THE LIMITS TO JUDICIALIZATION: LEGISLATIVE POLITICS AND CONSTITUTIONAL REVIEW IN THE IBERIAN DEMOCRACIES

DISSERTATION

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A growing body of literature has suggested that courts are becoming increasingly powerful political actors in many contemporary democracies. This trend is supposed to be stronger where constitutional courts perform a so-called “abstract review” of legislation. Such courts are the potential recipients of litigation by opposition parties against legislation passed by parliamentary majorities, and enjoy the power to veto it if they find unconstitutional provisions. Since oppositions have unrestrained incentives to contribute to the expansion of these courts’ jurisdiction and the latter are unconstrained by majority will, the inevitable result should be an important and systematic reduction of the discretion enjoyed by legislative majorities.

Focusing on the cases of Spain and Portugal, where constitutional courts have been in place for about two decades, this study challenges such understanding of the consequences of abstract review of legislation. Its first part deals with the institutional design of constitutional courts in both countries, including the rules of appointment and retention of judges frequently neglected by the extant literature. It shows that, unless conditions are such that presently dominant political actors can shape judicial institutions as insurance mechanisms against their future displacement from power, the resulting rules are likely to prevent the conversion of courts into full-fledged countermajoritarian actors, and may even allow for their congruence with and responsiveness to the
preferences of both present and future majorities. The second part of this study discusses how, in the last two decades, those institutional rules have actually shaped the incentives and constraints faced by majorities, oppositions, and judges. On the one hand, the possibility that strategic oppositions experience policy and electoral costs from litigation has contributed, most of the time, to keep the jurisdiction of constitutional courts over legislative processes under relatively strict boundaries. On the other hand, strategic judges have reacted to institutional constraints, remaining responsive to the parties that appointed them and displaying deference towards contemporary majorities. Thus, the pressures towards the judicialization of politics resulting from the creation of abstract review institutions in Spain and Portugal have been effectively contained, preventing an inexorable trend towards a government of judges.
To Rosy, Clara, and Joaquim
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INTRODUCTION

Are courts becoming increasingly powerful and unconstrained political actors in modern democracies? Is rule by parliamentary majorities and elected officials in general becoming a thing of the past, and being displaced by an increasing policy-making role of judges? In the last decade or so, the notion that a "judicialization of politics" or "expansion of judicial power" is taking place in contemporary democracies has been espoused by an increasing number of comparative political scientists. "Judicialization" has been defined as a process through which "elements of legal discourse penetrate and are absorbed by political discourse" (Stone 1994, 446) or even as the downright "transfer of decision-making rights from the legislature, the cabinet, or the civil service to the courts" (Vallinder 1995, 13). As a result of this trend, it is argued that "[c]ourts have developed into powerful institutional actors or policymakers" (Shapiro and Stone 1994, 401). Judges are increasingly "[directing] the making of public policies" (Tate 1995, 28) and "intervening in the legislative process" (Stone 1992a, 235), and the "work of governments and parliaments is today structured by an ever-expanding web of constitutional constraints" (Sweet 2000, 1). In sum, "an incredible judicialization has occurred in political life over the last decade at both the national and the supranational level" (Beirich 1999, 250). As a recent article in The Economist put it, "in an age when all political authority is supposed to derive from voters, and every passing mood of the
For some, it even marks the end of an old political order: "parliamentary supremacy, understood by most students of European politics to be a constitutive principle in European politics, has lost its vitality. After a polite, nostalgic nod across the Channel to Westminster, we can declare it dead" (Sweet 2000, 1)

There is a group of countries where these trends are supposed to be more visible. In general, "judicialization" has been attributed to many different causes: the "third wave" of democratization, the spread of values and practices of constitutionalism and rights, the decline of parliaments, the reaction to growing governmental interference in the private sphere of social life, the international influence of American jurisprudence and legal institutions, and the decline in public support for elected political institutions and élites, just to name a few. However, there is one characteristic shared by some contemporary democracies that seems to be particularly associated with judicialization: judicial review of legislation. And what seems to be new and worthy of attention is not that high courts can become relevant policy-makers on their own, something that observers of the U.S. Supreme Court had long remarked by calling it "the third lawmaking branch" (Adamany 1991, 23). Instead, the novelty is that, far from being an American singularity, such role seems to have materialized in European parliamentary or semi-parliamentary systems with perhaps even greater strength. These are the countries where abstract or "constitutional review" of legislation is typically performed according to the so-called "European" or "Kelsenian" model, named after the legal theorist Hans Kelsen who, as one of the fathers of the 1920 Austrian Republic's Constitution, was also the "creator" of the Austrian Verfassungsgerichtshof, the first constitutional court of its kind entrusted
with the power to produce final and binding rulings on the constitutionality of laws. And as Sweet and others suggest, "systems that contain abstract review ought to experience more judicialization than systems that do not" (Sweet 2000, 51)³

There are several good reasons to investigate this matter deeply. First, these alleged consequences of the Kelsenian model are all the more striking when we consider that, in many of the European political systems where it has taken hold, majority rule and parliamentary supremacy seemed previously unquestionable or, at least, unfettered by judges and courts. Back in the 1930s, the Kelsenian model was still an oddity among the democracies of the time, existing only in Austria, Czechoslovakia, and, starting in 1931, the Spanish Second Republic. Seventy years later, this is no longer true. By 2001, 35 independent European countries were classified as free electoral democracies by Freedom House (Karatnycky 2002). Of those, no less than half (seventeen) had constitutional courts enjoying abstract review powers. The so-called third wave of democratization made a crucial contribution to this expansion of constitutional review: among the thirteen Southern and Eastern European countries that became fully democratic since the 1970s, twelve (all but Greece) adopted courts with abstract review powers.

Second, comparative political scientists are increasingly acknowledging that judicial review "has become a central fact of political life in several European countries" (Gallagher, Laver, and Mair 1995, 60), and suggesting that it works as an "antimajoritarian device" whose presence — particularly if backed by a rigid constitution — helps distinguishing different types of democracies, by dispersing political power, increasing opposition influence, and making policy change less likely. Again, these effects seem to result more clearly from the functioning of "Kelsenian" constitutional courts: in
Lijphart's scale of the "strength" of judicial review in thirty-six consolidated democracies in the world, all but one of the countries with centralized judicial review of legislation by constitutional courts show up as "strong" or "medium-strength" cases of judicial review (Lijphart 1999, 225-230).⁴

Finally, if parliamentary democracies are treated as systems of delegation of powers from voters to legislatures and from legislatures to cabinets, the civil service or, for that matter, courts (Bergman, Müller, and Strøm 2000; Thatcher and Sweet 2002), several fundamental questions typically posed by agency theory can be applied to the role of judges. In what conditions should agents by willing to act for the benefit of principals? Why should principals be willing to delegate power on agents in the first place?⁵ If this "judicialization hypothesis" prevails, what may have started as a delegation of power from politicians to courts may have been converted into full-fledged abdication, a situation where agents — in this case, constitutional courts and their justices — become "unconstrained by how their actions affect their principals" (Lupia and McCubbins 2000, 300). This would have obvious implications for the normative dilemmas about the legitimacy, accountability, and the democratic nature of judicial review. As Bickel famously noted, "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it" (Bickel 1962, 16) If the judicialization hypothesis does hold, such dilemmas — that have been summarized in expressions such as "the countermajoritarian difficulty" of judicial review or the notion that judges can exert a potential "quasi-guardianship" over political processes where electoral accountability was supposed to
prevail (Bickel 1962; Dahl 1989) — would become particularly pressing in many parliamentary democracies.

**The judicialization hypothesis**

In order to provide a first answer to such potential dilemmas, we need to examine the judicialization hypothesis in greater detail and render it empirically testable. In fact, the notion that constitutional review of legislation has transformed the way both justice and politics are conducted in parliamentary systems is more than a mere atheoretical description of a seemingly unexplainable phenomenon. Instead, it is based on a theoretical understanding of the consequences of the Kelsenian model and of the causal mechanisms that relate its institutional features to increasing judicialization.

The "judicialization hypothesis" has a well-established intellectual and theoretical pedigree. In the early 1930s, reacting to the creation of the Austrian Constitutional Court and to rulings by the Weimar's *Reichsgericht* asserting its ability to control the constitutionality of laws, the German legal theorist Carl Schmitt depicted these developments as causes of a future " politicization of justice" and a "judicialization of politics." In Schmitt's (highly critical) appraisal of such trends, "conceiving a judicial resolution for all political questions (...) forgets that, with the expansion of justice to such issues, only harm can come for the judicial branch" (Schmitt 1983, orig. ed. 1931, 57). "If a Court of Constitutional Justice were instituted [in Germany], (...) no fiction, extreme as it might be, would prevent any person from viewing such a Court as a political instance" (1983, orig. ed. 1931, 70). And according to Schmitt, with this transformation of the judiciary's role, politics would also be transformed: by directing
justice "against parliament," a "Court of Political or Constitutional Justice becomes a supreme political instance with the power to formulate constitutional provisions," something Schmitt reputed as "scarcely imaginable from a democratic point of view" (1983, orig. ed. 1931, 245).

Almost thirty years later, Karl Löwenstein, a former disciple of Max Weber's, would make the decisive contribution to coin the expression "judicialization of politics" in the English language. In his *Political Power and the Governmental Process*, Löwenstein referred to the establishment of Kelsenian-style constitutional courts as "supreme arbiters in the political process" as "the core aspect of the 'judicialization of politics'" (Löwenstein 1976, orig. ed. 1957, 325). According to Löwenstein, the intervention of courts in constitutional matters "may lead to a blurring of the borders between politics and the administration of justice, (...) [and] exposes the politically accountable holders of political power — government and parliament — to the temptations of taking a political conflict before the Court. In turn, justices are obliged to replace the decisions of the democratic holders of power by its own political judgements, disguised in the form of judicial rulings" (1976, orig. ed. 1957, 325).

Most contemporary judicial scholars that have studied European constitutional courts have focused on the causal mechanisms and concrete empirical manifestations of the phenomenon described by Schmitt and Löwenstein. According to this literature, there are two main reasons why "judicialization" inevitably follows from the establishment of courts with constitutional review powers. First, by awarding parliamentary minorities the right to refer legislation for abstract review, the Kelsenian model opens up enormous opportunities for the use of constitutional litigation for countermajoritarian purposes. The
reason why what Löwenstein described as a "temptation" has become increasingly irresistible is the fact that strong and disciplined parties capable of exercising "centralized control over the legislative process" have come to dominate parliamentary politics. In these weak "arena legislatures" of most Western democracies, oppositions have enormous incentives to use the few remaining opportunities they have left to place obstacles in the path of governments supported by disciplined majorities in parliament (Sweet 2000, 57).

For constitutional courts and their justices, this means empowerment, since they depend upon such litigation in order to acquire jurisdiction over everyday law-production. For majorities, this means new and increased constraints, as they are now forced to internalize the likelihood that their political opponents will give courts the last word in policy-making and that their policies will be declared unconstitutional and vetoed.

All this might still conceivably be countered if majorities enjoyed the ability to reverse judicial rulings and force courts to abide by their wishes. However, a second factor allegedly intervenes here: given the institutional rules under which their activity is framed, constitutional courts are independent and insulated from the interests of majorities and executives. Litigation by opposition parties has turned them into actual "third chambers" in law production, replacing the traditional forms of legislative organization, unicameralism or bicameralism, by a new brand of "tricameralism" (Lane and Ersson 1999, 167). When abstract review takes place immediately before a bill becomes law — in a priori review —, constitutional courts proceed to a third (in bicameral systems) or second (in unicameral systems) reading of a bill, testing policies against constitutional rules before those policies have come into force. When referrals take place after the bill has become law — a posteriori review —, those referrals can
typically occur immediately after statutes have been promulgated, which means that the legislative process can still *de facto* be extended to include a second or third reading by a constitutional court. And the analogy between constitutional courts and legislative chambers is only less than perfect because the former are typically *more powerful* than the latter. Most real-world bicameral systems are asymmetrical, in the sense that the lower house can ultimately override rejections by the upper house through simple or absolute majority votes (Lijphart 1999, 205). However, this so-called "tricameralism" is *always symmetrical*: constitutional court rulings can only be reversed either by constitutional amendments or by special procedures that require at least qualified majorities in parliament.

In other words, constitutional courts are "veto players": "institutional or partisan actors whose agreement is necessary for a change of policy" (Tsebelis 2000, 442; Tsebelis 2002, 225-228). Incumbents have no alternative but to comply with whatever courts decide, and courts need not take into consideration whatever majorities wish. According to some observers, this has allowed courts to "rule in opposition to dominant political forces and mainstreams in society" (Landfried 1989, 8). And while others have been more neutral about how courts have used their power, they still see them virtually unconstrained: "constitutional law will evolve as the agent [the court] sees fit" (Sweet 2000, 89). In any case, as "voracious" oppositions refer partisan disputes to constitutional courts, unconstrained courts resolve such disputes applying constitutional rules, and majorities constrain their behavior according to likely future rulings, "law-making will inexorably be placed in the 'shadow' of constitutional review" (Sweet 2000, 202).
The limits to judicialization

Nevertheless, as engaging as this "judicialization hypothesis" may seem, one must at least consider an alternative view. In order to understand what that alternative might be, a good place to start is the very first rejoinder to the argument that constitutional courts were likely to lead to a "judicialization of politics." Its author was, predictably, Kelsen himself, in an essay reacting to Schmitt's criticisms of the very concept of a constitutional court (1981, orig. ed. 1932).

Kelsen recognized the inevitability of the politicization of constitutional justice. But he pointed out that such inevitability resulted merely from the fact that all courts and all judges at all levels of jurisdiction exert some sort of political power, in the sense that they weigh conflicting interests and decide in favor of one or the other (1981, orig. ed. 1932, 232). And if Schmitt was indeed right to worry about the limits of judicialization, the truth was that those limits were not necessarily indeterminate or simply non-existent. As Kelsen put it,

"It is not possible to deny that the problem posed by Schmitt about the 'limits' of judicial jurisdiction in general and constitutional jurisdiction in particular is entirely legitimate. However, in this context, this should be discussed not so much as a problem concerning the concept of jurisdiction, but rather as a problem concerning the best organization of a function, and these problems are entirely separate" (1981, orig. ed. 1932, 253).

In other words, Kelsen believed there were ways to "organize" constitutional review that might be able to "contain the power of the Court and thus the political nature of its function" (1981, orig. ed. 1932, 253). In a previous work, he had suggested that the appointment of justices should be regulated in such a way as to reduce illegitimate political influences, but at the same time accept the participation of political parties in
determining the composition of the Court, "instead of [their] occult and therefore uncontrollable influence" (2001, orig. ed. 1928, 20) Besides, Kelsen argued that there was no reason why such courts and their justices need to systematically collide with the "democratic principle": whether that is the case "may only depend on the way they are appointed and on their legal status" (1981, orig. ed. 1932, 284). Access to litigation could be generous enough to include public authorities and "qualified minorities," but not so generous as to allow "reckless litigation" (2001, orig. ed. 1928, 27). And constitutions should be designed in order to reduce the judges' discretion, by focusing on procedures rather than on general and vague notions of "freedom", "justice", and "equality" (2001, orig. ed. 1928, 26). Thus, what Kelsen also found "intolerable" — "making the fate of every law depend from the judgement of a college of judges composed in a more or less arbitrary way from a political point of view" (2001, orig. ed. 1928, 26) — could be avoided. The judicialization of politics could be contained by means of adequate institutional design.

The notion that not all rules under which constitutional review is framed are necessarily favorable to the judicialization of politics has also found supporters among contemporary public law scholars. Institutional rules have been argued to be the key for ensuring the "legitimacy" of constitutional courts, their alignment with prevailing political preferences, and their accountability before political actors. As Favoreau notes, the " politicization of appointments," typical of most constitutional courts, "far from being an aberration is instead an element necessary to the system" (1986a, 57). "Legislators participate in the recruiting, screening, and selection of candidates, (...) [and] the party loyalty of judges is acknowledged and important in this process" (Morton 1999).
Constitutional courts have even organized the renewal of its composition by allowing only limited terms for justices and, sometimes, the partial renewal of the entire court every couple of years, thus "facilitating the adaptation of its composition to political changes" (Favoreu 1986a, 60). It has also been suggested that although constitutional justices are and should be "independent," "[there are] other more subtle but not necessarily less effective elements in the judicial function which may be able to keep it in contact with, and responsive to, 'the people',' such as rules allowing justices to justify their reasons publicly (Cappelletti 1986, 312). And although constitutional justices are in a position to "freely give or refuse their consent to the promulgation of the law", they are also placed under "external and internal constraints". Those constrains include not only those "linked to the nature of the function, mainly the need to justify the decisions," but also "possible reactions of other authorities, (...) the strongest of which may consist in measures against the status and the person of the judges" (Troper 1990, 44-45).

It should therefore not come as a surprise that some of the empirical assessments about the consequences of constitutional review are not entirely coincident with those made by proponents of the "judicialization hypothesis," even when precisely the same cases and countries are under scrutiny. In Italy, for example, it seems that judges are not "unconstrained" at all: instead, they tend to "follow the political mainstream" and assume a "conscientiously passive," "deferential," "restrained," and "timid" role vis-à-vis parliament (Volcansek 1992b, 4; Franciscis and Zannini 1992, 78; Volcansek 1992a, 505). And even in Germany, the jurisprudence of the Bundesverfassungsgericht is said to have been "following the political shifts [and] (...) staying within the assumed limits of acceptability in the political arena" (Blankenburg 1996, 311), while its justices have
displayed an "hesitancy in invading the power of other branches" and a general self-restraint in all policy areas except that of the protection of individual rights, where the Court only "occasionally displays activism" (Wallach 1991, 170).

Thus, there seems to be an alternative to the "judicialization hypothesis." That alternative does necessarily deny that constitutional courts exert a political role, that their justices may enjoy some relative autonomy, or even that majorities will be somehow constrained by the presence of such courts. Instead, it focuses on the way that not only majorities, but also oppositions and courts themselves may be constrained by the institutional rules framing constitutional review of legislation. Depending on those rules and the political and social contexts with which they interact, lawmaking needs not be inexorably placed under the shadow of constitutional review. In short, it is a view that focuses on the limits to judicialization, and admits that, under certain conditions, the real story to tell about the judicialization of politics may be little more than the story of its absence.

In the following chapters, these two contrasting views about the consequences of constitutional review will be discussed and tested in the study of constitutional litigation and judicial decision-making in two countries: Spain and Portugal. From a comparative point of view, the only unusual thing about either case is that, although both countries have had constitutional courts functioning for about two decades, they have received less attention from comparative judicial scholars than other countries whose experience with constitutional review is shorter and, perhaps, less conclusive. By the end of the 1990s, an exhaustive list of bibliography on comparative judicial politics compiled by a reading
group led by Lee Epstein at Washington University contained 56 references about the Russian Federation, closely followed by Canada, and, at greater distance, by the United Kingdom, Germany, and France. Among the remaining European countries with abstract judicial review, only Italy had more than 10 references. However, while more recent democracies such as Poland or Hungary had, respectively, seven and eight references, there were only three articles dedicated to the Spanish constitutional court and no English language reference at all to Portugal.⁸

The paucity of comparative research about these countries' constitutional courts is all the more striking considering that, in the 1970s, Spain and Portugal inaugurated what would later be called the "third wave of democratization in the modern world" (Huntington 1991). Both countries came to epitomize two basic and contrasting types of transition from authoritarianism and their likely consequences. Spain represents the typical "regime-initiated" transition, which culminated in an "elite settlement" that established new institutions of open political competition and participation and was followed by a swift move towards attitudinal and behavioral compliance towards democracy.⁹ In contrast, Portugal represents the typical transition through "collapse," followed by a protracted struggle and uncertainty about the very nature of the regime itself, the persistence of important domains of power in the hands of democratically unaccountable actors such as the military, and a slow move towards the legitimization of democracy before the public and political élites.¹⁰ It is therefore surprising that the creation and functioning of these countries' judicial institutions has been addressed by so few political scientists, and much less from the kind of comparative perspective that the heuristic relevance of both cases to the study of democratization seemed to justify.
The following chapters are divided in two main parts. Regardless of the extent to which the "judicialization hypothesis" actually holds, both alternative views of the consequences of constitutional review give great importance to the role of institutional rules in determining the opportunities and incentives, as well as perhaps the constraints, under which the activity of governments, oppositions, and courts take place. Thus, Part One of this study discusses how such institutions came about in Spain and Portugal. In the three chapters that compose it, I will test alternative explanations of the emergence of constitutional review institutions. As we shall see, although that emergence is often explained on the basis of cultural-historical influences or in terms of the functions those courts were supposed to perform, what those institutions end up looking like (and whether they emerge in the first place) is better explained by recourse to the simple notion that political actors seek strategic advantages when making institutional choices.

If we focus on what political actors in both countries intended with and expected from the creation of constitutional jurisdictions in the Iberian democracies, what they got in the end, and why, we can realize how the rules regulating the jurisdiction, composition, and access to the Spanish and Portuguese courts bear the indelible imprint of self-serving choices on the part of political actors.

