by the Spanish Constitutional Court (abstract review) and even there we can see that party interests cannot fully explain judicial behavior.

⁴⁵ See Amaral Garcia et. al. (2009) for the Portuguese case.

TABLES

TABLE 1
CHARACTERIZATION OF DATA SET

	PSOE [LEFT]	UCD [RIGHT]	PP [RIGHT]
JUDGES	25	8	13
ATTRIBUTE			
CAREER MAGISTRATE	4	3	9
NON-MAGISTRATE	21	5	4
FEMALE	2	1	0
MALE	23	7	13

Source: Spanish Constitutional Court, 1980-2006.

TABLE 2
VOTING FOR CONSTITUTIONALITY (ALL OBSERVATIONS)

	VOTE FOR CONSTITU TIONALITY	VOTE AGAINST CONSTITU TIONALITY	TOTAL
JUDICIAL REVIEW REQUIRED BY SAME PARTY (NATIONAL)	423 (33.5%)	841 (66.5%)	1264
JUDICIAL REVIEW REQUIRED BY SAME PARTY (REGIONAL)	90 (30.7%)	203 (69.3%)	293
OTHER	856 (46.4%)	989 (53.6%)	1845
TOTAL	1369	2033	3402

Source: Spanish Constitutional Court, 1980-2006.

Note: The Yates chi-square, corrected for continuity, is 0.24 with df=1.

TABLE 3
VOTING FOR CONSTITUTIONALITY (ONLY NON-UNANIMOUS)

	VOTE FOR CONSTITU TIONALITY	VOTE AGAINST CONSTITU TIONALITY	TOTAL
JUDICIAL REVIEW REQUIRED BY SAME PARTY (NATIONAL)	142 (37.8%)	234 (61.2%)	376
JUDICIAL REVIEW REQUIRED BY SAME PARTY (REGIONAL)	45 (25.3%)	133 (74.7%)	178
OTHER	273 (41.2%)	389 (58.8%)	662
TOTAL	460	756	1216

Source: Spanish Constitutional Court, 1980-2006.

Note: The Yates chi-square, corrected for continuity, is 3.24 with df=1.

TABLE 4
VOTE ACCORDING TO THE PARTY
(CLUSTERED LOGIT ESTIMATION)

	All Observations	All Observations with Fixed Effects	Nonunanimous	Nonunanimous with Fixed Effects
Total Observations	3402	3402	1216	1216
Pseudo Log-Likelihood	-1942	-1874	-676.7	-641.6
Wald test	119.5	182.6	69.43	139.6
McFadden's R ²	0.175	0.204	0.193	0.235
AIC	3902.2478	3809.2766	1371.4043	1345.1518
SC	3957.4369	3999.3723	1417.3342	1503.3548
		VARIABLES		
Constant	-0.70** (-2.97)	-0.60 (-1.96)	-0.49 (-1.55)	-0.44 (-0.86)
PartyInGov	0.28 (1.27)	0.09 (0.38)	-0.10 (-0.38)	-0.36 (-1.14)
PSOE	1.01*** (4.56)	0.45 (1.77)	0.74* (2.46)	0.29 (0.79)
AppNationalist	-0.68*** (-3.74)	-0.60** (-2.81)	-0.39 (-1.16)	-0.41 (-1.07)
AppReglevel	-0.35 (-0.52)	-0.39 (-0.61)	-1.45* (-2.57)	-1.16* (-2.19)
JRNatlevel	1.38*** (5.50)	1.33*** (5.12)	1.62*** (4.78)	1.69*** (5.12)
JRReglevel	-1.20** (-3.20)	-1.26*** (-3.48)	-1.33*** (-3.49)	-1.33*** (-3.45)
JRNationalist	-0.90*** (-4.04)	-0.96*** (-4.31)	-1.13*** (-3.57)	-1.33*** (-3.84)
JRDPueblo	-0.64 (-1.67)	-0.53 (-1.42)	-0.65 (-1.21)	-0.60 (-1.13)
		FIXED EFFECTS		
C2		0.16 (0.76)		0.37 (0.75)
C3		0.48 (1.55)		0.69 (1.09)
C4		1.22*** (3.62)		1.49* (2.47)
C5		0.10 (0.35)		-0.01 (-0.03)
C6		-0.13 (-0.47)		0.16 (0.31)
C7		0.31 (1.04)		0.24 (0.47)
C8		0.18 (0.70)		-0.20 (-0.42)
Rubio Llorente (PSOE)		0.30 (1.54)		0.04 (0.06)
Tomás y Valiente (PSOE)		0.18 (1.19)		-0.21 (-0.50)
García-Mon (PSOE)		0.33* (2.21)		-0.13 (-0.38)
Truyol Serra (PP)		-0.48* (-2.12)		0.15 (0.41)
Díaz Eimil (PSOE)		0.26 (1.63)		0.11 (0.31)
de la Vega Benayas (PSOE)		0.48** (2.89)		0.39 (1.00)
Rodríguez-Piñero (PSOE)		0.41** (2.64)		0.15 (0.40)
Gimeno Sendra (PSOE)		0.48** (2.85)		0.51 (1.21)
Rodríguez Bereijo (PSOE)		0.47** (3.01)		0.19 (0.51)