What preferences of what actors were better served by those institutional outcomes is something that ended up having a decisive influence on the role constitutional review came to play in Spain and Portugal. Part Two of this study focuses on the two absolutely crucial aspects of that role, because they are precisely the ones we need to consider in order to test the basic causal mechanisms that support the "judicialization hypothesis." The first is the extent to which opposition parties have (or
have not) resisted the "temptation" to use their access to constitutional courts in order to reach their own policy goals. In both countries, I will start by isolating specific political and historical contexts in which the "judicialization hypothesis" would lead us to expect oppositions to make a systematic use of constitutional litigation for countermajoritarian purposes, and then determine whether those expectations are fulfilled. But alternatively, I will also consider the consequences of conceiving opposition parties and their leaders not as "voracious" policy-seeking litigants — as the "judicialization hypothesis" does — but rather as strategic actors involved in the pursuit of several and potentially contradictory goals. As we shall see, those consequences are particularly important for the likelihood of constitutional courts becoming the recipients of high levels of litigation, and therefore, for their actual empowerment and the expansion of their jurisdiction over legislative policy-making.

The second causal mechanism that supports the "judicialization hypothesis" concerns the unconstrained nature of judicial decision-making in constitutional courts. In chapter seven I will determine the extent to which the available data about declarations of unconstitutionality in Spain and Portugal are consistent with the notion that constitutional courts are powerful, autonomous, and unconstrained political actors. Alternatively, however, I will test different hypotheses. They point to the potential role that judicial policy preferences, partisan appointments, and mechanisms of accountability to which justices and courts as a whole can be subjected play in judicial decision-making. They conceive judges as policy-seekers inserted in a complex political and institutional environment that prevents them from exerting unconstrained power. As I hope to demonstrate, the second cornerstone of the "judicialization hypothesis" also does not
survive empirical scrutiny in our two cases, and the theoretical reasons why it does not suggest that it is also unlikely to hold in most real world democracies.
PART ONE

THE INSTITUTIONAL DESIGN OF CONSTITUTIONAL REVIEW

In the Introduction, we briefly addressed the main features of what have been called the institutions of "tricameralism" in modern parliamentary democracies. But how do such institutions come about in any specific political system? And what is behind the institutional details that regulate the composition of constitutional courts, the selection, appointment, and retention of their justices, their powers and jurisdiction, or the access of litigants to constitutional justice?

In the extant literature, it is possible to find three main types of explanation of institutional choices concerning constitutional review of legislation. The first could be called cultural-historical. From this point of view, the adoption of courts in charge of reviewing the constitutionality of legislation can be basically explained by legacies of the past, historical trends or events, or legal cultures and traditions. The spread of judicial review of legislation in general has been attributed to historical changes such as the new concern with the protection of human rights following the horrors of World War II, the expansion of the state intervention in social life, and the global diffusion of democracy. Variations within this general trend have been attributed to differences in legal cultures and broad institutional settings. Since civil law countries tend do see law as "sacred" and as an "expression of the general will," and since absolute parliamentary sovereignty is
contradictory with the ability of ordinary courts to "interpret and apply their interpretation to legislation," it is argued that only systems of concentrated judicial review were able take hold in most civil law systems. \(^2\) Besides, since they are normally characterized by having career bureaucratic judiciaries and by lacking unitary court systems and a doctrine of _stare decisis_, those countries have also tended to reject the American model in favor of the creation of centralized judicial review by constitutional courts. \(^3\)

Historical or cultural national peculiarities have also been used to explain differences _within_ civil law systems. In post-war Germany or Italy, in post-authoritarian Portugal or Spain, and in post-1989 Eastern Europe, the rejection of diffuse review is said to have been intensified by the strong previous subordination of ordinary judges to authoritarian or totalitarian rulers and their socialization in a culture of political submission, which rendered them untrustworthy from the point of view of new democratic authorities. \(^4\) Other authors have emphasized other types of variations between countries, also dictated by historical patterns. "Nations with no long-standing tradition of a reliable democracy" and where "deviations from parliamentary rule" have occurred are seen as more likely to add centralized judicial review by constitutional courts to their set of new democratic institutions (Beyme 1989, 37; Alivizatos 1995, 583).

A second type of explanation of what kind — if any — institutions of judicial review are adopted can be simply called _functionalist_. From this point of view, the existence of one or another type of judicial institutions results from their ability to solve or prevent certain problems, be they of a social, political, economic, or legal nature.
Functionalist explanations of judicial review institutions have different overtones according to the methodological approach that is used. Legal scholars and comparative political scientists, for example, have often described the creation of constitutional courts and the choice of certain institutional rules as a response to general political and social needs, such as introducing "institutional bulwarks against a recurrence of authoritarianism" (Stone 1992b, 43), assuring the "supremacy of the rule of law" (Brunner 2000, 93), preventing "unduly politicization" of the judicial system (Beirich 1998), or the need to "police the complex constitutional boundary arrangements" in federal countries (Shapiro 1999, 194-196). Others have linked institutional choices regarding judicial review to the need to solve certain specific political problems, such as preventing political decision-making gridlock caused by fragmented party systems or, conversely, introducing additional checks and balances on political systems that seem to lack them (Smithey and Ishiyama 2000; Schwartz 2000, 23).

Several scholars writing from a political economy perspective have also favored a functionalist explanation of judicial or constitutional review. However, they tend to link the emergence of non- or anti-majoritarian institutions such as constitutional courts to their role as efficient solutions to collective-action problems. There is a large literature addressing the role that institutions play in stabilizing potentially chaotic social choices, reducing transaction costs, fostering credible commitments, and solving coordination problems in economic and political markets. The emergence of constitutional courts has also been explained from this perspective. First, by creating checks upon unfettered majority rule such as judicial review, institutional designers contribute to give stability and credibility to policy outcomes and constitutional rules, protecting them against
transient passions and mitigating agency losses in the relationship between voters, representatives and bureaucracies. Second, if constitutions are seen as inevitably incomplete contracts, constitutional courts and other non-majoritarian institutional bodies can be described as outside arbitrators in charge of filling gaps, resolving ambiguities, monitoring the behavior of the contracting parties, and assuring them that such ambiguities will not be explored for private gain. In other words, constitutional courts are seen as "institutional responses to the incomplete contract, the linked problem of uncertainty and enforcement" (Sweet 2000, 44).

Finally, a third type of explanation of institutional choices concerning judicial review of legislation can be provided by a strategic approach. From this point of view, the choice of institutions can be described as a bargaining process in which political actors attempt to obtain distributional advantages. Political institutions, regardless of producing more or less efficient outcomes, also make political actors better or worse off in the pursuit of their interests. Under these assumptions, and since not all relevant political actors involved in these decisions have necessarily the same bargaining power, the balance of forces between them in the process of institutional design matters for which kind of institutions are chosen. And since preferences over rules derive from expectations about their consequences, generalized uncertainty about the future electoral strength of each political actor and about the consequences of institutional choices might have an important impact in outcomes.

From the point of view of a strategic approach, it is possible to make a few predictions about whether judicial review institutions are likely to result from a concrete
process of institutional design. When there are parties which "are dominant at the time of constitution-making and expect to win or retain a majority position in the future (...), the institutions created are expected to provide few checks on the power of the majority in terms of electoral mechanisms, executive-legislative balance, judicial independence, or decentralized structures of government" (Negretto 1999, 198). However, when the political actors that dominate the constitution-making process expect to lack control over legislatures in the future, judicial review of legislation may emerge as an institution designed to protect their interests, or in Ginsburg's words, as "a form of insurance to prospective electoral losers during the constitutional bargain" (Ginsburg 2001, 5). The current balance of powers can even affect what kind of judicial review institutions are adopted. If possible, dominant political actors will not only attempt to make courts more powerful in this sense, but also to maximize the congruence of the judiciary with their interests (by packing it with politicized appointees) and minimize its responsiveness to future majorities (by imposing rules that increase their autonomy and insulation): "by politicizing appointments while depoliticizing control (...), they augment their influence during periods when they are out of power" (Ramseyer 1994, 740-743). 10

It has been argued that the entire historical emergence of constitutional review in modern democracies can be explained in this way. As Mandel puts it, "parliamentary sovereignty is the battle cry of the bourgeoisie so long as the suffrage is restricted to property owners. But both property owners and constitutional theory both lose confidence in parliaments the moment they threaten property" (Mandel 1995, 262). In this sense, the expansion of judicial review in Europe can be seen as a preemptive reaction from the bourgeoisie to the expansion of suffrage, through which judicial institutions were
empowered in order to constrain the policy-making discretion of future legislatures soon about to be controlled by their political adversaries (Mandel 1989). But regardless of the dominant class-based interest at stake, the pattern may very well go back to the oldest example of a system of constitutional review of legislation. The 1776 Pennsylvania Constitution was the result of a unique power shift between the conservative dominant classes and the western peasantry and small bourgeoisie represented by the Constitution party (Haines 1932, 67). A Council of Censors, "chosen by ballot by the freemen in each city and county respectively", was empowered by the Constitution Party to "enquire whether the constitution has been preserved inviolate in every part". Here, the political purpose of constitutional review was crystal clear: fearing a reactionary return, the "radicals" proceeded to "protect their constitutional oeuvre from a future legislative power of the opposite sign" (Acosta Sánchez 1998, 82) not only by creating a powerful body in charge of constitutional review but also by designing its composition in a way that was more likely to favor their preferences (Wood 1969, 226-237).

The creation of the French *Conseil Constitutionnel* seems to have followed a similar pattern. Here, however, the balance of power that its creation wanted to redress was not one between majority and opposition, but rather one between executive and parliament. After decades of parliamentary instability and party-system fragmentation in the French Third and Fourth Republics, the creation of the Constitutional Council was part of an effort by General De Gaulle to make a pre-emptive strike on a previously sovereign parliament. By the 1958 Constitution of the French Fifth Republic, the Council was given *a priori* review jurisdiction not only over ordinary laws but also over organic laws and the standing orders of parliament, through which the legislature might
conceivably attempt to redefine executive-legislative relations. In order to ensure that the Council would not deviate from its predetermined role as parliament’s watchdog, the latter was prevented as a whole both from appointing Council members and from referring legislation for abstract review. Instead, those powers were entrusted to the President and the speakers of the lower and upper houses (plus the Prime-Minister in what concerned referrals), who in all likelihood would be members of the same party, while the lack of abstract or concrete forms of a posteriori review ensured that "the government would be able to act without constitutional scrutiny once policies were adopted" (Ginsburg 2001, 31).

However, from a strategic point of view, there are other circumstances in which judicial review may emerge: when no political actor is able to impose its preferences unilaterally on others and when there is generalized uncertainty about the prospective gains to be obtained from institutional choices (Przeworski 1992, 23-24; Negretto 1999, 199; Ginsburg 2001, 7). When no one can impose "custom-made" institutional rules, either because they lack the power to "impose" anything at all or because they do not know which rules would bring greater benefits, the process of institutional choice becomes more complex, making the different levels of impatience displayed by negotiators more important for the final outcome, and even threatening to paralyze the process of institutional change altogether (Reich 1997; Shepsle 1995, 291; Schiemman 2001, 365-366). But if the absence of an agreement and the breakdown of negotiations are seen as the worst possible outcomes — as they often are in periods of regime transition — political actors are likely to choose institutions that provide mutual
guarantees and allow them to "hedge their bets" (Przeworski, 1991, 22; Frye 1997, 533). Judicial review, as a check upon majorities, is likely to emerge in such situations.

What we should expect from such contexts in terms of institutional details regulating the relations between political actors and constitutional courts (and how they affect judicial power and independence) is less clear than in the previous case. Some have suggested that when uncertainty prevails about which position each party will have in the future distribution of power, all actors have incentives to choose rules for judicial appointment and supervision that restrict the prerogatives of majorities and executives, giving a say to minorities in those processes (Magalhães 1999, 47-48). Uncertainty has also been linked to a more open access to and generally more powerful and insulated courts with judicial review power (Ginsburg 2001, 34-37). However, the exact opposite argument has also been made: uncertainty about who will have control of government leads to less powerful and independent constitutional courts, as party leaders "may prefer to leave parliamentary power less rather than more encumbered by judicial power, as a sort of hedge against limiting one's own power should one's party achieve office" (Smithey and Ishiyama 2000, 12). And others still suggest that when the termination of conflicts over institutional choices cannot be made by unilateral choices or when uncertainty prevails about the "properties of rules" and party's own interests, the last resort is to use "solutions that are readily available and are not seen as self-serving", borrowing from foreign or domestic historical precedents (Przeworski 1991, 23; Schiemman 2001, 366).
In the light of these different approaches to institutional design, the following chapters will analyze how the Spanish and Portuguese constitutional courts came about. Which of these approaches — cultural-historical, functionalist, or strategic — is more successful in explaining the institutionalization of constitutional review in these two countries? And what do these processes of institutional design of constitutional review and their outcomes suggest in terms of the likelihood of politics becoming "judicialized" in the new Iberian democracies? These are the questions addressed in the next three chapters.
CHAPTER 1

A SHARED LEGACY

Determining the extent to which institutional choices concerning judicial review in Spain and Portugal can be explained by the "legacies of the past" requires that we set, first of all, exactly what those legacies might be. Students of both countries have usually emphasized several historical, cultural, socioeconomic and political similarities between Spain and Portugal that, to some extent, can be also generalized to all of Southern Europe. Among them, it is possible to include some of the basic factors that are thought to affect a democratization process and the type of new institutions likely to be chosen. In the early decades of the 20th century, both Portugal and Spain had experienced short-lived prior democratic regimes, the First (Portugal) and Second (Spain) Republics, the former terminated by a right-wing military coup and the latter by a full-fledged civil war. Second, by the late 1960s, Spain and Portugal had both undergone more than three decades under the longest-lived dictatorships in the Western hemisphere, the authoritarian regimes of Francisco Franco and António de Oliveira Salazar. Besides, by then, Spain and Portugal also enjoyed relatively similar levels of socioeconomic development, and were similarly affected by surges of economic growth and modernization in the 1960s. And they were influenced by similar external factors, including the inclusion of both countries in the Western-bloc and the role of the European
Community as a "catalyst of democratization." There is, however, another less remarked similarity that is crucial to put the process that gave birth to judicial review in Spain and Portugal into context: a shared legacy in terms of legal and judicial culture, systems, and institutions.

The civil law tradition and authoritarian rule

Historically, both Spain and Portugal fit quite well into what has been called the "civil law tradition," the result of an historical sequence shared by most Continental European nations: a common experience with Roman Law, the revival of the Justinian Code in Medieval and Renaissance Europe, and finally, in the late 18th and early 19th centuries, the liberal thrust towards the transfer of sovereignty from the "King" to the "Nation" represented in parliament, the French invasions, and the spread of Code Napoléon.2

In the 1800s, the fundamental transformation undergone by these civil law systems was the conversion of written and exhaustive legal rules emanating from a sovereign parliament into the only acceptable source of law, taking precedence over custom, precedent, or the judicial discovery of law. Obviously, this "ideal" has been always undercut in reality, especially by the slowness and incompleteness of legal codification processes, the de facto role assigned to precedent in judicial opinions, and the important role played by doctrine produced by legal scholars and professors in the interpretation of legal commands (Shapiro 1981, 135-136). Nevertheless, this "ideal" has weighted heavily in terms of determining both a shared conception of the judge's role and of the concrete, institutional organization of judicial systems. While the judge was supposed to do little else besides passively and mechanically apply preexisting rules to
concrete cases, the judiciary as a whole was to be treated as a collection of "expert clerks" inserted in the overall bureaucratic state apparatus. In Damaška's words, in civil law systems, judging was understood as a "pure conflict-solving procedure adapted to an environment of a hierarchical bureaucratic judiciary" (Damaška 1986, 184).

These main features of the Spanish and Portuguese judicial systems, some of them untouched until this day, were already fully established by the end of the 19th century. Moreover, they persisted with remarkable stability in the background of rather dramatic political changes. Although the introduction of penal, civil, commercial and procedural codes was more difficult in Spain — due to its collision with the specific "foral laws" pertaining to several ancient kingdoms in the Spanish territory — the process was practically completed by 1889, with the promulgation of the Civil Code (Lancaster and Giles 1986, 360). By then, in both countries, the modern institutional architecture of the judicial system had also been mostly achieved. Following the progressive elimination (or, at least, severe curtailment) of locally elected judges and jury courts, a bureaucratic three-tiered system was established, comprising a highest Supreme Court, an intermediate level of appeals courts, and a network of regional or municipal level courts of justice. In both countries, this was accompanied by the increasing fragmentation of judicial jurisdiction, as military, administrative, labor courts, and other ad hoc special jurisdictions in charge of more politically sensitive matters were established. The appointment of judges by the Crown and/or the executive became the norm, awarding ruling parties and local notables a preponderant role (Hespanha and Malheiros 1986, 504-505; Paredes Alonso, 1991).
The Portuguese and Spanish authoritarian regimes in the 20th century did very little to change this basic institutional setting. In Portugal, several conflicts with the political authorities of the First Republic on the issue of "revolutionary purges" revealed that judges had remained generally conservative in their ideological outlook, which made them eminently tolerable in the eyes of Salazar (Magalhães 2000, 108). The same did not happen in Spain, where Franco would include many judges (as well as civil servants in general) as targets of extensive political purges conducted in the 1940s. But beyond that, the changes operated by both authoritarian regimes in their judiciaries were very similar, and consisted both in reinforcing the bureaucratic and hierarchical features of the judicial system and in increasing the jurisdictional fragmentation of the past.

First, and in many respects, both judiciaries became an integral part of these countries' civil services. Applicants were selected on the basis of their general knowledge of several branches of the law, as tested by written and oral exams. Professional training and experience were acquired inside the judicial organization itself, starting from the bottom of a pyramid-like hierarchy in which progression was mainly decided upon criteria of both seniority and merit as assessed by judicial councils entirely composed of judges. However, these basically self-regulating corporations were framed under strict political "safety controls". In both countries, appointments to high courts and judicial councils were strictly controlled by the executive, which meant that the evaluation, placement, promotion, and discipline applied to lower court judges, as well as the review of their decisions, was conducted by hierarchical superiors in the highest courts that were closely attuned to the regime's preferences (Magalhães, Guarnieri, and Kaminis forthcoming).
On the other hand, the relative "looseness" of the existing political controls over the ordinary judiciary's organization and decisions — at least when compared to those in place in totalitarian regimes\(^3\) — was only possible because the jurisdiction of those courts was curtailed and transferred to new quasi-judicial institutions, all of them strictly dependent from political authorities. This was especially clear in what concerned the judicial repression of political dissent. In Portugal, special *Tribunais Plenários* came to replace military courts in 1945 in what concerned the trial of "crimes against the state". Staffed by career judges that would later be favored in terms of career progression, the *Plenários* were closely monitored by the staff of PIDE-DGS, the regime's political police. In Spain, although the use of military courts for political repression extended until much later, a similar *Tribunal de Orden Publico* was created in 1963 (Magalhães 1995).

This general trend towards the fragmentation of judicial jurisdiction increasingly left regular courts and ordinary judges with little else to do beyond the resolution of routine conflicts in matters of private law. This was a task they performed using the legalistic and positivistic standards that prevailed in legal education and doctrine, meaning a close reverence for the letter of the law and its unquestioned application regardless of content (Gor 1995, 222). Whenever some amount of judicial discretion was indeed available, the congruence of the judiciary's general ideological outlook with the regime's and, ultimately, the installed "safety controls" (review by politically controlled higher courts and the politicized management of judicial careers) were enough to ensure the general conformity of judicial decisions with the regime's preferences (Magalhães, Guarnieri, and Kaminis forthcoming).
Judicial review: failed experiments

Considering these broad features of the Spanish and Portuguese judiciaries, their role as European precursors in the adoption of judicial review of legislation in the early 20th century may seem like a surprising departure from the civil law tradition. Portugal went first, becoming, in fact, the first European nation to have judicial review of legislation. The 1911 Republican Constitution, under the avowed influence of the Brazilian 1891 Constitution, instituted "diffuse" and "concrete" judicial review inspired by the American model, under which all courts could refuse to apply statutes in specific cases on grounds of their unconstitutionality (Miranda 1982; Costa 1989).

Although its introduction in 1911 resulted from an unanimously shared disgust with the use of executive decrees during the dictatorial periods of the deposed monarchy, the constituent debates in Portugal showed little convergence of views about which courts should be able to review what kind of statutes. In 1911, several members of the constituent assembly expressed fears that, with diffuse and concrete judicial review, jurisprudence would become incoherent and courts would become excessively powerful, which lead to (defeated) proposals such as the concentration of judicial review powers in the Supreme Court or the limitation of judicial jurisdiction in this respect to executive decrees (but not acts of parliament) (Araújo 1995, 886-888).