Gabaldón López (PP)		-0.96* (-2.56)		-0.50 (-0.92)
González Campos (PSOE)		0.31 (1.63)		-0.11 (-0.28)
Cruz Villalón (PSOE)		0.68*** (3.39)		0.79* (2.08)
Viver Pi-Sunyer (PSOE)		0.58** (2.89)		0.64 (1.57)
Mendizábal Allende (PP)		-1.23** (-3.29)		-1.24* (-2.17)
Jiménez de Parga (PSOE)		0.26 (1.16)		0.35 (0.71)

Robust z statistics in parentheses. *** p<0.001, ** p<0.01, * p<0.05
C2 to C8 refers to the Second Court to the Eight Court since 1980

TABLE 5
INTERPRETATION OF COEFFICIENTS
REGRESSIONS WITHOUT FIXED EFFECTS

dPr(AccParty = 1)	% CHANGE OF DV WHEN THE VARIABLE IS CHANGED FROM 0 TO 1 (All Observations)	[95% Conf. Interval]		% CHANGE OF DV WHEN THE VARIABLE IS CHANGED FROM 0 TO 1 (Only Non Unanimous)	[95% Conf. Interval]	
		value	value		value	value
	value (standard deviation)			value (standard deviation)		
PartyInGov	0.06 (0.05)	-0.04	0.16	-0.02 (0.06)	-0.15	0.10
PSOE	0.24 (0.05)	0.15	0.34	0.18 (0.07)	0.03	0.31
AppNationalist	-0.13 (0.04)	-0.21	-0.06	-0.09 (0.07)	-0.22	0.06
AppReglevel	-0.05 (0.13)	-0.24	0.26	-0.23 (0.07)	-0.37	-0.07
JRNatlevel	0.33 (0.05)	0.22	0.44	0.37 (0.07)	0.21	0.50
JRReglevel	-0.20 (0.06)	-0.31	-0.09	-0.24 (0.06)	-0.35	-0.12
JRNationalist	-0.16 (0.04)	-0.24	-0.07	-0.21 (0.06)	-0.34	-0.10
JRDPueblo	-0.12 (0.07)	-0.24	0.00	-0.13 (0.11)	-0.31	0.10