As it turned out, time showed those fears were largely unjustified. The problem with diffuse and concrete judicial review in early 20th century Portugal was not that judges were too eager to use it, but rather that they were unwilling to do so. Until 1933, the cases in which statutes were declared unconstitutional were extremely rare (Costa 1989, 917). The reasons are readily understandable considering what was previously said...
about the Portuguese career judiciary. There was, so to speak, a disjuncture between the Portuguese institutions of judicial review and the concrete cultural and political context to which they were so "progressively" transplanted (Miranda 1968, 109; Costa 1989, 916-917). A legal culture of deference for the law and an institutional setting that fostered almost perfect ideological congruence and responsiveness on the part of judges in relation to political incumbents was more than enough to neutralize judicial review and remove all temptations of "judicial activism".

Therefore, it comes as a no surprise that Salazar decided not to eliminate judicial review altogether in the 1933 Constitution. Instead, he corrected it by introducing a hybrid political-judicial system in which courts were allowed to review the conformity of laws to the "substantive" content of constitutional rules, while a rubber-stamp parliament would review their conformity to the formal procedures of law production. All in all, until 1974, judges remained quite aware that stepping outside their prescribed passive role would cause permanent and irreversible damage to their careers, and the number of rulings refusing to apply statutes on grounds of their unconstitutionality remained close to nil (Teles 1971, 193; Mendes 1989, 926).

The failed experiment with judicial review in Spain occurred in a different way. After the stillborn 1873 federal constitution of the First Republic (which created a mixed model of "political" and "judicial" review of legislation in charge of a Senate and the Supreme Court), it was in only in 1931 that a downright constitutional court was created, the Tribunal de Garantias Constitucionales (TGC), partially modeled after Kelsen's Austrian court.4
The first signs of future trouble could already be detected in the 1931 constituent debates. Back then, the several draft projects and amendment proposals indicated the lack of any clear and shared conception about the role that such a constitutional court should perform. The draft project produced by the provisional government's *Comisión Jurídica Asesora* failed to specify the effects of judicial rulings and who should be awarded standing before the court. In the subsequent draft, presented by the Congressional Constitutional Committee, judicial review was simply eliminated — with the TGC retaining mere consultative powers —, only to be reintroduced again in the final version debated in November 1931. In fact, in the constituent debates, the notion that the TGC was to function as an actual court coexisted — and, to a great extent, collided — with its conception as a substitute "Senate", against whose establishment the constituent assembly had already voted (Cruz Villalón 1987, 301-340). This general "indeterminacy of the model of constitutional justice" (Tomás y Valiente 1993, 26) in the Spanish II Republic left important traces in the TGC's institutional framework: an unrestricted access to litigation awarded to virtually all citizens, a vast number of competencies beyond judicial review of legislation, and the adoption of appointment rules in which members elected by parliament awkwardly coexisted with justices appointed by the regular judiciary and by all the Spanish regions (the "senatorial element"), raising the number of its justices to no less than twenty-six.

The political problems brought about by this system of constitutional review of legislation started with the election of the court's "regional" justices. Those elections were highly contentious and politicized, and ultimately placed within the court many judges associated with the Catholic right in the opposition. As soon as the November 1933
elections brought CEDA (*Confederación Española de la Derecha Autónoma*) to power, cutting the Socialists parliamentary representation in half and nearly eliminating the Republican left, the court was immediately portrayed by the leftist opposition as a rightist force that would work at the government's behest (Rubio Llorente 1981). Besides, and predictably so if we consider the generosity allowed in terms of standing before the court, the judicialization of political controversies was relatively intense during the TGC's short life (Cruz Villalón 1987). The case that ultimately became most damaging for the court's legitimacy was a challenge to the constitutionality of a Catalan law on agricultural activities and contracts, on grounds of the invasion of central government competencies. When the Court nullified the statute, the Catalan authorities simply refused to comply. This ultimately contributed to the 1934 Catalan insurrection that, in turn, fed the TGC again with more cases concerning the suspension of Catalan autonomy and the criminal trial of the cabinet members. From that point on, the TGC never ceased to be under intense attack from one or another political sector. The civil war, and Franco's victory, would ultimately put an end to this first unfortunate experience with judicial review in Spain.

In spite of the important differences concerning the institutional models and ultimate fates of judicial review in Spain and Portugal, its failure in both countries can be partially attributed to a very similar cause. In the context of their civil law legal systems and prevailing legal culture, the Iberian political and judicial elites of the time had enormous difficulties in conceptualizing any model of judicial review that could fall somewhere between a totally "depoliticized" and bureaucratic judicial role and what came to be a overtly politicized *Tribunal de Garantias Constitucionales*. In Portugal, it
was the first option that ultimately prevailed, leading to the practical irrelevance of judicial review, before and during Salazar's authoritarian regime. In Spain, it may very well be the case that the tragic fate of the TGC was to be unavoidably similar to that of the Second Republic's (Roura Goméz 1998, 306). However, the absence of a chamber of territorial representation under the 1931 constitution exponentially increased the political stakes around the institutional design of judicial review, and converted it into a political body lacking any insulation from the acute political and social conflicts that ravaged the Spanish Second Republic.
CHAPTER 2

FROM CONSENSUS TO DUOPOLY: THE INSTITUTIONAL DESIGN OF JUDICIAL REVIEW IN SPAIN

The contrast between the creation of the *Tribunal de Garantías Constitucionales* of the Spanish Second Republic and the establishment of judicial review in democratic Spain in the 1970s has led observers to describe the latter as a relatively (and surprisingly) unproblematic affair. There was apparently "little haggling" in the negotiations about judicial review in the 1977-1978 Constituent Assembly, as parties are said to have paid scarce attention to the creation of the *Tribunal Constitutional* (García Escudero and García Martínez 1998, 187; Beirich 1998). Agreement on the final institutional makeup of judicial review in Spain was achieved at an early point in the constitution-making process, and the approval of the organic law of the *Tribunal Constitutional*, as well as the appointment of its justices, followed swiftly — in less than two years — after the constitution entered into force. Parties are said to have managed to "avoid the errors of the past," borrowing on foreign examples to solve what were mainly technical problems (Tomás y Valiente 1993, 32-33).

To some extent, these descriptions are not entirely lacking in accuracy. They point out important differences between the institutionalization of judicial review in 1970s Spain and what had happened in the Spanish Second Republic or in other cases, such as
Italy or Portugal, where the process was much more protracted in time.\textsuperscript{1} It is also true that, among all the issues debated in the Spanish constituent process, judicial review did not generate the kind of controversy that characterized debates on how to deal with the main political and social legacies of Franco's regime, such as the privileged position of the Catholic church, the suppression of labor rights, the corporatist state structure, and the extreme centralization of the Spanish state (Gunther 1985, 34-36; Gunther, Sani, and Shabad 1988, 114-121).

However, these descriptions of the process through which political élites agreed to include judicial review in their new set of democratic institutions end up neglecting several important aspects. First, they neglect the fact that the different political actors involved in the Spanish constitution-making process started with sharply different institutional preferences about how to organize judicial review in the new regime, and fail to address the contextual conditions that facilitated the final convergence around the adoption of a "Kelsenian-type" constitutional court. Second, they seriously overestimate the extent to which the establishment of the institutions of judicial review in Spain was indeed a "haggling-free" process. Instead, as we shall see, it was a highly politicized process, in which different political actors sought to impose the kind of judicial institutions that would allow them to obtain strategic advantages in the competition for power and policy. Finally, they fail to note how the institutional details regulating the interface between legislative politics and constitutional justice ended up bearing an indelible imprint: instead of the search for the efficient resolution of "technical" legal or political problems, those institutions ended up reflecting the interests and priorities of the two main political parties in the Spanish democratic transition, UCD and PSOE.
Constitution-making and constitutional review

The transition to democracy in Spain started in July 1976, when Adolfo Suárez, a 43-year-old former minister of Franco, became the country's Prime Minister, following a failed attempt at creating a "liberalized authoritarianism" in the aftermath of Franco's death and King Juan Carlos's accession to the throne. The account of what followed is one of the most frequently told stories in the study of the transitions from authoritarian rule. In November, with the King's support, Suárez obtained the approval by the Spanish Cortes of a Law for Political Reform. This law included the introduction of a proportional representation electoral system, scheduled elections for a lower chamber of parliament and the largest part of a senate, and imposed the need for a popular referendum about any future constitutional reform approved by those chambers.

In the following months, amnesties, the suppression of censorship, and the legalization of opposition parties created the basic conditions for free and fair elections to take place in June 1977. Those elections gave representation in the constituent Cortes to six major parties. The Unión de Centro Democrático (UCD), a loosely organized and ideologically heterogeneous center-right party led by Suárez himself, obtained the largest share of seats in the lower chamber. It was followed by the Partido Socialista Obrero Español (PSOE), a century-old socialist party led since 1974 by a moderate social-democrat (Felipe González). The third major party was the Partido Comunista Español (PCE), led by Santiago Carrillo, who had led the party in an approximation to Eurocommunism throughout the late 1960s and early 1970s. Alianza Popular (AP), a coalition of parties founded by former ministers of Franco's governments and led by Manuel Fraga Iribarne, obtained only about 5 percent of the seats. Finally, the
Convergencia Democrática de Cataluña (CDC) and the Partido Nacionalista Vasco (PNV) obtained, respectively, 3 and 2 percent of the seats, on the basis of a platform whose fundamental component was the devolution of power to Catalonia and the Basque Country. Throughout the following year and a half, these parties would engage in negotiations inside and outside the constituent assembly, which culminated in the approval of a fully democratic constitution that obtained the support of (almost) all relevant political elites and of a large majority of voters in the December 1978 referendum.

The constitution-making process

The Spanish constitution-making process was indelibly marked by three major factors. The first was the specific balance of forces between the partisan political actors in the constituent assembly. Contrary to UCD's expectations (Dorado and Varela 1989, 258), the June 1977 elections did not produce an absolute majority for any party. A relatively small parliament, many relatively small electoral districts, the overrepresentation of rural areas, and the use of a D'Hondt formula combined with the Spanish electorate's strategic voting to assure representation to no less than twelve different parties, but also to produce a strong bias towards the largest ones (UCD and PSOE), as well as a very close balance between the electoral weights of the Left and the Right of the party system (Maravall and Santamaría 1986, 85; Gunther 1989, 837-838). UCD obtained 47 percent of seats in the Congreso de los Diputados, followed by PSOE (34 percent). Much further behind came the PCE (6 percent), AP (4.6 percent), and the Catalan and Basque nationalist parties. In the Senate, although the King was allowed to
appoint 41 senators on his own and the electoral system had produced a strong UCD overrepresentation, although the party in government still lacked an absolute majority there. In this way, although the government's party could reap the advantages of being the pivotal party in the constituent assembly (no majority could be plausibly formed without it), Suárez and the government were nevertheless prevented from imposing their options on any constitutional issue.²

The second major factor that affected the Spanish constituent process was the great uncertainty about which party, UCD or PSOE, might win the next legislative election. Opinion polls conducted since 1977 showed that both parties received, by far, the greatest share of voting intentions. However, in a pattern that would prevail until after the Constitution had been approved, polls showed not only that both parties were very close, but also that a large number of voters remained undecided.³ Uncertainty about who would govern after approval of the Constitution persisted well until the 1979 elections. Especially after PSOE had managed to absorb other smaller Socialist or Social Democratic parties throughout the previous year,⁴ polls suggested the possibility of a Socialist growth to the point of becoming the largest party (although short of an absolute majority). However, the public evaluation of Suárez as a political leader continued to benefit from his ability to claim credit for the peaceful dismantling of authoritarianism, allowing his public approval scores — that would ultimately play a crucial role in UCD's victory in 1979 — to remain above those of all remaining party leaders.⁵

The absence of a dominant political actor in the constitution-making process and the generalized uncertainty about future election results increased decision-making costs, as well as the difficulties in solving, in a single moment of constitutional coordination,
many of the contentious substantive policy and institutional issues that divided the Spanish political parties. However, a third important factor helped overcoming potential paralysis and to facilitate agreement about the Spanish Constitution: the generalized perception among almost all parties that, in spite of the losses they might suffer in the inevitable trade-off around concrete constitutional rules, those losses would always be inferior to the costs of a complete breakdown in negotiations.

That perception was expressed numerous times by many different political actors before, during, and after the Spanish constituent process. In the very first session of Congress, party leaders depicted a new Constitution as a crucial instrument of "national reconciliation," in which all the different political and ideological families should be able recognize their interests, or at least, not to find aspects that might be truly unacceptable (Gregorio Peces-Barba, quoted in Gunther, Sani, and Shabad 1988, 119). This perception was favored, on the one hand, by the historical memories and values of the relevant political elites — especially the Communists and the Catalans, whose leaders had been politically active in the 1930s —, which led them to compare this new constituent process against past experiences (the 1931 Constitution), and how these had reinforced the explosive social and ideological divisions in Spanish society (Gunther 1992, 77). On the other hand, the Communists' disappointing social mobilization capabilities — and the converse electoral success of the Socialists and the UCD —, also favored the convergence around a non-rupturist, moderate, purely "democratic", and "institutionalist" strategy for political reform (Oñate Rubacalba 1998, 180).

In this way, a "first and foremost consensus" in the constitution-making process emerged: that the Constitution should be approved by all parties, that it should be all-
inclusive, and that it should produce no clear winners or losers (Oñate Rubacalba 1998, 239). Failure to accomplish these tasks might result in disastrous results for all political forces involved: a military coup, the maintenance of the undemocratic system of leyes fundamentales, or a new civil war (Desfor Edles 1998, 106). This contributed to the prevention of "numerically" feasible but potentially unacceptable outcomes (such as a rightist "mechanical majority" between UCD and AP), to the acceptance by all parties of secret negotiations outside parliament whenever public deliberations entered into deadlock and, more generally, to trade-offs in constitutional issues that redistributed utility among them instead of simply maximizing it (Colomer 1990, 116).

There are many examples of such trade-offs in the Spanish 1978 Constitution. On the part of AP and UCD, the preference had initially been for a rather brief constitution, which would address only the institutional framework of government (Gallego-Díaz and de la Cuadra 1995, 199). However, in exchange for getting the issue of “monarchy vs. republic” off the agenda, UCD was forced to concede to the Socialists an extensive bill of rights in the Constitution that might effect, symbolically but also in substantive terms, a clear break with Franco's legacies (Colomer 1990, 118). The problem then became how to achieve some sort of compatibility between the institutional and substantive policy preferences of the different parties in a more detailed constitutional text. Among the most difficult issues were the degree to which the Constitution should acknowledge a break with the clericalism of the Spanish state, including the role of the Catholic church in education and the prohibition of divorce and abortion, finding a mutually acceptable institutional solution for regional nationalism and political decentralization, prescribing
the state's role in the economy, recognizing labor and social welfare rights, and abolishing the death penalty.

The result of the simultaneous placement of all these issues on the constitutional agenda ended up being a systematic reliance on vagueness, ambiguity, contradiction, and a general indeterminacy in the drafting of constitutional rules. The system of regional autonomy, as it was designed in the Spanish Constitution, provides an interesting illustration of that sort of outcome. Early on, while AP persisted in a staunch defense of a unitary organization of the Spanish state, PSOE and PCE initially sided openly with the claims of Basques and Catalans for political autonomy and, in fact, went even further, defending a federalist or quasi-federal solution that could be extended to the entire territory. As for the nationalist parties, they were mainly concerned with obtaining maximum political autonomy for their territories and the recognition of their historical, linguistic, and cultural specificities, the so-called hecho diferencial. In the Basque case, this also meant the recognition of the medieval administrative and fiscal institution of the Fueros, a direct pact between Euskadi and the Spanish crown through which the right to secession was preserved. Finally, as in many other issues, UCD was internally divided. While some of its MP's simply aligned with AP, the party leadership ultimately split between two alternatives. One consisted in overtly awarding Catalonia and the Basque country a special status, and dealing with the specifics later. The other, which ultimately prevailed within UCD, was simply called café para todos ("coffee for everybody"), and consisted in "dissolving" the particular claims of the so-called "historical" communities by generalizing autonomy rights to all regions of Spain (Gallego-Díaz and de la Cuadra 1995, 201-202).
The final outcome was a system that most qualified observers would later describe as "ambiguous," "fluid," "flexible," "ambivalent," "open," or "unfinished."\(^7\)

First, the Constitution established a distinction between "nationalities" and "regions" without specifying which were which, although several decrees approved throughout 1977 and 1978 had already created thirteen "pre-autonomic" governments (still without legislative powers). Second, the Constitution did not impose one general path for devolution of powers. Instead, and contrary to what had been envisaged in the first preliminary draft of the Constitution, it allowed two major paths to regional autonomy, possibly decomposable into no less than ten different and alternative procedures. The obvious intent was to safeguard a "fast" or "reinforced" track, intended for the "historical communities" (Catalonia, the Basque Country, and Galicia), as ultimately specified in the Constitution's Second Transitional Disposition (Solé Tura 1985, 109). The remaining nationalities or regions could also follow this fast track, but only provided they managed to muster enough regional and national political support to pass a heavily veto-laden procedure for the approval of the communities' own "constitutions" (Estatutos).\(^8\) In any case, the region's Estatuto would have to be elaborated by its parliament (or by the congressmen and senators elected by the region), an it would then be directly negotiated with the Congressional Constitutional Committee. The final project, to be approved or rejected without amendments by the plenary of Congress and Senate as an organic law, would then be submitted to a regional referendum.

Finally, the Spanish Constitution did not establish a set of powers to be assumed by all regions, and made the distinction between central government and communities' competencies fuzzy and open to change, in a use of ambiguity and imprecision that
"seemed conscious and even calculated" (Tomás y Valiente 1992, 33). On the one hand, two lists were advanced, one containing areas in which legislative powers were reserved to the central government (Article 149), and the other containing areas in which legislative powers could be devolved exclusively to the comunidades (Article 148), as specified by each region's estatuto. However, the list of Article 149 included areas in which the central government enjoyed both exclusive legislative and executive powers (international relations, armed forces, and monetary system, nationality and immigration, for example), others in which the central government could issue "basic legislation", leaving to the comunidades of the "reinforced track" the power to complete and implement that legislation (health policy, education and scientific research, media and communication policy, local government, and environment and forestry, for example), and, finally, those in which the comunidades enjoyed only executive powers (labor legislation, intellectual property, pharmaceuticals, for example). Furthermore, several issue areas in which powers and competencies were to be exercised were not even mentioned in the Constitution at all, case in which the regions could assume both legislative and executive powers (culture and tourism, for example). And the Constitution even provided for several methods through which this distribution of competencies could be changed, either widening regional autonomy or restricting it: the reform of the regional estatutos (or, ultimately, the amendment of the Constitution itself), the harmonization of competencies by law on ground of "general interest," or their transfer to the comunidades with or without setting general principles (Article 150). In fact, as a future President of the Tribunal argued in a seminal 1982 article, the ambiguity and open-endedness of Title VII was such that, in practice, it took the specific shape of the estado
Devolution of powers to the regions was far from being the only area of indeterminacy in the Spanish Constitution. The legalization of divorce, for example, was dealt with merely implicit acknowledgment and postponement: Article 32.2 mentioned the future legislative regulation of "the forms of matrimony (…) and causes of separation and dissolution and its effects". The issue of the church's role in education also proved to be one of the most complex in the entire constituent process, along with that of abortion (Desfor Edles 1998, 113). In this case, the acute conflicts over legalization were only solved by a purely verbal compromise around an ambiguous formulation. By stating that "all have the right to life", Article 15. "satisfied" both the right and the left: while AP interpreted this article as meaning that abortion was unconstitutional, UCD, PSOE and PCE thought that formulation was vague enough to allow any possible future legislative option.

Therefore, in the most controversial issues, the Spanish constituents systematically sought constitutional formulas that worked as temporizing solutions (Przeworski 1992, 21) or, in Carl Schmitt's seminal terminology, "apocryphal commitments": rules ambiguous and vague enough to accommodate all demands and to postpone decisions for the future (Schmitt 1982, orig. ed. 1928, 54-56). In other words, and to the extent that constitutions can be equated with contracts, the Spanish constitution was indeed a particularly "incomplete contract": vague, ambiguous, imprecise, and with important gaps that would have to be filled in the hoped-for future of Spanish "normal" politics. As UCD's Herrero de Miñón pointed out in an interview given just after the
*Ponencia*'s preliminary draft had been made public, "with this Constitution, it is possible to legalize abortion or to forbid it; to keep the death penalty or to abolish it; (…) there is only an open door for divorce, but its full recognition through a future law cannot be pinned down as unconstitutional".¹³

This indeterminacy, however, also suggested that the gaps Spain's incomplete Constitution would be filled through an interaction between legislative and judicial politics, i.e, whose final outcomes would be dictated by the forces in control the legislature and the judiciary. As Peces-Barba, PSOE's *ponente*, eloquently put in a discussion about the concrete formulation of Article 15,

“Everybody knows that the problem of law is a problem of the force behind interpretation and political power. And if the Constitutional Court and the majority are pro-abortionist, ‘all’ [have the right to life] allows a law of abortion; and if the Constitutional Court and the majority are against abortion, [all] ‘persons’ [have the right to life] prevents an abortionist law.”¹⁴

Thus, from a technical-legal debate about the best way to reform the Spanish judiciary, insert the protection of constitutional individual rights into the judicial architecture, or assure the supremacy of the rule of law, the establishment of judicial review in Spain rapidly became a debate about how — and in what substantive way — constitutional ambiguities were likely to be resolved in the future. This seriously increased the stakes involved in the design of judicial review institutions.
In the vespers of the constituent process, the only consensus among Spanish political élites in what concerned judicial review was a vague notion that any political reform would have somehow to include the establishment of a system through which the constitutionality of laws could be tested. On the side of political actors within the authoritarian regime, that consensus began to be forged well before any substantive political reforms were even considered. The promulgation in 1967 of the last of Franco's *Leyes Fundamentales* already reflected, albeit quite modestly, the need to accommodate domestic — as well as international — pressures for greater political liberalization (Maravall and Santamaría 1986, 77). Among the novelties introduced then was an incipient form of review of the "constitutionality" of legislation, the so-called *recurso de contrafuero*. Under appeal from the *Consejo Nacional del Movimiento* (whose members were all directly or indirectly appointed by Franco) or the parliament's Permanent Committee, Franco himself would then decide whether any law or act of government contradicted the principles or text of the *Leyes Fundamentales*. The adoption of this system of "political review" of legislation remained, obviously, even less than an unworkable façade of constitutional control.15 However, it also indicated that, from the point of view of the regime's hard-liners, constitutional review of legislation might be seen as a way of tinkering with Franquist institutions in order to allow them some vague resemblance to a constitutional democracy.