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APPENDIX FOR
REFEREES

NOT INTENDED FOR
PUBLICATION

DATASET

CHARACTERIZATION OF DATASET

CODE	JUDGE	PARTY	TERM IN COURT	MAGISTRATE	NUMBER OF VOTES
J1	Manuel García Pelayo y Alonso (P1)	UCD/PSOE (PSOE)	1	NO	45
J2	Jerónimo Arozamena Sierra (VP1)	UCD	1	YES	46
J3	Francisco Rubio Llorente (VP3)	UCD/PSOE (PSOE)	1, 2 &3	NO	111
J4	Aurelio Menéndez Menéndez	UCD	1	NO	--
J5	Gloria Begué Cantón (VP2)	UCD	1 & 2	NO	85
J6	Manuel Díez de Velasco Vallejo	PSOE	1	NO	44
J7	Ángel Latorre Segura	PSOE	1 & 2	NO	80
J8	Rafael Gómez-Ferrer Morant	UCD	1	NO	45
J9	Luis Díez-Picazo y Ponce de León	UCD	1 & 2	NO	76
J10	Francisco Tomás y Valiente (P2&3)	PSOE	1, 2 &3	NO	120
J11	Angel Escudero del Corral	UCD	1	YES	44
J12	Plácido Fernández Viagas	PSOE	1	YES	14
J13	Francisco Pera Verdaguer	UCD	1	YES	25
J14	Luis María López Guerra (VP4)	PSOE	2, 3 &4	NO	129
J15	Fernando García-Mon y González-Regueral	PSOE	2, 3 &4	NO	159
J16	Antonio Truyol Serra	UCD (1&2) / PP(3)	1, 2 &3	NO	93
J17	Jesús Leguina Villa	PSOE	2 & 3	NO	70
J18	Eugenio Díaz Eimil	PSOE	2, 3 &4	YES	113
J19	Carlos de la Vega Benayas	PSOE	2, 3 &4	YES	122
J20	Miguel Rodríguez-Piñero y Bravo-Ferrer (P4)	PSOE	2, 3 &4	NO	127
J21	Vicente Gimeno Sendra	PSOE	3 & 4	NO	118
J22	José Luis de los Mozos y de los Mozos	PP	3	NO	34
J23	Álvaro Rodríguez Bereijo (P5)	PSOE	3 & 4	NO	123
J24	José Gabaldón López (VP5)	PP	3 & 4	YES	108
J25	Julio Diego González Campos	PSOE	4 & 5	NO	119
J26	Pedro Cruz Villalón (P6)	PSOE	4 & 5	NO	115

CHARACTERIZATION OF DATASET (CONT)

CODE	JUDGE	PARTY	TERM IN COURT	MAGISTRATE	NUMBER OF VOTES
J27	Carles Viver Pi-Sunyer (VP6)	PSOE	4 & 5	NO	119
J28	Rafael de Mendizábal Allende	PP	4 & 5	YES	105
J29	Enrique Ruiz Vadillo	PP	5	YES	26
J30	Javier Delgado Barrio	PP	5, 7 & 8	YES	64
J31	Manuel Jiménez de Parga y Cabrera (P7)	PSOE	5, 6 & 7	NO	91
J32	Tomás Salvador Vives Antón (VP7)	PSOE	5, 6 & 7	NO	88
J33	Pablo García Manzano	PP	5, 6 & 7	YES	83
J34	Pablo Cachón Villar	PP	5, 6 & 7	YES	54
J35	Fernando Garrido Falla	PP	6 & 7	NO	35
J36	Vicente Conde Martín de Hijas	PP	6, 7 & 8	YES	84
J37	Guillermo Jiménez Sánchez (VP8)	PP	6, 7 & 8	NO	84
J38	María Emilia Casas Baamonde (P8)	PSOE	6, 7 & 8	NO	83
J39	Elisa Pérez Vera	PSOE	7 & 8	NO	50
J40	Roberto García-Calvo y Montiel	PP	7 & 8	YES	53
J41	Eugeni Gay Montalvo	PSOE	7 & 8	NO	55
J42	Jorge Rodríguez-Zapata Pérez	PP	7 & 8	NO	46
J43	Ramón Rodríguez Arribas	PP	8	YES	29
J44	Pascual Sala Sánchez	PSOE	8	YES	30
J45	Manuel Aragón Reyes	PSOE	8	NO	30
J46	Pablo Pérez Tremps	PSOE	8	NO	28

Source: Spanish Constitutional Court, 1980-2006.

P is for President and VP is for Vice-President of the Court.