A more substantive concern with judicial review of legislation was forged among other sectors within the regime. This primarily came out of a changed academic environment in Spanish legal scholarship, itself related to a climate of relaxation of
political repression and to the growing visibility of reformist factions within Franco's regime. For decades, the study of public law in Spain had been limited to the fields of administrative law and, at most, comparative constitutionalism (Esteban 1999, 68), a result of both political and doctrinal control over universities and the fact that Franco's regime simply did not have a constitution as such. However, in the 1960s, a whole generation of constitutional lawyers that had studied abroad (particularly in Italy and Germany) slowly emerged in the Spanish scholarly community, and several important works on the issue of constitutional reform and, particularly, judicial review were published (Tomás y Valiente 1993, 34; Esteban 1998, 68). In 1967, a study by Luis Sánchez Agesta (later a senator by royal appointment in the constituent Cortes) discussed the American judicial review system and criticized the recurso de contrafuero that had been established in Spain that year, suggesting instead the creation of a "constitutional section" within the Supreme Court that would replace the role of the Head of the State in adjudicating on the constitutionality of legislation (Sánchez Agesta, 1967). Later, in 1973, one of the most influential works on constitutional reform published before Franco's death also discussed the establishment of judicial review in Spain (Esteban et al. 1973). This study, which had originated from the reformist sectors within the regime that were closest to the future King, made a very negative analysis of the functioning of the recurso de contrafuero since 1967, and repeated Sánchez Agesta's suggestion of the need for further "judicialization" of the system. Both studies were the most important first steps towards what came to be an "almost unanimous support among the legal community" around the establishment of judicial review (Tomás y Valiente 1993, 35).
Following Franco's death in November 1975, Prime Minister Arias Navarro and his deputy Manuel Fraga attempted to combine some of the demands for political reform with a general continuity with Franco's system of "fundamental laws". Arias advanced a program for the establishment of a (deceptively called) "Spanish-type democracy," including the creation of a Tribunal de Garantías Constitucionales. However, although the language of the 1931 Constitution was evoked, this Tribunal would be nothing more than a section inside the existing Supreme Court, composed of six justices. Three of them would be career judges, but the remaining three would come from the Consejo del Estado (a consultative body of the executive) and the two chambers of parliament. Appeals against statutes on grounds of their unconformity with the Leyes Fundamentales could only be lodged by a minimum of 2/3 of parliamentary committees' members or by any citizen whose rights were affected by those statutes. In this way, although the projected creation of a more genuinely "judicial" mode of constitutional review sought a convergence with the more reformist sectors of the regime and the procedural legitimization of Spanish political institutions, the way access to this TGC and its composition were regulated determined that it would inevitably remain a cosmetic addition to Franquist authoritarian institutions.

On the part of the opposition to the Franquist regime, the concern with judicial review first came to light in the early 1970s. By then, the so-called "rupturist" opposition to the regime was represented by two main organizations. One was the Junta Democrática de España, formed in Paris in 1974 and composed of the Communist Party, the union Comisiones Obreras and a series of other smaller parties and independents. The second, the Plataforma de Convergencia Democrática, was formed a year later, and
reunited a heterogeneous group of organizations that included the Socialist Party and a variety of other smaller forces, including the Basque Nationalists. What made them both "rupturist" was a shared rejection of the basic institutional and political legacies of Franco's regime: centralism, repression, corporatism, clericalism and, at least at an earlier stage, the monarchy itself. These were to be replaced by a federal or semi-federal system, the reestablishment of individual, political, and labor rights, the complete separation between the state and the Catholic church, the release of all political prisoners, the return of exiles, and the organization by a provisional government of free and fair elections for a constituent assembly. In March 1976, two months after Arias Navarro had presented his program, and at the height of strike activity and social mobilization in urban Spain, both organizations fused under the name of Coordinación Democrática, better known as Platajunta.

The Platajunta's proposals for judicial reform focused mainly on the more immediate need to assure judicial independence and to dissociate the judiciary from the apparatus of political repression. Within the Platajunta, Justicia Democrática, an association formed in the late 1960s by the most progressive members of the Spanish judiciary, sponsored the most far-reaching proposals. They included the elimination of the infamous Tribunal de Orden Público, as well as the establishment of a council that would be in charge of managing judicial careers. This council would be composed of judges elected by and among themselves, a solution inspired in the Italian model, in order to assure judicial independence from the executive in the context of a civil law system (Gor 1995, 222-223). However, in what concerned judicial review, the "rupturist" opposition remained vague at this point. Among the opposition parties, PSOE was the
only one that addressed the issue consistently, framing the introduction of judicial review primarily as a means to protect individual rights. Later, the Socialists would go further, stating that judicial review should be the preserve not of ordinary courts, but rather of a specially created *Tribunal de Garantías Constitucionales*, to which citizens whose rights had been violated by laws or Supreme Court jurisprudence should be able to appeal (González and Guerra 1977, 40-41).

However, on the eve of the constituent process, the nature of the debate on judicial review showed signs of change. The increasing political sensitivity of the issue became clear as some parties began preparing their own internal constitutional drafts. In March 1977, a new draft commissioned by the Socialists included the creation of a new politically appointed constitutional court. However, this time, its jurisdiction was clearly specified: the court would be in charge of both the abstract review of legislation and of solving conflicts of competence between the central government and the future regional governments. A few months later, as the constituent process began, PSOE presented itself as the true champion of the Kelsenian model. The draft approved by the party in August 1977 reunited the contributions of renowned legal scholars (such as Jorge de Esteban, Elías Díaz, and Gregorio Peces-Barba) and included the creation of a *Tribunal de Garantías Constitucionales*, composed of 15 justices, all appointed by qualified majority rule: ten by Congress (in which PSOE had obtained a reasonably good result in the previous June elections) and five by the Senate (where the electoral system had produced a brutal under-representation of the Socialists). Justices would enjoy a nine-year term, but one third of them would renewed every three years, allowing the Court to become responsive to future electoral shifts. The court's jurisdiction would include not
only the abstract review of national or regional legislation, but also conflicts of competencies between the central government and regional authorities, citizen's appeals for redress (*amparo*) against state actions that violated fundamental rights, "issues of constitutionality" (questions sent by ordinary judges about the constitutionality of laws applicable on pending trials), and the ability to review the jurisprudence of the *Tribunal Supremo*. Standing before the court in abstract review of legislation and jurisprudence was to be awarded to an apparently vast range of authorities, such as the speakers of Congress and Senate, the Prime Minister, the presidents of regional parliaments and governments, the Attorney-General at the Supreme Court, the Ombudsman, 50 MP's (about 14 percent of Congress) and 25 senators (about 15 percent of the Senate). \(^{18}\)

The Communists — having won only 6 percent of seats in Congress and almost no representation in the Senate in the June 1977 elections — had rather different preferences about judicial review, and expressed "serious doubts about the opportunity of establishing a [constitutional court] in Spain at this moment" (Solé Tura 1978, 58). Memories of the past, ideological legacies, and present and future interests all combined to produce this skepticism in relation to judicial review. Ideologically, Communist distrust of judicial review of any kind followed generally the Jacobin and Marxist traditions of the European left, which had consisted in general suspicion of any check on institutions representing popular sovereignty and in perceiving judicial institutions as bourgeois "superstructures." The same suspicion had been shared, for example, by the entire Italian left in relation to the constitutional tribunal in 1946 (Volcansek 1992a, 92-93). Second, for the PCE, anything was better than entrusting judicial review to what was inevitably going to be — considering the transacted nature of the Spanish transition —,
an unpurged and conservative career judiciary. But history suggested that a specialized constitutional court might not be an advantageous solution either. After all, from the Communists' point of view, the Tribunal de Garantías Constitucionales of the Spanish 2nd Republic had also become an agent of the rightist parties, as well as a poor substitute for a Senate that the PCE saw as a more fitting site for the political (rather than judicial) resolution of conflicts between the central government and the autonomous communities in the context of a federal system (Solé Tura 1978, 58). Finally, and even more pragmatically, the Communists also understood that all examples in comparative law left little room for their influence in the future interpretation and application of the constitution, both in terms of the standing of small parties before the court in abstract review and of their ability to participate in the appointment of justices.

Thus, the Communists expressed their fear that a constitutional court with abstract review powers might become an instrument usable to introduce "rigidity in the political process" (Solé Tura 1978, 58), i.e., to block the actual implementation of a progressive constitution after it had been approved. According to the PCE, these dangers would seriously increase if judicial appointments were to be made by any other authorities than the sovereign chambers of parliament, if justices could be selected among Franquist judges and law professors, if terms were excessively long and disconnected from electoral changes, and especially if the court could start functioning before new elections had taken place or all the estatutos creating the autonomous regions — susceptible themselves to constitutional control — had been approved (Solé Tura 1978, 58).
On the right, *Alianza Popular* simply failed to include any section on judicial review of legislation in its constitutional draft (Peces-Barba Martínez 1988, 37), although the recent past suggested that Fraga might be willing to support something like the project he and Arias Navarro had advanced in 1976. UCD's position was, as usual, ambiguous. There was agreement about introducing judicial review proper.\(^{19}\) In his speech at the opening of the judicial year in the same month, the Minister of Justice Landelino Lavilla suggested that the current trend in comparative law favored the creation of specialized courts in charge of abstract judicial review, instead of the "traditional" American model where the ordinary courts performed that task.\(^{20}\) However, by mid-1977 and in the beginning of the *Ponencia*’s discussions, UCD was still set on avoiding the creation of a specialized court, giving instead judicial review powers to the extant *Tribunal Supremo*, under referral from several public authorities, including the King.\(^{21}\)

By early October 1977, as part of the increasingly pressing discussion on the way the constitution would deal with the issue of devolution of powers to the regions, it was announced that PSOE's proposal was going to prevail: the members of the *Ponencia* had agreed upon the creation of a constitutional court with jurisdiction over the conflicts of competencies between parliament, the executive and the Autonomous Communities.\(^{22}\)
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<tr>
<th>PSOE’s draft</th>
<th>Ponencia’s report (November 1977)</th>
<th>Constitution (November 1978)</th>
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**Structure and appointment rules**

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<th>PSOE’s draft</th>
<th>Ponencia’s report (November 1977)</th>
<th>Constitution (November 1978)</th>
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<tr>
<td>N. of members: 15</td>
<td>N. of members: 12</td>
<td>N. of members: 12</td>
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<tr>
<td>Term length: nine years (partial renovation of the Court every three years)</td>
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<td>Term length: nine years (partial renovation of the Court every three years)</td>
</tr>
<tr>
<td>Appointing authorities: Congress (10) and Senate (5), by 3/5 majority</td>
<td>Appointing authorities: Congress (4) and Senate (3) by a 3/5 majority, Executive (2), General Council of the Judiciary (2)</td>
<td>Appointing authorities: Congress (4) and Senate (4) by a 3/5 majority, Executive (2), General Council of the Judiciary (2)</td>
</tr>
<tr>
<td>Requirements: two judges with 15 years experience, one lawyer, two law professors, all more than 40 years old</td>
<td>Requirements: lawyers with more than 20 years of professional experience</td>
<td>Requirements: lawyers with more than 15 years of professional experience</td>
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<td>CC’s president: elected by Cortes</td>
<td>CC president: elected by the Court</td>
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**Abstract review**

- A priori review
  - Initiative/standing: government, Congress or Senate
  - Object: treaties

- A posteriori review
  - Initiative/standing: Speaker of Congress, Speaker of Senate, Prime Minister, speakers of regional parliaments, presidents of regional governments, Attorney-General, Ombudsman, 50 MPs, 25 senators
  - Object: laws or decrees
  - Effects: annulment

**Concrete review**

- A priori review
  - Initiative/standing: government, Congress or Senate
  - Object: treaties

- A posteriori review
  - Initiative/standing: Speaker of Congress, Speaker of Senate, Prime Minister, speakers of regional parliaments, presidents of regional governments, Ombudsman, 50 MPs, 25 senators
  - Object: laws or decrees
  - Effects: annulment

Table 2.1: Preferences and outcomes in the design of judicial review in Spain

However, as we can see in Table 2.1, what the preparatory draft reflected was not really a complete triumph for PSOE, but rather a basic trade-off between the UCD’s and PSOE’s institutional preferences. On the one hand, UCD refrained from forming a "mechanical majority" with AP on the issue, i.e., from imposing the attribution of judicial review powers on the Tribuno Supremo. Many of PSOE’s proposals were accepted, and the Spanish Court was to be not very different from the German
Bundesverfassungsgericht, the main inspiration behind PSOE’s proposal. However, there were very significant differences in both the Socialists' proposals and the preliminary draft that were likely to favor PSOE’s interests. The Senate's role in judicial appointments would be — considering PSOE’s weak representation — predictably smaller than the German Bundesrat's. Besides, in a particularly important option for a party currently in the opposition, justices' terms would also be shorter than in Germany, and the staggered renovation of the TGC's composition would reinforce its sensitivity to future electoral realignments.

UCD's interests, by contrast, were reflected in two crucial details. First, the Socialists' proposal concerning the review of the Tribunal Supremo's jurisprudence by the Constitutional Court was left out of the preparatory draft negotiated by the members of the Ponencia. Second, unlike what the Socialists had proposed, the Court would be composed of 11 rather than 15 justices, all of them with at least 20 years professional experience, and not all of them elected by both chambers of parliament by a qualified 3/5 majority. In fact, while seven would indeed be elected by the Congress (4) and the Senate (3), the remaining justices would be appointed by the executive (2) and by a new Consejo General del Poder Judicial (2). Crucially, this CGPJ, which would have authority over promotions, discipline and management of the career judiciary, was to be presided over by the President of the Tribunal Supremo and composed of twenty other members, twelve of whom would be career magistrates. This "judicial majority" within the CGPJ resulted from UCD and AP's concern with "insulating the judiciary from politics", preventing both potential purges and the penetration of progressive judges into the higher echelons of the judicial apparatus (Bonime 1985, 25-26). However, it also had important
consequences for the likely composition of the future constitutional court. The caveats imposed by UCD on the Socialists' draft mitigated the subjugation of the regular judiciary to a newly created constitutional court, and tipped the ideological balance within the latter in favor of the right, by increasing the likelihood that justices recruited among a predominantly conservative judiciary would also find their way onto the Constitutional Court.

The following rounds of the Spanish constituent process resulted only in minor changes to the Ponencia's preliminary report. PSOE's insistence on abstract review of the Supreme Court's jurisprudence ended up being of no consequence. Initially, in June 1978, as part of the general agreement with PSOE and to AP's dismay, UCD conceded it would abstain in what concerned the introduction of this sort of judicial review (Peces-Barba Martínez 1988, 208). However, in the final stage of the constitution-making process, UCD returned to its original position. In the joint Congress-Senate committee, UCD's president of the Cortes, Hernandez-Gil, suggested a vague formula whose basic purpose was to eliminate abstract review of the Tribunal Supremo's jurisprudence from the Constitution, allegedly after intense pressure from the higher ranks of the judiciary.\textsuperscript{23}

In what concerned the Court's composition, the Catalan and the Basque nationalists stressed that "one of the fundamental functions of this court is the control of the constitutionality of the activity of the autonomous institutions" and the "transcendent role that the decisions of the Tribunal Constitucional will have in regard to the autonomous territories"\textsuperscript{24}. At the very least, and according to the Catalans, the Senate — as the chamber of territorial representation — should have a greater role in the appointment of justices. Given its favorable number in the Senate, UCD predictably had
no problems accepting that Congress and Senate should have equal standing in the appointment of justices (4), increasing the total number of justices to twelve. However, PNV's demands concerning adding one representative for each autonomous region in the court's composition, a solution inspired in the Second Republic's *Tribunal de Garantías*, were adamantly rejected by both PSOE and UCD.

Finally, in what concerned standing before the court in abstract review, the right to litigate was ultimately regulated in such a way as to require the agreement of a minimum of 50 MP's and 25 Senators, and was also awarded to the Ombudsman, the Prime Minister, the speakers of Congress and Senate, and the governments and assemblies of the autonomous communities. In other words, and as the smaller parties immediately understood, UCD and PSOE had regulated it in such a way as to be generous enough to allow easy access to Court for the two largest parties (and authorities appointed or controlled by them), and restrictive enough to exclude everybody else. There were only two likely exceptions, the Basque and Catalan nationalists, who, through their control of the *comunidades*' governments and assemblies, might also obtain access to the court in abstract review. However, as important sectors with both UCD and PSOE increasingly came to believe that at least the PNV might conceivably have no future in Basque electoral politics, they also perceived the use of constitutional litigation by the regional governments as less likely. Not surprisingly, the smaller parties' reacted very negatively to this. AP argued that both the presidents of Congress and Senate and the Ombudsman would be inevitably "implicated in the political majority that approved the legislation", and suggested instead that petitions for appeal could be presented by groups of 10,000 citizens and that the number of MP's and senators entitled to refer legislation to
the court should be reduced. In a similar vein, the Basques proposed that standing be given directly to parliamentary groups. But the UCD/PSOE bloc consistently opposed most amendments to the Ponencia's report throughout the different stages of the constitution-making process. In fact, the only changes that were ultimately made consisted in withdrawing standing before the court to the speakers of both houses, and making the rules for senators' access to the court even more demanding, raising the number of senators required to present refer laws to the constitutional court from twenty-five to fifty.  

In the end, most public and political reactions to the constitutional regulation of Spain's Tribunal Constitucional ended up ranging between general approval and reluctant acceptance. The Communists remained inclined to the latter. After the preliminary constitutional draft had been presented, the PCE expressed fears that the court might become too much of a free agent and, on top of it all, a rightist one. According to Solé Tura, the Communist representative at the Ponencia, the "constitutional court's composition and term length may convert it into a very conservative instrument" and "disconnect it from the renovation of parliament" (Solé Tura 1978, 92). The use of abstract review could eventually "produce the transformation of the Tribunal Constitucional into a sort of third chamber, largely uncontrollable, especially considering the length of justices' terms, that exceed a legislative term". But in the plenary session of Congress in which the section of constitution that regulated judicial review of legislation was put to the vote, the PCE finally gave its approval, and all relevant articles were passed with just two votes against.
The few public reactions focused only on potential technical problems, and were generally favorable.\textsuperscript{27} The most vocal public criticisms came from judges, who were obviously concerned with the insufficient representation of the career judiciary in determining the court's composition and the projected powers of review of the Supreme Court's jurisprudence. The former was described as a threat "against the independence and impartiality of what a court of law should be",\textsuperscript{28} while the latter was depicted as a "radical damage to the independence" of the \textit{Tribunal Supremo}.\textsuperscript{29} However, the final changes imposed by UCD ultimately satisfied some of the judges' demands.

**Implementing the Court**

In October 31, 1978, the Spanish Constitution was approved in both chambers, and the constitutional referendum that took place in early December resulted in a "yes" majority of 87.9 percent of the valid vote. In the following months, the end of the constituent process and the bitterly contested 1979 elections opened a period of apparently "normal" politics that, nonetheless, still had to coexist with the unfinished legacies of the constituent process. Among those legacies was the negotiation of the several \textit{estatutos} of the autonomous communities, as well as the implementation of a large number of constitutional articles concerning fundamental rights and political and legal institutions. In this context, and especially after the 1979 elections confirmed the status of UCD and PSOE as the two major parties and disclosed the unexpected electoral resilience of Basque and Catalan nationalism, the creation of the Spanish Constitutional Court — which required the approval of the respective organic law and the appointment
of its justices — involved intense political haggling and was permanently threatened by a break in the consensual style of decision-making that had previously prevailed.

In December 1978, sensing potential trouble in the forthcoming local elections, Suárez dissolved parliament and called legislative elections for March 1 1979. The results — UCD’s victory with 35 percent of the vote, closely followed by PSOE with 30.5 percent — were open to different interpretations. Although they showed the entrenched domination of both UCD and PSOE in the party system, they also revealed the surprising electoral consolidation of Catalan and Basque nationalism, as well as the emergence of a variety of nationalist or regionalist parties in Canarias, Aragón, Navarra and, especially, Andalucía (Fusi 1996, 456-457).

In Euskadi, nationalist parties greatly improved their strength in the party system as a result of the spectacular electoral emergence of radical nationalism, with Herri Batasuna, obtaining 15 percent of the vote. This increase in party system polarization was a direct result of highly unsatisfactory resolution of the Basque question in the constituent process. In fact, the issue of the fueros and the implicit right to self-determination proved to be an insurmountable obstacle to agreement, an obstacle whose origins can be traced back to PNV’s absence from the initial Ponencia and its integration into the constitutional bargaining only after negotiations had been made public, making compromise much more difficult (Gunther 1986, 56-57). Among the few MP’s and senators who abstained or voted against the Constitution were those of the Basque nationalist parties, who campaigned for abstention in the constitutional referendum. This was ultimately reflected in the referendum’s final results: abstention soared well above
average in the Basque country — 54 percent, as against 32 percent in the entire Spanish territory —, raising questions about the legitimacy of the new regime in Euskadi.

This and other unresolved issues were explicitly left by the constituent assembly as a legacy to the new parliament elected in 1979. Inspired by the French 1958 Constitution, Article 81 of the Spanish Constitution had introduced a new type of law ("organic laws"), that occupied an intermediate category between the Constitution itself and regular acts of parliament. They were also given an intermediate rigidity: instead of requiring the approval of a simple majority in parliament, they required the favorable vote of an absolute majority of MP's. This meant that, like in the constituent process, and given the conditions created by the 1979 elections — whereby no party obtained an absolute majority — the approval of organic laws would again require negotiation among different parties. Areas to be regulated by organic laws included, among many others, elections and referenda, military organization, law enforcement, all matters related to fundamental rights and public freedoms, the estatutos de autonomia, and, of course, the Constitutional Court.

The approval of the Ley Orgánica del Tribunal Constitucional (LOTC) was defined very early as one of the most urgent post-constituent tasks. Responsibility for the preliminary draft was delegated by the UCD government to three of the foremost legal scholars in Spain (two of them future justices in the Tribunal): Eduardo García de Enterría, Jerónimo Arozamena, and Francisco Rubio Llorente.30 On March 1979, after the legislative elections had already taken place, the preliminary draft was delivered to the government, which sent it on May 9 to parliament as a finalized governmental bill (proyecto de ley) to be debated under a special urgency procedure. In the meantime, just a
few days after the LOTC bill had been introduced in parliament and in the context of ongoing speculations about who would be appointed to the Constitutional Court, the newspapers observed that, given its standing in Congress and Senate and the extra-two justices appointed by the executive, UCD might be able to choose no less than half of the twelve justices in the Court.31

Although some of the innovations that the LOTC bill introduced in relation to the constitutional text were not particularly controversial,32 others were very much so. First, on the basis of Article 161 of the Constitution, which allowed organic laws to expand the Constitutional Court's jurisdiction, the government attributed it two new powers. The first concerned the ability to rule on "conflicts of competence between constitutional bodies of the State," including the executive, the Congress, the Senate, the Court of Accounts, and the General Council of the Judiciary. According to UCD, this resulted from the need to compensate for the lack of "consolidation of constitutional conventions" in what regarded the separation of powers or, as one UCD MP put it, "to rationalize politics by judicializing politics."33 Second, the LOTC bill introduced a priori review of organic laws. Recall that although nothing but a posteriori review of legislation had been contemplated in the constituent assembly, an exception had been made for international treaties. In those cases, under appeal from the executive or either of the parliamentary chambers (by majority), the Court would be able to examine whether any treaty contained provisions contrary to the Spanish Constitution before it had been ratified. But what UCD government's LOTC bill did was simply to make organic laws — including the estatutos de autonomia — susceptible of a priori abstract review. According to the government, since organic laws "completed" the Constitution and, especially in the case of the
estatutos, were going to be used as an additional parameter for testing the constitutionality of ordinary legislation, it was wholly advisable to make sure they would be themselves be in keeping with the Constitution. Finally, these two expansions of the judicial scope of decision-making were accompanied in the LOTC bill by two restrictions upon the autonomous communities’ access to Court. One concerned requests for the a posteriori review of laws produced by the autonomous communities: only the executive (and neither the Ombudsman, the opposition parties, nor the assemblies or executives of other communities) would be entitled to lodge them. The other concerned the standing of the comunidades in abstract review against national legislation. Left unrestrained by the Constitution, it was now to be restricted to cases in which laws "could affect" the comunidad's "own range of autonomy."

UCD's strategy was therefore to place the negotiations of the estatutos de autonomia under the impending threat of a priori review (a referral that could only be made by the executive or a parliamentary majority), thus hoping to use the Court as an instrument with which to improve the executive's position in the negotiation of the estatutos (Herrero de Miñon 1993, 196). If agreement between the Congressional Constitutional Committee and the autonomous communities failed to occur, the referendum on the estatuto could be blocked and the responsibility for a possible — and unpopular — veto transferred to the Constitutional Court (Requejo 2000, 141). Besides, and given that the executive lacked an absolute majority in parliament, the introduction of the conflicts of competencies between state bodies could easily become a useful weapon for UCD to deal with "negative majorities" in parliament. Finally, this expanded role was
given to a court where, given the executive's share in judicial appointments, UCD-appointed judges were likely to be in the majority.

There was only one small glitch in this strategy: LOTC could only be passed if UCD obtained the support of at least one additional party in order to form an absolute majority of 176 votes in Congress. Therefore, UCD padded the bill with something that might appeal to the nationalists in general and the Catalans in particular. It restricted the standing before the Court in what concerned appeals against laws passed by the autonomous communities to the executive, thus preventing opposition parties or other regions from using referrals against the comunidades own law-production, or in other words, against the recognition of the Basque and Catalan "specificity" and the greater devolution of powers to their governments.

Predictably, most opposition parties reacted very negatively to the LOTC bill, claiming that the introduction of both a priori review and conflicts of competence between state bodies was itself unconstitutional. The Socialists even announced that, if this bill were indeed approved, they would send LOTC to the Constitutional Court itself in order to be examined. However, during the discussion in Congress, two surprising twists took place. First, with UCD's abstention, PSOE and the Partido Socialista de Andalucía (PSA) approved an amendment allowing MPs, Senators and the executives and assemblies of all regions to refer legislation by other autonomous communities to the Constitutional Court. The dismay of the Catalans was enormous, since this opened the gates for a full-fledged competition between the autonomous communities and endangered the special status of the "historic nationalities." According to Jordi Pujol, leader of the Catalan nationalists, these appeals would most certainly "be used in practice
against Catalonia". However, it was this amendment that created the conditions for a new pact between UCD and the Catalan nationalists (and, implicitly, the Basques), made public in July 24. From UCD, the latter obtained the reinstatement of the bill’s original version, whereby only the executive could refer laws issued by the communities to the Court for *a posteriori* review. They also obtained the guarantee that *a priori* review of *estatutos* would only take place for those that had been ratified in the chamber after LOTC had been approved. In other words, this meant that both the Basque and the Catalan estatutos, whose negotiation was already well under way, — were always going to escape Constitutional Court scrutiny. In exchange, the Catalans accepted the institutionalization of conflicts of competence between state bodies and *a priori* review of organic laws, which was only likely to constrain the negotiation of the estatutos of other autonomous communities, where the UCD executive, the Basques, and the Catalans had a shared interest in placing more stringent limits in terms of devolution of powers.

The disclosure of this pact between UCD and the nationalist parties sent the Spanish Congress into turmoil. The Catalan Roca Junyent still attempted to justify it as preventing the future use of judicial review for purposes of a “war” between autonomous communities, and refuted that *a priori* review was specifically designed against Andalucia. However, both Socialists and Communists suggested that this new draft fostered a "Constitutional Court dictatorship" and established a reserve power that would allow the government to judicialize political conflicts whenever law production escaped its control. And for the Andalucistas, the deal between the executive and the Catalans simply meant that they were interested in turning the approval of the estatutos into bilateral pacts between the government and "only some of the autonomous communities", 67
marginalizing all other political forces and regions in the process. The controversy became particularly bitter in July 23, the day scheduled for the vote, when four UCD MP's indispensable for the approval of LOTC in Congress were found missing and the Speaker decided to postpone the vote. The Socialists, through Felipe González himself, accused UCD of filibustering and "lack of seriousness", while Santiago Carrillo prognosticated that, like this one, all future and indispensable organic laws would be "born without any prestige or authority". Alfonso Guerra, PSOE's number two, stated that, in the Senate, the Socialists were "simply not available to sell their votes, because we are fundamentally against two fundamental aspects of this bill: a priori review of organic laws and autonomy statutes and the power of the Court in terms of conflicts between state organs".

Ultimately, the final stage of LOTC’s approval showed that, contrary to Guerra’s suggestion, the Socialists were after all willing to sell their votes. Following direct negotiations between the government's party and PSOE leaders, the latter conceded that they could give their support to the establishment of a priori review of organic laws provided that UCD conceded that the major opposition party (through 50 MP's or senators), the Ombudsman, or even the autonomous communities (but only if the bill affected them directly) could also refer organic laws to the Constitutional Court for a priori review. Tellingly, the PSOE and UCD senators who composed the sub-committee in charge of LOTC stressed that this consisted not so much in "consensus", but rather in a "transaction". While the main features of the trade-off between UCD and the Catalan nationalists had been basically preserved, UCD gave PSOE the ability to refer proyectos de ley of organic laws to the Constitutional Court in exchange for the
maintenance of what a newspaper editorial called "a veneer of consensus." For the Basque and Catalan nationalists, this remained a reasonable deal. In fact, only twenty days after the official publication of LOTC, the estatutos of Catalonia and the Basque Country were approved in referendums by majorities of 90 percent of voters. The estatutos, the product of intense negotiations between the UCD government and the leaders of the Basque and Catalan nationalist parties throughout 1979, gave both autonomous communities extensive powers in issues of language, teaching, culture, regulation of mass media, and, in the Basque case, substantial financial autonomy. And as promised, there was no possibility of referring those estatutos for a priori review by the Constitutional Court.

However, it is not surprising that the Socialists ultimately described the agreement as merely "acceptable" and not "entirely satisfactory", since the potential to introduce veto points in legislative policy-making was constrained by what all political actors already realized to be an inescapable fact: that UCD would be able to appoint the majority of the Court's justices. The last task involved in the establishment of the Spanish Tribunal Constitutional was precisely that appointment. Recall that constitutional rules imposed that eight of the Court's twelve justices were to be elected by Congress (4) and the Senate (4) by a 3/5 majority, while the remaining were to be appointed directly by the executive (2) and the Consejo General del Poder Judicial (2). The Court's President — who enjoyed an important "quality vote" in case of ties— was to be elected by and among the justices by majority vote in the first round, or plurality in the second. According to the recently approved LOTC, the deadline for the presentation of candidates expired in January 25, 1980.
Immediately after the Constitution had been approved, it had become clear that the election of justices by parliament would take place mainly through previous extra-parliamentary negotiations between the different parties. In fact, well before the LOTC bill had even been presented by the executive to parliament, speculation about possible names for President of the Court had already started. On the side of UCD, one of the names advanced was that of António Hernández-Gil, the Speaker of the Cortes throughout the constituent period. The other was Joaquín Ruiz-Giménez, a respected lawyer and philosophy professor who, in spite of having been a former minister of Franco enjoyed a solid reputation (that extended beyond UCD circles) as a moderate pro-democratic reformer. Inter-party negotiations on concrete justices were nevertheless postponed until the approval of the Court’s organic law. In December 1979, UCD, PSOE and PCE established the first reported formal contacts, with the Communists stressing the need for a consensus that encompassed a larger number of parties than those strictly necessary to obtain a 3/5 majority in the Congress and the Senate. However, that was not to happen. Instead, José Pedro Pérez-Llorca and Gregorio Peces Barba — two of the "constitutional fathers", now, respectively, a government minister and the leader of the Socialist parliamentary party — led the negotiations over the names of all ten justices to be appointed by political bodies, in a system of pure UCD/PSOE duopoly.

Arithmetics and the shifting political climate contributed to this outcome. On the one hand, although UCD lacked the required 3/5 majority in either chamber, it had more than 40 percent of both MP’s or Senators, which made the formation of a qualified majority impossible without the participation of its parliamentarians. One of the remaining alternatives for a minimum-winning coalition for judicial appointments
involved the exclusion of PSOE from negotiations, but that was politically unwise and unfeasible, since it would require UCD to pact appointments with every other parliamentary party in Congress besides the Socialist. The last possibility was a straight UCD/PSOE pact. And although PSOE could have accepted the inclusion of other opposition parties in the negotiations, that would mean abdicating from proposing, at the very least, one of the justices. Considering that UCD was already going to appoint two justices directly through the executive’s quota, as well as the Socialists’ previous inability to impose a qualified majority rule for the appointments by what would likely be a conservative *Consejo General de Poder Judicial*, the inclusion of other political forces in negotiations might ultimately result in an even more unfavorable balance of forces inside the Court in favor of UCD than was already inevitable (Colomer 1990, 211-213).

Besides, by then, the stakes involved in judicial appointments had substantially increased, given the drastic alteration in the political climate that had prevailed during the constituent process. Suárez’s strategy after 1979 had become to convert the transitional "consensus" into a catch-all appeal to the centrist vote (Hopkin 2000). In the meantime, the Socialists felt increasingly comfortable in adopting a more aggressive oppositional posture, identifying the government with the most conservative and retrograde right. This increasing polarization of Spanish politics was further reinforced by UCD’s shift on the autonomies issue, its internal politics, and a new stance of the sociological right, particularly the Church and the business community. After the approval of the Basque and Catalan *estatutos*, Suárez created a committee led by former minister Rodolfo Martín Villa to study the future "rationalization of the autonomic process," in an attempt to impose the "slow track" of devolution of powers to all the remaining autonomous
communities and to increase the power of the Cortes (Fusi 1996, 458-461; Aja 1999, 60-61). However, that did not stop Andalucía from joining the fast track, as its *estatuto* was ultimately approved by referendum in which UCD had called for abstention. Already weakened by this setback, as well as by the unflattering results of the first regional elections, Suárez’s leadership was further undermined by the increasing division within UCD ranks. Particularly damaging was an alliance between some of the party "barons" and the increasingly vocal Catholic Church, expressed most prominently in the approval of the *Estatuto de Centros Escolares*. Regulating the functioning of educational institutions, a particularly divisive issue in the constituent process, this law was approved with the support of Fraga Iribarne's rightist party and the Basque and Catalan nationalists in a way that openly protected the interests of the Catholic Church, generating "the most rancorous debate in the Congress of Deputies since the creation of the new regime".49 Throughout 1980, the possible unconstitutionality of this and other laws (such as the anti-terrorist law, tax law, and the Andalucian *estatuto* itself) was openly argued, and future referrals to the Constitutional Court announced. Thus, giving this political climate and the increasing importance of the issue of the Court’s composition, UCD and PSOE moved away from practices that had prevailed during the constituent process — and, to a more limited extent, during the debate of the Court’s organic law. They were no longer willing to make any sort of numerically unnecessary concessions in the name of "consensus."

The first consequence of this was Suárez’s veto of Hernández-Gil for President of the *Tribunal Constitucional*. Even though the Socialists and Communists were apparently willing to accept him, his past equanimity as Speaker of the *Cortes* during the constituent process and his proximity to Landelino Lavilla, one of the party’s Christian Democratic
"barons," made him unacceptable to Suárez from the point of view of both his responsiveness to the party leadership’s interests and his ideological and personal affiliations. Instead, UCD proposed the reluctant Aurelio Menéndez, a former Minister of Education in Suárez’s first cabinet.50 By the end of January, after more than twenty different names had been discussed, negotiations were finally concluded, and the names of the justices, as well as of the parties that had proposed them, rapidly found their way into the press.

<table>
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<tr>
<th>Proposed by or seen as close to UCD</th>
<th>Proposed by or seen as close to PSOE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jerónimo Arozamena (former secretary of state in Suárez’s first cabinet, drafter of LOTC bill and judge in the Tribunal Supremo)</td>
<td>Francisco Rubio Llorente (legal clerk in the Cortes, drafter of LOTC bill, and director of the Center for Constitutional Studies)</td>
</tr>
<tr>
<td>Rafael Gómez Ferrer (law professor and letrado of the Consejo del Estado)</td>
<td>Aurelio Menéndez (former minister in Suárez’s cabinet and law professor) - resigned in October</td>
</tr>
<tr>
<td>Antonio Truyol Serra (law professor) - replaced Aurelio Menéndez in December</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Proposed by or seen as close to PSOE</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td>Manuel Diez de Velasco (law professor)</td>
<td></td>
</tr>
<tr>
<td>Francisco Tomás y Valiente (law professor)</td>
<td></td>
</tr>
<tr>
<td>Manuel García Pelayo (law professor, former fighter in the Civil War on the Republican side)</td>
<td></td>
</tr>
<tr>
<td>Angel Latorre (law professor, anti-Franco activist)</td>
<td></td>
</tr>
<tr>
<td>Plácido Fernández Viagas (judge, proposed by PSOE to the CGPJ)</td>
<td></td>
</tr>
</tbody>
</table>

Table 2.2: The first composition of the Spanish Tribunal Constitucional

Several criteria were used for these appointments, such as a self-imposed moratorium by UCD and PSOE in the appointment of party cadres and a concern with obtaining an adequate distribution in terms of expertise in different fields of the law.

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However, the most prominent distribution criterion was strictly partisan. In both chambers of parliament, UCD and PSOE proposed four justices each, to the dismay of the Communists and the Andalucistas. As for the Catalan and Basque nationalists, while the former presented their own candidate simply in order to put pressure on the Catalan Socialists, the latter were simply absent from the chambers when appointments were formally voted.\(^{51}\) In a political context in which the politics of consensus that had characterized the Spanish transition was rapidly waning, PSOE and UCD clearly showed their unwillingness to make any concessions to other parties. Besides, UCD reaped the benefits it had sown by imposing executive prerogatives on judicial appointments in the constituent debates. As had been predicted ever since the Constitution was approved, their parliamentary minority had now been converted into a judicial majority (Colomer 1990, 211).

The only setback suffered by UCD in the following months was the defeat of Aurelio Menéndez in the internal election of the Court’s President, which took place even before the CGPJ had elected its appointees. Instead, the winner was Manuel García Pelayo who, with Rubio Llorente, was one of the most politically consensual justices.\(^{52}\) As a result of his failure to be elected as President, Menéndez resigned from Tribunal Constitucional even before it had issued its first decision. In November, the CGPJ elected its two justices, one identified with UCD and the conservative wing of the Council (Angel Escudero del Corral, former president of the Tribunal Supremo) and another with its progressive wing (Plácido Fernández Viagas, former president of Andalucia's "pre-autonomy" and a judge proposed by PSOE to the CGPJ), thus keeping the original balance of power found in the executive and parliamentary appointments.\(^{53}\) Finally,
Menéndez’s vacancy was filled in December through negotiations between UCD and PSOE, resulting in the selection of Antonio Truyol Serra, a law professor identified with UCD. In the meantime, by October, abstract review litigation had given its very first tentative steps: under request of PSOE parliamentarians, legislation on local government, a decree-law about the right to strike, and, quite predictably, the *Estatuto de Centros Escolares* were the first statutes sent to the Constitutional Court for abstract review of their constitutionality.

**Conclusion**

Among legal scholars and other observers, a more or less idealized version of the process by which the Spanish Constitutional Court was created has prevailed, describing it as broadly consensual and inspired by virtuous external models. From this perspective, the creation of the Court was permeated by the need to avoid the errors of the past and assure the protection of rights and the rule of law, the supremacy of the constitution, and the depoliticization of the judicial system in a new democracy where, previously, none of those aims had ever been achieved.

However, a more detailed analysis of the constitution-making process and the implementation of the *Tribunal Constitucional* tells us a somewhat different story. In spite of their awareness of past errors, different political actors entered the constitution-making process with sharply different views about which institutional choices were more likely to avoid those errors. Parties did borrow from external models in order to shape their own proposals, but also tinkered with those models in order to have them serve their own interests. And in spite of a legacy of a civil law judiciary recruited and socialized by
an authoritarian regime, the rejection of a role for ordinary judges in constitutional justice was far from unanimous. Instead, against the desires of the left, rightist parties went to great lengths to assure that the career judiciary would enjoy some significant representation in the newly created Constitutional Court and remain preserved from blatant intrusions in the Tribunal Supremo’s jurisprudence.

"Functional" concerns, such as the need for an institutional body that might adjudicate on the inevitable controversies generated by center-periphery relations or resolve the vagueness of certain constitutional provisions, were also clearly present from the very beginning of the constituent process. However, parties also diverged about which institutional rules would allow those functions to be best performed. Some, like the Communists, simply preferred that such functions were not performed by a court at all. Others, like UCD, betted on creating a court that would function as a shadow over legislative "negative majorities" and the negotiation of the autonomous communities' estatutos. In the end, both the Socialists and the nationalist parties ultimately accepted this kind of court, but only in exchange for some concessions. The former were given access to the Constitutional Court in a priori review litigation against organic laws approved in parliament, obtaining at least the opportunity to use litigation as a means to introduce an additional veto point in some areas of legislative policy-making. The latter were given assurances that the Basque and Catalan estatutos were to be negotiated bilaterally with the government, with no externally imposed intervention from the Court. Here, again, a bargaining process in the ceaseless search for strategic advantage seems to have permeated institutional choices concerning judicial review in Spain.
It cannot be denied that, at several points during the process, the search for consensual solutions went beyond what was strictly imposed by the decision-making rules, and expressed something more than a narrow self-interested search for strategic advantage. For example, and as would ultimately occur at several other crucial moments in the constituent process, UCD refrained from forming a "mechanical majority" with AP on the basic option of whether a new specialized court in charge of judicial review should be created in the first place. In the bargaining process that led to LOTC, the government's party leaders and senators made an explicit effort to extend the coalition supporting the organic law of the Constitutional Court beyond UCD and the nationalist parties, ultimately helping to prevent the immediate delegitimization of judicial review in the eyes of the major opposition party, the Socialists. The "first and foremost consensus" that presided over the constitution-making process — a perception of the disastrous consequences of a breakdown of the Spanish transition — seems to have contributed to these outcomes, and thus to the institutionalization of a system of judicial review in which no single political actor would enjoy complete control over the interpretation of constitutional rules.

However, as fears of a potential reversion to authoritarianism or worse subsided, uncertainty about the balance of power between political actors diminished, and the political stakes involved in the design of judicial review became more evident, UCD and PSOE became increasingly unwilling to make “unnecessary” concessions. This was particularly evident in the last stage of the establishment of the Spanish Constitutional Court, the screening and selection of its justices. There, both parties disputed inch by inch the ability to install a court that might be more congruent with, and responsive to, their
preferences, a dispute in which UCD, through its pivotal role both in the institutional
design and the appointment process, managed to obtain an important short-term
advantage, turning legislative minority into a judicial majority. From this point of view, a
strategic approach is, again, better suited to explain the inception of judicial review
institutions in Spain than one that focuses merely either on cultural-historical factors or
functional demands.
Juan Linz and Alfred Stepan have argued that one of the necessary conditions for the consolidation of a democratic regime is the presence of an arena for the "rule of law" organized around the principle of "constitutionalism". This requires not only the formation of a "relatively strong consensus over the constitution" and "a commitment to 'self-binding' procedures of governance that require exceptional majorities to change", but also a "clear hierarchy of laws, interpreted by an independent judicial system and supported by a strong legal culture in civil society" (Linz and Stepan 1996, 10). From this point of view, the path towards democratic consolidation followed by Portugal was much more protracted and hazardous than in Spain. In the latter, an exhaustive bargaining process around all major divisive political and institutional issues led to a relatively "consensual" constitutional text, to the extent that almost all major political actors and the public (with the important exception of the Basques) were able to accept it as a legitimate framework for "normal politics" in the future Spanish democracy. Besides, in the Spanish constitution-making process, the rather different preferences of political actors about how to assure the supremacy of the constitution ended up being successfully reconciled, leading to the creation of a constitutional court which, at least, prevented the complete
control of a single political actor over how constitutional controversies were to be resolved.

In contrast, the Portuguese 1976 Constitution generated anything but "relatively strong consensus". Instead, the political institutions it contained and the model of economy it prescribed became the object of the main political cleavage that divided political parties and actors in post-1976 Portugal. Moreover, the establishment of institutions in charge of assuring the supremacy of constitutional rules was one of the most delicate and contentious issues of the Portuguese democratization process. It was only after almost a decade, during which an overtly "political" mode of constitutional review of legislation controlled by the military coexisted with (and prevailed over) genuine judicial review, that a sovereign Constitutional Court was finally established.

In this chapter, I will address two interrelated questions. First, why has Portugal followed such a radically different path towards the consolidation of an arena for the "rule of law" from Spain? Second, what kind of judicial review institutions were ultimately adopted in the consolidated Portuguese democracy, and why? It will be argued that, again, the explanation is to be found less in "cultural-historical" or "functional" factors than in the strategic context of institutional choice created by contrasting modes of democratic transition, the balance of powers between the relevant political forces, and their expectations of the future. First, as a consequence of collapse of authoritarianism by military coup and the political upheaval that ensued, the 1976 Constitution ended up enshrining the "conquests of the revolutionary process", as well as a role for the military allowing it to protect those conquests from a future legislative power whose direct control it had agreed to relinquish. Later, however, as the transitional period of military tutelary
power came to an end, no political actor was in a position to impose new "custom-made"
judicial review institutions. This, together with the willingness to prevent judicial review
from becoming a weapon usable by the President the Republic, facilitated the adoption of
judicial review institutions that fostered extensive power-sharing between all major
parties.

The 1976 Constitution and its origins

From a purely formal point of view, the process that led to the approval of the
first Constitution of the new Portuguese democracy began in April 25, 1975, when free
and fair elections by universal suffrage took place for the first time in Portuguese history.
The constituent assembly that resulted from those elections functioned for almost a year,
until April 2, when the 1976 Constitution was approved with the support of six of the
seven parliamentary parties, representing 93.6 percent of seats. However, the first
Portuguese fully democratic constitution was the result of a process that lasted much
longer than a single year, and involved several other active participants besides the
parliamentary parties. From the 1974 coup that put an end to authoritarian rule in
Portugal until as late as 1982, the emerging political parties, the military, the Presidency,
and various social movements and organizations were involved in a protracted struggle
about the design of Portuguese democratic institutions and, in fact, the very nature of the
regime. That struggle had profound consequences for the adoption of judicial review in
Portugal, its institutional configuration, and the political aims its establishment intended
to achieve.
The major factor that conditioned the Portuguese constitution-making process in 1975 and 76 was the fact that the transition from authoritarian rule was initiated by the collapse of the previous regime, and more specifically by a coup d'état led by junior military officers (Linz, Stepan, and Gunther 1995, 101-106; Linz and Stepan 1996, 118-122). This had at least three important consequences. First, the sudden collapse of the previous regime caused a vacuum in the structure of political authority that facilitated the generalization of a struggle for power not only in the context provided by electoral and political institutions, but also in many other state and societal arenas. Second, the overthrow of right-wing authoritarianism by force contributed to the complete delegitimization of the previous regime's policies and actors, favoring instead a general dislocation of all relevant political élites' discourse to the left, creating an enormous distance between that discourse and the actual preferences of the social groups those élites actually represented. Finally, the fact that the transition was initiated by military coup, and particularly by the "non-hierarchical military" represented by the insurgent junior officers, contributed not only to the future direct involvement of the military in politics but also to its acute political fractionalization unchecked by military hierarchical authority. In the two years following April 25, 1974, these three consequences of the type of regime transition in Portugal became evident, turning what started as a military coup into a full-fledged revolutionary process.

Following the April military coup, and in accordance with the program of action drafted by the Movement of the Armed Forces (MFA, the acronym through which the group of insurgent officers came to be known), a Junta de Salvação Nacional (JSN) was formed, composed of seven of the highest-ranking officers deemed trustworthy by the
The JSN, together with a military-appointed provisional government, would be in charge of organizing free and fair elections for a constituent assembly in no more than a year, as well as of eliminating the regime's repressive apparatus, giving amnesties to political prisoners, abolishing censorship, and guaranteeing freedom of association. However, the MFA's program also expressed the ideological legacy of what had been the most severely persecuted opposition movements — among which the Communist Party was, by far, the most deeply rooted and best organized —, as well as some of the institutional consequences of military interim government. On the one hand, among the MFA's immediate and short-term measures were "an economic policy (...) with an antimonopolistic strategy" and "the defense of the working classes." On the other hand, the program established an institutional framework of power through which a provisional cabinet would be appointed and remain accountable to the military Junta and its president, who would also appoint a ad hoc temporary committee in order to "control" the mass media, preventing "ideological aggressions from reactionary sectors".

In the following months, these internal contradictions unfolded dramatically. General António de Spínola, the JSN-appointed first President of the Republic, attempted to placate the anti-capitalist impetus of some of MFA's members and to consolidate his own power by reinforcing presidential prerogatives and promoting elections for the presidency before the election of a constituent assembly. However, his gamble met the opposition of most of the MFA's junior officers. This led to a succession of showdowns between the increasingly organized Movement of the Armed Forces and the President, which culminated in his resignation from office two days later, followed by the banning of almost all openly rightist parties. In the meantime, Portugal had plunged into political
and social turmoil, as a process of increasing social mobilization — first condoned and later supported by radical left-wing parties and factions in the military — lead to the illegal purges in the state apparatus and the private sector, as well as to the occupation of factories and vacant housing. As the Communist party began to consolidate its control over the unions, the media and, after Spinola's demise, the government itself — moving to a de facto alliance with the radical factions of the military — the revolutionary elements of the Portuguese transition became increasingly prominent. Occupations of land and housing were legitimized by ad hoc legislation, the government intervened directly in the management of private enterprises in order to fight "economic sabotage," and the activities of a new “Commission for Purge and Reclassification” increased in speed and scope.

The following attempt to halt the revolutionary process was the organization of a military coup in March 11, 1975. Its failure marked the beginning of a second phase in the Portuguese transition, during which the objective of installing a "Socialist democracy" through popular revolution and under military guidance was openly embraced by the majority of the MFA. On the evening following the coup attempt, the Movement of the Armed Forces received full political institutionalization, through the creation of a sovereign "Council of the Revolution" (CR). In the next few days, the CR decided the full nationalization of all Portuguese owned banks and insurance companies, followed by all major industrial groups, transportation companies, and, indirectly, many other private companies, including most newspapers. In the south of the country, where the Communist Party was strongly supported and would have its best electoral performance, large agricultural properties were taken over by rural wage laborers, often
in coordination with unions, the military, and even governmental authorities, in actions that would later be legalized *post hoc* through decree. By the end of 1975, land equivalent to no less than 12 percent of the entire Portuguese territory had been occupied in this way.\(^5\)

After some uncertainty about whether they would be carried out or not,\(^6\) elections to the Constituent Assembly took place in April 1975. Those elections acquired a crucial importance. In spite of being systematically devalued by the radical left (and by many qualified domestic and international observers) as a mere sideshow to the revolutionary process and of the appeals to the "blank vote" made by the radical military, they ended up having a staggering turnout level of 91 percent. Besides, they helped revealing the contradiction between the claims of the radical military to popular revolutionary legitimacy and the actual correlation of forces between parties and political projects among the electorate (Table 3.1).

<table>
<thead>
<tr>
<th>Party</th>
<th>% of the vote</th>
<th>N. of seats</th>
<th>% of seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>PS (Socialist Party)</td>
<td>37.9</td>
<td>116</td>
<td>46.4</td>
</tr>
<tr>
<td>PPD (Popular Democratic Party)</td>
<td>26.4</td>
<td>81</td>
<td>32.4</td>
</tr>
<tr>
<td>PCP (Portuguese Communist Party)</td>
<td>12.5</td>
<td>30</td>
<td>12</td>
</tr>
<tr>
<td>CDS (Social and Democratic Center)</td>
<td>7.6</td>
<td>16</td>
<td>6.4</td>
</tr>
<tr>
<td>MDP (Popular Democratic Movement)</td>
<td>4.1</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>Others</td>
<td>4.5</td>
<td>2</td>
<td>0.8</td>
</tr>
</tbody>
</table>

Table 3.1: The 1975 elections: shares of the vote and composition of the Portuguese constituent assembly
In fact, in spite of a PR electoral system, the myriad of parties that presented themselves at the polls, and the Communist dominance of the political process, no less than 72 percent of the popular vote and 85 percent of seats in the constituent assembly fell upon only three parties, precisely those that had detached themselves from the revolutionary aims of the radical leftist movements and military. The *Partido Socialista* (PS), led by Mário Soares, obtained a comfortable plurality of votes and seats. Although institutionally affiliated with the Socialist International and European Social Democrats in general, the PS still preserved many of the Marxist and utopian Socialist elements of its original ideological template (Sablosky 2000, 25-29). However, by clearly drawing the dividing line between themselves and the remaining parties to their left on the option for procedural democracy, the Socialists managed to occupy the center of a highly left-skewed political spectrum. Thus, at the polls, they obtained the support of sectors of the large agricultural and industrial working-classes, but also went further to capture important fractions of the electorate that were clearly to the ideological right of their proposed policies and discourse (Opello 1985, 127). The second and fourth larger parties also belonged to the "democratic arch". The *Partido Popular Democrático* (PPD), led by Francisco Sá Carneiro, was, in spite of some leftist rhetoric, a center-right congregation of a few Social Democrats and many Liberals and Christian-Democrats, most of them previously involved in the moderate and partially tolerated opposition to authoritarianism (Frain 1998, 21-36). And the *Centro Democrático Social* (CDS), which had been on the brink of being declared illegal in the aftermath of the March coup attempt, was, in spite of its denomination of Centro (center), a conservative Christian-Democratic party.
Finally, the Communists of the Partido Comunista Português (PCP), to the surprise of many, got no more than 12.5 percent of the popular vote.

These results changed the entire dynamic of the Portuguese transition. Quickly perceiving how their own survival was intimately linked to the survival of pluralist democracy, the Socialists took the forefront of the anti-Communist struggle, and soon their rupture with the provisional government and the MFA became inevitable. Besides, in the Catholic North of the country and the islands of Azores and Madeira, where the PPD and the CDS had obtained their best electoral returns, a semblance of counterrevolution started taking place, as demonstrators supported by sectors of the Catholic Church attacked the offices of the Communist Party, and extreme-right terrorism and separatism emerged. The mounting social and political polarization around the options for "liberal democracy" and "popular Socialist democracy" was also felt within the MFA, as its less radical members increasingly began to align with the pro-democratic parties in general, and the Socialist Party in particular. Following a complex sequence of events, including a siege of the Constituent Assembly, a military coup attempt in November 25 was successfully followed by a countercoup led by the military moderates. As the survival of the Communist party hung by a thread, the balance of power shifted decisively in favor of the less radical and more hierarchical military faction, which now took complete control of the Council of the Revolution.

Inevitably, the constitution-making process that took place during 1975 and 1976 was anything but immune to this convoluted political process. The assembly began its work at the height of radical leftist dominance over the transition, and was severely constrained by a pact preemptively imposed by the Council of the Revolution upon all
major legalized parties less than two weeks before elections took place. The so-called "First Pact MFA-Parties" consisted in a pre-commitment on the part of political parties about the constitution-making procedures, the choice of political institutions, and the general ideological content of the Constitution. The Pact gave the military veto power over the constitutional text, imposed the constitutionalization of the Council of the Revolution and an "Assembly of the Movement of the Armed Forces," and bound the parties to consecrating in the future Constitution "the principles of the Program of the Movement of the Armed Forces, the conquests legitimately obtained throughout the process, as well as the developments to the Program imposed by the revolutionary dynamic that, openly and irreversibly, committed the country in an original path towards a Portuguese socialism" (Miranda 1978, 203). The basic purpose was to bind policy-making to a constitutional text that formalized the political and economic legacies of the revolutionary process, including nationalizations, agrarian reform, and workers' rights, among others.

Therefore, the first steps of the Portuguese constitution-making process turned out to be very different from what would later happen in the Spanish case. In the latter, the participating political parties expressed widely divergent preferences about the extent to which the Constitution would effect a break with the authoritarian legacies of Franquism. However, this overt polarization was compensated by a commitment to maintaining the degree of secrecy and informality necessary to preserve the ability to reach some kind of agreement. In Portugal, the opposite occurred. All major parties presented complete constitutional drafts that publicly expressed not so much the sincere preferences of party
leaders and their constituencies, but rather those of the dominant actors in the transition, the radical military and parties.

This was especially visible in the way all drafts committed future policy-makers to the realization of socialist goals and ideals. For example, the draft presented by the party furthest to the right in the assembly, the Christian-Democratic CDS, started with a preamble stating the role of the Revolution in "suppressing the inequalities that so deeply affected Portuguese society" and "affirming the principles of economic and social equality in the path to a Portuguese Socialism" and a "society without classes".7 "Socialism" in CDS's draft was more than ideological rhetoric in legal print. In a Part Two entirely dedicated to "economic, social, and cultural life" permeated by Marxist language, it was stated that Portugal was to adopt a "social market economy" with the "socialization of the means of production", including the state's total or partial ownership of companies in the industrial and service sectors and of "inconveniently explored rural properties".8 Obviously, all the remaining parties went much further in this respect.9 In the end, while the Spanish Constitution was to devote a single article (40) to the guiding principles of economic policy, another to the role of the public sector (128), and yet another to economic planning (131), the Portuguese Constitution ended up containing no less than twenty-five articles prescribing in excruciating detail the dominant role of the state and public property in the economy. In constitutional debates and deliberations, most of these provisions resulted from partisan coalitions where the PS played the pivotal role, and from which only the CDS — particularly after November 25 — was ultimately left aside. All nationalizations made after 1974 were constitutionally defined as "irreversible conquests of the working classes" (Article 83.), and further nationalization
could take place without owners being compensated (Article 82.). Recognizing another
*de facto* situation, Article 97. stated that large landowners were to be expropriated, and
land transferred to small farmers and cooperatives. Certain economic sectors (to be
defined by law) would remain closed to private enterprise (Article 85.). And in a
provision intended to tie future policy-makers to this economic structure, Article 290.
specified that "the principle of collective appropriation of the main means of production
and soils, as well as natural resources, and the elimination of monopolies and *latifúndios*"
were among the aspects of the Constitution that any future constitutional amendments
would have to respect.

The ideological convergence between all parties' constitutional drafts was a little
less pronounced in the definition of fundamental rights and guarantees. For example, both
the CDS and the PPD gave greater emphasis to civil and political liberties than to
"second" and "third generation" social welfare rights (Miranda 1978, 316-324). The CDS
went so far as to propose that the notion of state/church separation should be qualified
with a (ultimately rejected) mention of the Catholic Church and its role in education.
However, this did not prevent the Christian-Democrats from openly proposing the
constitutionalization of divorce, the creation of a national health service and social
security system, as well as the right to housing and to free public education.¹⁰ During the
constitution-making process, the Socialists and Communists introduced additional
rights¹¹ and laid the ground for a very rigid job market, by constitutionally prohibiting
managers from laying off workers without having proved their wrongful conduct. This
was accompanied by extensive regulation of other individual and collective workers'
rights, including the participation in the drafting of labor legislation and economic planning.12

But by far the most complex dimension of the 1976 constitution-making process concerned the design of political institutions. Initially, all parties more or less abided by the First Pact in their constitutional drafts. However, as a direct result of the November countercoup that crushed the radical military, the First Pact itself, and thus the design of future Portuguese political institutions, again became open for discussion.13 From the point of view of the revamped Council of the Revolution, the defeat of the radical factions of the MFA did not necessarily have to lead to an immediate return of the military to the barracks. Unlike what happened in the Greek case — where the overthrow of the totally delegitimized "Colonels' regime" by the hierarchical military could be swiftly followed by a transfer of power to civilian authorities — the previous year and half in Portugal had created important obstacles to the full normalization of civil-military relations in Portugal. The revolutionary process had caused not only the acute politicization of the military, but also its factionalization over ideological cleavages that had put down roots in political society. This required the temporary replacement of civilian authorities in performing a task that they were seen as unable to perform at the moment: restoring military cohesion and discipline in the armed forces.14 In other words, and in an only apparent paradox, the only conceivable way to submit the military to political authority was temporarily to cede authority to the military victors of November 25 (Teles 1998, 696). The parties' proposals for revision of the First Pact all abided by this imperative, accepting, with slight variations, the transitory autonomy of the military vis-à-vis civilian power and the establishment of some form of political
institutionalization of the military's role. That included giving the Council of the Revolution jurisdiction over military issues and defense policy, as well as requiring its consultation on all major political decisions, during a transitional period that would last at least until 1980 (the length of the four year mandate of a legislature) and after which the Constitution could be amended.

This, however, opened a new question. Considering that the MFA's assembly had also been eliminated, how should the President now be elected and executive-legislative relations reconfigured? In their proposals for the revision of the First Pact, all parties converged around the election of the President by universal suffrage, but the Council acceded only under stringent conditions: the adoption of a peculiar brand of semipresidentialism (or "president-parliamentarism"). The executive would be accountable before the legislature, but both could be dismissed by a popularly elected president with substantial veto powers.15 Most importantly, this was to be accompanied by what was called an "implicit military clause" (Pereira 1984, 42-43): the fact that the president would be a member of the Council of the Revolution, more specifically, General António Ramalho Eanes, who had been appointed the Army's Chief of Staff following the November countercoup, in which he had played a leading role.

Less than two months after the Second Pact was signed, on April 2, 1976, the Constitution was approved in parliament. Alleging that it "mortgaged the State to the maximalist creation of Socialist relations of production" and was nothing but an instrument of "temporarily majoritarian forces,"16 the CDS was the only party to vote against the constitutional text. This text was the longest in Portuguese history and one of the longest in the Western World, described by Guy Hermet as a set of "311 disciplinary
regulations [that] provided for no return from the alignment of Portugal between Socialism and the Third World" (Hermet 1988, 270). Institutionally, it assured the military, represented in the Council of the Revolution and the Presidency a joint veto power over policy-making, as well as the ability to choose and dismiss the elected branches at will. And although it exhibited a very complete catalogue of civic and political rights, it also bore a striking resemblance to the constitutions of Eastern European “socialist democracies” in what concerned social and economic rights, in an attempt to tie legislative policy-making to a dominant role for the state in the economy.

However, these constitutional rules, even if excruciatingly detailed, might not be enough. How could it be guaranteed that the legislature and judiciary would abide by those rules, and that the residual control over their interpretation would not be used to undo military power and the "conquests of the revolution"? The answer found by the military was to effectively neutralize the ability of courts to review the constitutionality of legislation and turn the military tutelage of the transition into a full-fledged constitutional guardianship: in other words, to award constitutional review powers to the Council of the Revolution itself.

**Constitutional review in the Portuguese democratic transition**

Throughout the duration of the authoritarian *Estado Novo*, one of the few issues about which some degree of public criticism of political institutions was tolerated was in relation to legal and judicial institutions (Magalhães 1995, 55). The fact that the mixed system of concrete judicial review by ordinary courts and political review by the legislature had remained totally inoperative throughout the life of Salazar's regime did
not go unnoticed by legal scholars. Suggestions for the reform of judicial review came from a variety of sectors, ranging from those close to the regime to the moderate opposition, and all revolved around the need to concentrate powers of judicial review either in an already existing high court or in a newly created institution, allowing it to issue generally binding decisions on the constitutionality of laws.\footnote{17}

During the early months following the 1974 coup, this idea was embraced more or less discretely by all parties from the right to the center-left (including the Socialists\footnote{18}), and expressed most articulately in a constitutional draft produced by a PPD parliamentarian and prominent legal scholar, Jorge Miranda, proposing the creation of a Kelsenian-type constitutional court.\footnote{19} However, the failed coup in March 11 changed the terms of the debate. The First MFA/Parties Pact gave the Council of the Revolution the power to veto with general binding force all laws it deemed unconstitutional, installing a system that, not unlike that of the previous regime, still combined "judicial" with "political" review of legislation. The difference was that a rubber-stamp National Assembly was replaced by the Council of the Revolution itself, and ordinary courts were, unlike the Council, limited to scrutinizing the "formal" (procedural) constitutionality of legislation. The scrutiny of what the European legal doctrine defines as "material" unconstitutionality — meaning, in this case, the accordance of legislation to the "conquests of the revolution" to be enshrined in the doctrinal part of the Constitution — was to be strictly reserved to the CR.

However, the issue remained so controversial that not even the First Pact was enough to mute the profound differences that still prevailed. In their 1975 constitutional drafts, the center-right CDS and PPD attempted to "smuggle" modalities of judicial
review into the Constitution that somehow circumvented what had previously been agreed with the military. The Christian-Democrats retained the proposal of creating a constitutional court, which would share constitutional review powers with the Council of the Revolution. While the latter would have the powers predetermined by the Pact, the former — to be appointed in equal shares by the President, the Speaker of Parliament, and the President of the Supreme Court, and assuring that a majority of its justices would come from the ordinary courts — would also have extremely broad powers, which could be further expanded by law.\textsuperscript{20} The purpose of CDS's proposal was to lay the ground for the future replacement of the Council of the Revolution as the body responsible for constitutional review and, in the meantime, to give that court as many competencies as possible without openly violating the First Pact.\textsuperscript{21} As for the PPD, its draft turned the Supreme Court of Justice into the true body of constitutional review, giving the Council of the Revolution "only" the power to confirm or veto its decisions.\textsuperscript{22} Although the center-right parties were those that, before November 1975, most vocally expressed their disagreement with the system established by the First Pact,\textsuperscript{23} even the Socialists attempted to mitigate the powers enjoyed by the CR, with the suggestion of creating a consultative "Council for the Defense of Liberties and Constitutional Guarantee", composed of four members appointed by the Council of the Revolution and four by parliament.\textsuperscript{24} Although the debate on these proposals did not go very far before November 25, they were all seen by the extreme-left — especially by the Communists — as a clear violation of the First Pact.\textsuperscript{25}

After November 25, "one of the most hotly debated issues in the negotiations" for the Second Pact became, again, constitutional review of legislation (Teles 1998, 700).
While the CDS maintained its general support to a Kelsenian-type constitutional court, an even more forceful stand came from PPD's Jorge Miranda, who argued that, in a renegotiated Pact, a constitutional court should be jointly appointed by the Supreme Court and by the Council of the Revolution, and issue generally binding decisions on the constitutionality of laws both at the request of the CR and in rulings about appeals from lower courts. However, both the Socialists and the PPD's leadership shied away from proposing such an extreme curtailment of the CR's powers. The former simply neglected to address the issue in their proposal for the revision of the First Pact, while the latter held on to a somewhat vague defense of diffuse judicial review (Teles 1998, 706-707).

In fact, constitutional review of legislation proved to be one of the areas in which the Council of the Revolution remained most adamant in preserving the fundamentals of the First Pact. From the CR's point of view, as well as that of the Socialists and Communists, the ordinary judiciary could not be trusted to abide by the new Constitution. Its conservatism and positivistic legal culture suggested it would be not only insensitive to a modern outlook vis-à-vis political and civic rights, but also that it might be willing to use judicial review in order to "reject the legislation issued since 1974 (…), destroying all the revolutionary legislation." Thus, at the beginning of negotiations for the Second Pact, the CR started by proposing an absolutely central role for itself in abstract review and the almost complete neutralization of the role of lower courts in constitutional adjudication, as we can see the second column of Table 3.2
<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>Bodies with constitutional review powers</td>
<td>Council of the Revolution</td>
<td>Council of the Revolution</td>
</tr>
<tr>
<td>_abstract review</td>
<td>Abstract and concrete review, assisted by Constitutional Committee</td>
<td>Abstract review, assisted by Constitutional Committee</td>
</tr>
<tr>
<td>Ordinary courts</td>
<td>Concrete review</td>
<td>Ordinary courts</td>
</tr>
<tr>
<td>Structure and appointment rules</td>
<td>Structure and appointment rules</td>
<td>Structure and appointment rules</td>
</tr>
<tr>
<td>Council of the Revolution (CR)</td>
<td>Council of the Revolution (CR)</td>
<td>President, chiefs of staff, 14 officers appointed by each branch</td>
</tr>
<tr>
<td>Unspecified</td>
<td>Unspecified</td>
<td>N. of members: 9</td>
</tr>
<tr>
<td>Term length: four years</td>
<td>Term length: four years</td>
<td>Term length: four years</td>
</tr>
<tr>
<td>Appointing authorities: Supreme Court of Justice and Supreme Administrative Court in equal parts (2/3); 1/3 by CR</td>
<td>Appointing authorities: Supreme Court of Justice (1); Superior Judicial Council (3); CR (2); President (1); Parliament (1); plus, 1 member of CR.</td>
<td>Appointing authorities: Supreme Court of Justice (1); Superior Judicial Council (3); CR (2); President (1); Parliament (1); plus, 1 member of CR.</td>
</tr>
<tr>
<td>Requirements: all lawyers; 2/3 judges</td>
<td>Requirements: 5 lawyers; 4 judges</td>
<td>Requirements: 5 lawyers; 4 judges</td>
</tr>
<tr>
<td>CC president: member of CR</td>
<td>CC president: member of CR</td>
<td>CC president: member of CR</td>
</tr>
<tr>
<td>Abstract review</td>
<td>Abstract review</td>
<td>Abstract review</td>
</tr>
<tr>
<td>A posteriori</td>
<td>A priori and &quot;by omission&quot;</td>
<td>A priori review</td>
</tr>
<tr>
<td>Initiative/standing: CR</td>
<td>Initiative/standing: CR and President</td>
<td>Initiative/standing: CR and President</td>
</tr>
<tr>
<td>Object: laws and decrees before promulgation and treaties</td>
<td>Object: bills and decrees before promulgation and treaties</td>
<td>Object: bills and decrees before promulgation and treaties</td>
</tr>
<tr>
<td>Effects: restricted to case</td>
<td>Effects: total or partial veto</td>
<td>Effects: total veto</td>
</tr>
<tr>
<td>Override: no</td>
<td>Override: in case of vetoed bills, override by 2/3 parliamentary majority</td>
<td>Override: in case of vetoed bills, override by 2/3 parliamentary majority</td>
</tr>
<tr>
<td>A posteriori review</td>
<td></td>
<td>A posteriori review</td>
</tr>
<tr>
<td>Initiative/standing: President, Speaker of Parliament, Prime Minister, Attorney General</td>
<td>Initiative/standing: President, Speaker of Parliament, Prime Minister, Attorney General</td>
<td>Initiative/standing: President, Speaker of Parliament, Prime Minister, Attorney General</td>
</tr>
<tr>
<td>Object: all legal norms</td>
<td>Object: all legal norms</td>
<td>Object: all legal norms</td>
</tr>
<tr>
<td>Effects: annulment</td>
<td>Effects: annulment</td>
<td>Effects: annulment</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Concrete review</th>
<th>Concrete review</th>
<th>Concrete review</th>
</tr>
</thead>
<tbody>
<tr>
<td>Any court</td>
<td>Council of the Revolution</td>
<td>Council of the Revolution</td>
</tr>
<tr>
<td>Initiative/standing: ordinary litigants</td>
<td>Initiative/standing: judges or ordinary litigants</td>
<td>Initiative/standing: ordinary litigants</td>
</tr>
<tr>
<td>Object: legal norms</td>
<td>Object: legal norms</td>
<td>Object: legal norms</td>
</tr>
<tr>
<td>Effects: restricted to case</td>
<td>Effects: annulment by CR</td>
<td>Effects: restricted to case</td>
</tr>
<tr>
<td>Appeal: to higher court</td>
<td>Appeal: -</td>
<td>Appeal: to higher courts and Constitutional Committee</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Constitutional Committee</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Initiative: ordinary litigants</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Object: rulings not applying laws deemed as unconstitutional or applying laws previously declared unconstitutional by CR</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Effects: restricted to ruling but, if norm declared unconstitutional three times by CC, annulment by CR</td>
</tr>
</tbody>
</table>

Table 3.2: Portugal: Constitutional review from the First Pact to the 1976 Constitution
On the one hand, in what would function as a kind of abstract *a priori* review system, the Council would be able to rule, on its own or the President's initiative, on the constitutionality of all bills and decrees before they were promulgated. Furthermore, with even greater originality, the CR reserved for itself the right to make advisory opinions that verified "unconstitutionalities by omission," meaning to determine whether the legislation necessary for implementing constitutional rules was being enacted by parliament, and to take the legislature's place if necessary to ensure the implementation of the progressive catalogue of rights to be enshrined in the Constitution. Finally, lower courts were to lose judicial review powers entirely. Instead, if issues of constitutionality were raised in an ordinary court, proceedings would be suspended and the question taken to the Council of the Revolution, which would then rule on the constitutionality of the disputed legal norm. In all this, the CR was to be assisted by a technical Constitutional Committee (CC) with no power to issue binding decisions of its own, to be jointly appointed by the Supreme Courts (2/3 of its members) and the Council (1/3).  

During the negotiations of the Second Pact, the parties, especially the PPD, managed to extract some concessions from the Council of the Revolution. However, the price for them was always increased powers for the CR in constitutional review. First, the parties bargained with the CR on the effects of *a priori* abstract review, alleging that, as proposed, it could become an absolute veto power over all legislative or executive policies. In the end, in return for obtaining for the CR also *a posteriori* review powers, the military accepted that rulings of unconstitutionality in abstract *a priori* review could be overridden by parliament, but only by a qualified 2/3 majority (Article 278.) (Teles 1998, 700). Second, the CR consented in preserving diffuse judicial review, giving lower
courts the ability to refuse to apply legislation in concrete cases on grounds of its unconstitutionality. However, in exchange, it insisted that all rulings applying laws or decrees previously deemed unconstitutional by the CR could also be appealed to the Constitutional Committee (Teles 1998, 701). Third, that Committee — and not the Council of the Revolution — became the last instance of appeal against judicial review decisions by lower courts. However, in exchange for that concession, the CC's composition was redesigned in order to increase its congruence with the Council's preferences. Instead of 2/3 of the Committee's members being appointed by the judiciary, as in the CR's initial proposal, this share was reduced to a minority of four out of nine members. Of the remaining five, four would directly or indirectly enjoy the Council's confidence, while only one would be appointed by parliament. In any case, the Committee could not make generally binding decisions annulling legislation since that power was reserved to the Council.

Therefore, constitutional review in post-1976 Portugal would ultimately retain its previous "hybrid" nature, combining "political" (by the Council of the Revolution) and "judicial" (by ordinary courts and a Constitutional Committee) elements. However, it was made sure that only the Council could make generally binding annulments or veto legislation on grounds of its unconstitutionality, and that all relevant decisions by lower courts would find their way to a Constitutional Committee in which the military exerted, under normal circumstances, an important influence. Therefore, besides awarding the military a reserved domain of power (further extended by the Council's jurisdiction over military and defense policies), the 1976 Constitution allowed the Council to refer legislation to itself, thereby partially concentrating in a single institution — at least
during the four year transitional period established by the Second Pact MFA/Parties —
the role of legislator, constitutional judge and constitutional litigant.

The way in which the Council of the Revolution performed that role in the following years has been analyzed by several scholars. Bruneau and Macleod, for example, have stressed how "the Council adopted an activist stance which upset many politicians, rejecting no fewer than thirty-five of the seventy-four bills that were submitted to it" (Bruneau and Macleod 1986, 40). However, Portuguese observers have tended to make less critical assessments. Antunes, for example, argues that the Council's role in constitutional review was like that of "an arbiter that intervened as little as possible" (Antunes 1984, 329; see also Mendes 1989).

<table>
<thead>
<tr>
<th>Years</th>
<th>% of all passed bills referred to CR</th>
<th>Ratio Bills deemed unconstitutional/ Bills scrutinized</th>
<th>% of all decrees referred to CR</th>
<th>Ratio Decrees deemed unconstitutional/ Decrees scrutinized</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977</td>
<td>7.3</td>
<td>0.14</td>
<td>1.4</td>
<td>0.86</td>
</tr>
<tr>
<td>1978</td>
<td>5.1</td>
<td>0.25</td>
<td>0</td>
<td>-</td>
</tr>
<tr>
<td>1979</td>
<td>14.1</td>
<td>0.25</td>
<td>0.4</td>
<td>0.75</td>
</tr>
<tr>
<td>1980</td>
<td>5.9</td>
<td>0.66</td>
<td>1.9</td>
<td>0.58</td>
</tr>
<tr>
<td>1981</td>
<td>3.8</td>
<td>0</td>
<td>0.8</td>
<td>0.36</td>
</tr>
<tr>
<td>1982</td>
<td>5.6</td>
<td>0.5</td>
<td>0.9</td>
<td>0.22</td>
</tr>
</tbody>
</table>

Sources: Antunes 1984, 333 for referrals and rulings; Magalhães 1996, 129 for law production data.

Table 3.3 The *a priori* abstract review activity of the Council of the Revolution (1977-1982)

Table 3.3 shows that, between 1977 and 1982, a total of 7 percent of all bills passed in the Portuguese parliament were referred to the Council of the Revolution for *a priori* constitutional review, and only in 1979 did that figure reach more than 10 percent.

100
From a comparative point of view, although not irrelevant, these figures cannot be seen as inordinately high. As for governmental decrees, figures for the period are much lower (1.5 percent), which is understandable when we consider that the Portuguese executive issues several hundreds of decrees per year, many of them regulating routine issues. Furthermore, litigation figures in *a priori* review result not only from the Council's own initiative in referring laws to itself, but also from the President's litigation, who, in practice, referred almost as many statutes as the CR.

Even more striking is the fact that although the CR itself was responsible for initiating proceedings against thirty-five parliamentary bills and governmental decrees between 1977 and 1982, it found only little more than half of them (nineteen) of them unconstitutional. Looking at the ratios between the bills deemed unconstitutional and those against which appeals for *a priori* review were introduced by the CR or the President, we see that only in 1980 has that ratio surpassed 0.5. In other words, throughout the period, most bills referred by the Council or the President for constitutional review were not deemed unconstitutional. Thus, considering the vast powers enjoyed by the Council of the Revolution in constitutional litigation and review, those powers seem to have been used with considerable restraint.

This fact has often been attributed to the role played by its advisory Constitutional Committee. Composed of some of the most important "heavy-weights" in the Portuguese legal community (Mendes 1999, 69), the CC issued opinions that were not only made public but also, in both form and content, no different from typical judicial rulings of European constitutional courts, in that they used complex and exhaustive legal argumentation and comparative precedents. The Council of the Revolution did indeed
have the right to ignore those opinions in its final rulings, but had then to be willing to suffer the public costs associated with engaging in what could only be perceived as overt political decision-making in legal matters. Ultimately, of the 213 abstract review cases in which it adjudicated, the Council accepted the advisory opinion of the Committee 200 times, only rejecting (ultimately deciding contrary to) thirteen opinions made by the majority of the Committee (Antunes 1984, 322). Some of those thirteen cases concerned military issues, particularly two laws approved by the Council itself, in which, obviously, the CR chose not to accept Committee's opinion that they were unconstitutional.

However, we should be careful not to overestimate the ability of a more "judicial-like" body such as the Constitutional Committee to determine the Council's rulings, nor should we forget the overtly political uses of constitutional litigation and decision-making in this period. Early on, from 1976 to 1979, the Council’s role in constitutional adjudication was indeed restrained. The Socialist minority cabinet formed with Eanes's acquiescence in 1976 faced a particularly difficult combination of political and economic obstacles: economic recession, a massive and inefficient state enterprise sector (the largest in Western Europe in relative terms — Corkill 1999, 56), a constitutional text that imposed strict limits on the expansion of private enterprise, an exceedingly rigid labor market, particularly strong workers' rights, and an extremely powerful trade union movement — Intersindical — controlled by the Communist Party. Without the support of a stable majority in parliament and with a strong but incompatible Communist party to its left, the Socialists were forced to embrace a much more pragmatic and centrist approach to economic policy than its previous political rhetoric might anticipate.
The priority was to obtain two difficult compromises: relaying the ground for a market economy without openly challenging the constraints posed by the 1976 "collectivist" Constitution; and achieving urgent economic stabilization without totally discarding a social-democratic approach to social policy. Soares's government took on itself passing legislation that implemented constitutional rules in what concerned which sectors would be closed for private enterprises, that (re)regulated agrarian reform, and that paid compensations to owners of nationalized companies. These bills resulted from complex negotiations between the PS and the center-right parties intended to obtain their support or, at least, their abstention in parliament.\textsuperscript{30} Given the consensuality behind the approval of these bills, which reduced the military's responsibility for the passing of such controversial measures, Eanes and the Council were able to show their openness to some non-dogmatic compromises about the "conquests of the Revolution". In fact, although the Council decided to scrutinize the constitutionality of most of these bills, its final ruling validated them and reinforced their constitutional legitimacy, despite the protests of the Communist Party and leftist factions within the PS. They passed by narrow margins in the Constitutional Committee (with the favorable vote of one of the CR's and the President's appointees), in decisions that the Council of the Revolution would simply ratify a few days later. In these rulings, where a potentially damaging disagreement between the Committee's advisory opinion and the Council's final ruling was avoided, the importance of Eanes's personal intervention should not be underestimated.\textsuperscript{31}

However, the Socialist government's austerity policies ended up producing major social costs and eroded their thin and conditional popular, parliamentary and presidential support. By 1978, public expenditure had been stabilized and labor costs reduced, but at
the expense of a rise in unemployment a drop in real wages, increasing mobilization of the trade unions, internal fractionalization of the Socialist Party both to the left and right of its leadership, and, most damagingly, withdrawal of the tacit support that Eanes — increasingly unwilling to share responsibility for the failures of the PS government — had briefly given them. After the disintegration of an awkward PS-CDS coalition cabinet, Eanes stepped in to dismiss Soares, experimented with cabinets of "presidential initiative" led by independents and, finally, dissolved parliament and called elections for 1979. In those elections, victory fell to a pre-electoral coalition — (*Aliança Democrática* — AD) between the PPD (now renamed *Partido Social Democrata* - PSD) and the CDS.

<table>
<thead>
<tr>
<th></th>
<th>1976</th>
<th>1979</th>
<th>1980</th>
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<tbody>
<tr>
<td></td>
<td>% of</td>
<td>% of</td>
<td>% of</td>
</tr>
<tr>
<td></td>
<td>valid</td>
<td>seats</td>
<td>valid</td>
</tr>
<tr>
<td>PS</td>
<td>36.7</td>
<td>42.8</td>
<td>28.3</td>
</tr>
<tr>
<td>PPD/PSD</td>
<td>25.2</td>
<td>39.2</td>
<td>AD</td>
</tr>
<tr>
<td>CDS</td>
<td>16.7</td>
<td>16.8</td>
<td>46.4</td>
</tr>
<tr>
<td>PCP</td>
<td>15.3</td>
<td>16.0</td>
<td>19.5</td>
</tr>
<tr>
<td>Others</td>
<td>6.0</td>
<td>0.4</td>
<td>5.8</td>
</tr>
</tbody>
</table>

*In 1980, the PS ran as the dominant partner in a pre-electoral coalition called *Frente Republicana e Socialista* (FRS) with ASDI and UEDS, two spliter parties of PSD and PS.

Table 3.4. Election results in Portugal (1976-1980)

AD's absolute majority in 1979 opened a new stage in the relations between parliament and cabinet, on the one hand, and the Presidency and the Council of the Revolution, on the other. The PSD adopted a strategy of open conflict with the left and the military, attempting to place the major cleavage in Portuguese politics around the Constitution itself. In his own personal project for constitutional revision, Sá Carneiro
proposed a drastic reduction of presidential powers, the elimination of most of statist and collectivist constitutional norms, and even changes in the very procedure of constitutional revision, dispensing with the need for a qualified majority of 2/3 and replacing that with a referendum, thus withdrawing any veto power that the parties of the left might retain (Carneiro 1979). This confrontational strategy spilled over to legislative and constitutional politics under the AD government. Enjoying an absolute majority, the AD government was now able to make frequent use of delegated decree authority, often to issue decrees aimed at reducing state intervention in the economy. The response of the Council of the Revolution was to increase the intensity of its scrutiny of executive decrees, as we can see in Table 3.3. Levels of consensuality in legislative policy-making also decreased sharply, not only because the AD cabinet no longer needed external support, but also because it often legislated in blatant contradiction to the constitutional constraints Eanes and the Council of the Revolution were supposed to defend and represent (Antunes 1988, 91). Since presidential elections were approaching, Eanes opted to delegate the use of constitutional litigation as a countermajoritarian weapon to the CR itself, which initiated proceedings against four successive versions of a bill that opened up the economy further to private initiative. Ultimately, and once against the Constitutional Committee's opinion, those parliamentary bills were deemed unconstitutional by the Council of the Revolution in a priori review.  

Therefore, by the early 1980s, after the demise of PS's pivotal strategy at the hands of Eanes, his increasing intervention in political life, and the confrontation between himself the AD government, a pronounced political and institutional cleavage had emerged in Portugal. While the right’s and Eanes mutual hostility was clear, the
Socialists came to learn at their own expense that the President could not be trusted to lend his support to a PS minority government or even to be a neutral arbiter of partisan conflicts. Besides, afraid that Eanes's confrontation with the center-right parties might turn the PS into a mere spectator, or even an instrument, of presidential politics (Gaspar 1990, 21), the PS turned the table on Eanes, and joined the PSD and CDS on one of the sides of the conflict that pitted all parties to the right of the Communists against the "outsiders" in Portuguese democratic party politics: Eanes and the Council of the Revolution. The creation of the Portuguese Constitutional Court, and the institutional rules under which constitutional review of legislation would function after 1982, was greatly influenced by the emergence of this political and institutional cleavage pitting Socialists, Social Democrats, and Christian Democrats against Eanes.

The creation of the Tribunal Constitucional

As prescribed by the Second Pact MFA/Parties and the 1976 Constitution itself, the Assembleia da República elected in 1980 enjoyed powers of constitutional revision, a revision that, once completed, would put an end to the transitional period of tutelary rule by the military. By April 2, 1982, after a slow and cumbersome negotiation process, the leaders of AD and the Socialist party finally reached an agreement on the necessary constitutional amendments. Only four particularly delicate issues were still pending: agrarian reform; the preservation of the "transition to Socialism" in the constitutional text; the question of whether the cabinet should remain accountable both before parliament and the President; and the composition of the Constitutional Court. In a May 1982 summit between the leaders of PSD, CDS, and PS, that had been called in order to
discuss these final disagreements, the way in which the justices of the future *Tribunal Constitucional* would be appointed was the very last issue to be addressed; it was also the one in which agreement was more difficult to obtain.\textsuperscript{34}

The need to redefine the institutional format of constitutional review was an inevitable consequence of the elimination of the Council of the Revolution and the reallocation of its powers. Between 1979 and 1981, the several drafts that emanated from the center-right area (and ultimately led to AD's formal constitutional revision project) were more or less convergent on the shape of things to come in relation to judicial review.\textsuperscript{35} First, they proposed the creation of a Kelsenian-type constitutional court, enjoying abstract review powers and appointed by political authorities. Second, AD was strategically interested in eliminating both *a priori* abstract review of legislation and "unconstitutionality by omission". In defense of their proposal, AD MP's argued that *a priori* review had "the serious inconvenience of excessively politicizing the Constitutional Court", while "unconstitutionality by omission" was also "purely political" and, in fact, "unworkable".\textsuperscript{36} However, regardless of the "technical-juridical" reasonings that might be advanced, it was clear the center-right was set on withdrawing from the President one of the weapons he and the Council of the Revolution had enjoyed, namely the right to introduce an additional veto point in legislative policy-making, as well as on eliminating from the court's jurisdiction a type of review that was indelibly connected to the "Socialist" and "programmatic" nature of the constitution and that, after all, had practically remained stillborn since 1976.\textsuperscript{37} As a high-ranking member of the AD coalition put it,
"our proposal to eliminate a priori review had little to do with legal or doctrinal issues. Instead, it was a conjunctural reaction to the Eanes's militantism against AD. (...) We felt the need to remove from the President any possibility of negative intervention against a parliamentary majority with which he had deep political disagreements."

Thirdly, AD was set on assuring that presidential and leftist appointees would always be a minority within the court. Some of the earlier constitutional revision drafts, such as those by Sá Carneiro and Barbosa de Melo, Cardoso da Costa, and Vieira de Andrade, sought that goal by giving parliament a strong role in judicial appointments and/or by ensuring the preponderance of the career judiciary's top hierarchical levels within the court. In Carneiro's proposal, the court would be composed of nine justices: three appointed by the President, three elected by parliament (by an unspecified election rule, presumably majority rule), and three by the Supreme Court of Justice, but always ensuring that a majority in the court (five of the nine justices) would have to be selected among judges of the Supreme or Appeals courts. Barbosa de Melo and his colleagues advanced a similar proposal, whereby three of the nine justices would be elected by the highest courts in and among themselves, while the three justices appointed by parliament would be elected by majority rule. AD's formal constitutional revision draft, produced soon after Eanes's reelection, went even further. Of the nine justices, the President would only appoint two. The parliament's share was also cut to two, while the majority (five justices) of the Court would be the President of the Supreme Court and four judges of the Supreme and Supreme Administrative courts. In other words, presidential and parliamentary appointees would be in the minority, while those of the conservative higher echelons of the ordinary judiciary would be in the majority, regardless of any eventual electoral shifts that might occur in the future.
The Socialists' position in relation to the future format of judicial review, as well as to the entire institutional problem in the 1982 revision, was conditioned by other factors. Back in 1980, Eanes and the Socialists had reached an agreement through which the President committed to refuse any referendum to do with constitutional revision and to resign from the office of Chief of Staff of the Armed Forces, in exchange for the PS's support in the coming presidential elections and their commitment to veto any constitutional amendments that reduced presidential powers. From this point of view, PS’s support for any curtailment of the President's broad powers of cabinet dismissal and parliamentary dissolution was clearly unacceptable, and although the agreement made no mention whatsoever of constitutional review, the elimination of *a priori* review litigation rights for the President and a small role for Eanes in the appointment of constitutional court justices could easily be construed as a breach of the PS/Eanes agreement.

The question, however, was whether the Socialist Party felt effectively bound by this agreement once Eanes had been reelected. As negotiations for the revision of the constitution opened, the PS was divided on the issue. On the one hand, an important party faction, strongly represented within the parliamentary party, saw the PS/Eanes agreement as still valid, and was adamant in preserving the collectivist bent in the economic articles of the Constitution. On the other hand, the party's leadership saw the agreement as no longer binding and was indeed willing to join AD in reducing presidential powers. However, it still had to prevent the right from adapting political institutions to suit its own preferences — such as packing of the constitutional court with members of the ordinary judiciary — to maintain the PS's internal cohesion, to block any major changes
in the "economic constitution," and to give the semblance that the agreement with Eanes was going to be respected.\textsuperscript{40}

These contradictory demands were clearly reflected in the PS's constitutional revision draft. On the one hand, the Socialists openly proposed the curtailment of the President's ability to dismiss the cabinet, limiting it to "exceptional cases, and only when indispensable to assure the functioning of democratic institutions", something similar to what came to be the final formulation of Article 198.\textsuperscript{41} On the other hand, they attempted to compensate that breach in the agreement with Eanes by not only facilitating his powers of parliamentary dissolution and veto,\textsuperscript{42} but also by defending the preservation of the status quo in what concerned his initiative in \textit{a priori} review of legislation and giving him the ability to appoint 1/3 of the Constitutional Court's justices. The remaining 2/3 would be elected by Parliament (five) and the \textit{Conselho Superior da Magistratura} (also five, by a two-thirds majority rule, designed to maximize the influence of the non-judicial members within that Council).\textsuperscript{43} The remaining important changes proposed by the Socialists concerned the object of \textit{a priori} review (provisions contained in bills or decrees, instead of bills and decrees as a whole\textsuperscript{44}), the elimination of diffuse judicial review, and the expansion of access to the court in \textit{a posteriori} review to all parliamentary parties.\textsuperscript{45}
<table>
<thead>
<tr>
<th>AD's draft</th>
<th>FRS's draft</th>
<th>1982 revised Constitution</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Bodies with constitutional review powers</strong></td>
<td><strong>Bodies with constitutional review powers</strong></td>
<td><strong>Bodies with constitutional review powers</strong></td>
</tr>
<tr>
<td>Constitutional Court</td>
<td>Constitutional Court</td>
<td>Constitutional Court</td>
</tr>
<tr>
<td>Abstract review</td>
<td>Concrete review</td>
<td>Concrete review</td>
</tr>
<tr>
<td><strong>Ordinary courts</strong></td>
<td><strong>Concrete review</strong></td>
<td><strong>Structure and appointment rules</strong></td>
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<td><strong>Structure and appointment rules</strong></td>
<td><strong>Structure and appointment rules</strong></td>
<td><strong>Structure and appointment rules</strong></td>
</tr>
<tr>
<td>Constitutional Court (CC)</td>
<td>Constitutional Court (CC)</td>
<td>Constitutional Court (CC)</td>
</tr>
<tr>
<td><strong>N. of members: 9</strong></td>
<td><strong>N. of members: 15</strong></td>
<td><strong>N. of members: 13</strong></td>
</tr>
<tr>
<td><strong>Term length: 6 years, renovation of 4 justices every 3 years</strong></td>
<td><strong>Term length: 6 years</strong></td>
<td><strong>Term length: 6 years</strong></td>
</tr>
<tr>
<td><strong>Appointing authorities:</strong> President (2); Parliament (2); Supreme Court (2); Supreme Administrative Court (2); plus, president of Supreme Court</td>
<td><strong>Appointing authorities:</strong> President (5); Parliament (5); Superior Judicial Council (5); <strong>Requirements:</strong> SJC appointees would have to be judges, 2 from higher and 3 from lower courts</td>
<td><strong>Appointing authorities:</strong> Parliament (10); Constitutional Court (remaining 3)</td>
</tr>
<tr>
<td>CC's president: Supreme Court president</td>
<td>CC president: -</td>
<td>CC president: elected by his/her peers</td>
</tr>
<tr>
<td><strong>Abstract review</strong></td>
<td><strong>Abstract review</strong></td>
<td><strong>Abstract review</strong></td>
</tr>
<tr>
<td>None</td>
<td>A priori review</td>
<td>A priori review</td>
</tr>
<tr>
<td>Initiative/standing: President and Ministers of the Republic in the autonomous regions</td>
<td>Initiative/standing: President and Ministers of the Republic in the autonomous regions</td>
<td>Initiative/standing: President and Ministers of the Republic in the autonomous regions</td>
</tr>
<tr>
<td>Object: norms contained in bills, and decrees treaties before promulgation</td>
<td>Object: norms contained in bills and decrees before promulgation and treaties</td>
<td>Object: norms contained in bills and decrees treaties before promulgation and treaties</td>
</tr>
<tr>
<td>Effects: suspensive veto until unconstitutional norm is amended</td>
<td>Effects: suspensive veto until unconstitutional norm is amended</td>
<td>Effects: suspensive veto until unconstitutional norm is amended</td>
</tr>
<tr>
<td>Override: in case of vetoed bills or treaties, override by 2/3 parliamentary majority</td>
<td>Override: in case of vetoed bills or treaties, override by 2/3 parliamentary majority</td>
<td>Override: in case of vetoed bills or treaties, override by 2/3 parliamentary majority</td>
</tr>
<tr>
<td>A posteriori review</td>
<td>A posteriori review</td>
<td>A posteriori review</td>
</tr>
<tr>
<td>Initiative/standing: President, Speaker of Parliament, Prime Minister, Ombudsman, Attorney-General and regional assemblies</td>
<td>Initiative/standing: President, Speaker of Parliament, Prime Minister, Ombudsman, Attorney-General, parliamentary parties, president of National Council of the Plan and regional assemblies</td>
<td>Initiative/standing: President, Speaker of Parliament, Prime Minister, Ombudsman, Attorney General, 1/10 of MP's, and regional assemblies and cabinets</td>
</tr>
<tr>
<td>Object: all legal norms</td>
<td>Object: all legal norms</td>
<td>Object: all legal norms</td>
</tr>
<tr>
<td>Effects: annulment</td>
<td>Effects: annulment</td>
<td>Effects: annulment</td>
</tr>
<tr>
<td>None</td>
<td>See note*</td>
<td>Unconstitutionality by omission</td>
</tr>
<tr>
<td>Initiative/standing: President, Ombudsman, speakers of regional assemblies</td>
<td>Object: failure to pass legislation that executes constitutional rules</td>
<td>Initiative/standing: President, Ombudsman, speakers of regional assemblies</td>
</tr>
<tr>
<td>Effects: recommendations</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 3.5: Bargaining over the Portuguese *Tribunal Constitucional* (Continued)
Ultimately, the fact that no single party or coalition was able to impose its preferences in the constitutional revision process turned some of the aspects of the debate into a swift and more or less inevitable acceptance of the status quo. That was the case, for instance, in what concerned the proposed elimination of *a priori* and "omission" abstract review. In March 1982, the parliamentary debate on the jurisdiction of the future constitutional court started with a PPD MP stating that "it is now fairly obvious that our proposal of eliminating *a priori* review will not be accepted" and adding that "we will not block the revision of the constitution because of an issue such as that [unconstitutionality by omission]." 46 Similarly, FRS's proposal to eliminate of diffuse judicial review was immediately vetoed by AD at the very beginning of the debate. 47 The future Constitutional Court would therefore inherit the broad jurisdiction enjoyed by the Council of the Revolution, including *a priori* and *a posteriori* abstract review of legislation; concrete diffuse review by all courts would also be preserved. Also relatively

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* FRS's project also gave the "Council of the Republic", a newly created body in charge of advising the President, the power to initiate proceedings and rule on "unconstitutionalities by omission".
swift and consensual was the discussion about who would be entitled to refer legislation to the court for *a posteriori* review. Initially, from AD’s point of view, "the initiative in terms of constitutional review of legislation should be as restricted as possible". Fearing the increasing "trivialization" of the use of referrals against parliamentary bills or, more precisely, as one PPD MP ultimately admitted, that the Communist Party would turn the frequent accusations of unconstitutionality it had made in the past into systematic countermajoritarian litigation, AD initially opposed the expansion of litigation rights to members of parliament. However, the Socialists in the opposition obviously supported it.

Involved in the FRS coalition that comprised two other smaller parliamentary parties (ASDI and UEDS), the PS proposed that all parliamentary parties, regardless of their size, should have access to the court. Finally, the Communists suggested a criterion that would allow themselves (but not the smaller parliamentary parties) access to court: 1/10 of MP’s. The final compromise solution involved adopting precisely the Communists' proposal.

Once the parties had agreed upon the broad powers of, and a relatively generous access to, the Constitutional Court, the next and final item on the agenda took on an inordinate importance: the appointment and retention rules for the Court's justices. The only thing on which there was reasonable consensus was that the appointment of justices should have a tripartite character, inspired by the Italian example, with the participation of the President, Parliament and the judiciary (either directly through the higher courts — AD — or by the *Conselho Superior da Magistratura* — PS). The crucial questions, however, were how many justices should be appointed by the President and how many should be judges from the higher courts.
On the face of their agreement with Eanes and fearful of the Court being controlled by the judicial higher ranks, the Socialists were reluctant to cut down on the number of justices the President could appoint, and totally unwilling to give the ordinary judiciary more appointees than either parliament or the President. The center-right, on the other hand, enjoyed greater flexibility. Attempting to appease PS's concerns, AD abdicated from a "judicial majority" during the debate, suggesting also an increase in the number of parliamentary appointees: eight out of thirteen. However, this proposed increase, while acceptable to the Socialists, immediately complicated the debate. It forced the center-right to speculate about how "party quotas" should be designed in order to prevent a majority of leftist judges in the Court, and still fell short of resolving the crux of the disagreement: the President's influence on the court's composition. At one point, an agreement seemed so difficult that one high-ranking member of the PS, Almeida Santos proposed — very much as a provocation — the direct election of the Constitutional Court justices by universal suffrage.

It took a high-level summit between the leaders of AD and the PS to break the deadlock. In that summit, several hours were spent in sheer speculation about the names of the justices that Eanes might appoint to the Court (Almeida 1995, 248). One of AD's fears was that the President might appoint only leftist justices, seriously skewing the Court's ideological composition and jurisprudence against the right. Conversely, considering the "ideological nebula" that surrounded the President, the Socialists feared that Eanes might even appoint conservative justices (Almeida 1995, 248). But what both delegations feared the most was that the President might appoint people from his personal entourage and area of influence, favorable to a more "presidentialist" evolution of the
regime, and allowing him to prolong to the Constitutional Court the same kind of influence he had extended to the Council of the Revolution and the Constitutional Committee in the past. As one of the members of the PS delegation in the summit put it,

"my fear was that the President would appoint (…), people that came from his very own 'grey' area: people whose personal relationship with him determined their appointment, fostering an inextricable intimacy between the exercise of the function and their personal relationship with the President. (…) In fact, from our point of view, if Eanes was to appoint justices at all, the more the better: the more likely it was that he would appoint people closer to the PS, closer to the left. Within his support base, he couldn't select only 'grey' justices. He would have to balance 'grey' and 'rose' justices, and the smaller the number of justices he could appoint, the smaller the number of 'roses' would be."

The solution ultimately rested on both delegations focusing on what, after all, they really shared during that summit: "an extremely high level of distrust of President Eanes and the shared desire to give him no powers whatsoever [in what concerned judicial appointments]." In fact, it was the PS delegation that broke the deadlock, abdicating from the tripartite appointment solution and proposing that all justices should be elected by a parliamentary qualified majority of two-thirds. Surprised, the AD delegates asked for a recess to discuss the proposal, and returned half hour later to give their full agreement. Once this fundamental deadlock had been broken, the rest of the bargaining process was much easier. To mitigate the perception of an overt politicization of the appointment of members of the ordinary judiciary, the Socialist delegation also proposed that three of the Court's thirteen members and six ordinary judges would be "coopted" by the first ten justices appointed by parliament. In fact, the agreement between AD and PS went as far as to specify the kind of balance between party appointees that should prevail. On the one hand, the leftist and rightist party blocs in parliament should be able to
appoint an equal number of justices. On the other hand, a 13th justice, one of the three co-opted ordinary judges, should break the tie between leftist and rightist blocs and, in this way, ensure the impartiality of the Court. As one of the PS negotiators put it during the summit, referring to the ten justices to be appointed by the parties in parliament, "let them find a Cato". In other words, as one of its future justices would put it, "the predictable composition of the Court would be such that its decisions could not be predicted" (Almeida 1995, 248).

Either because this elegant piece of institutional engineering was not entirely disclosed or fully understood, but also because it represented open defiance of Eanes, the agreement between AD and PS was violently attacked in the following months. Vital Moreira, of PCP, described it as "technically unsustainable and politically dangerous". Jorge Miranda suggested that future changes in the composition of parliament would lead to immediate challenges to the Court's legitimacy. In fact, even MP's of both AD and PS seemed at something of a loss about how to justify it before the public. PS's Almeida Santos argued that the solution was "not good, but not terrible either," while another high-ranking member of the PS argued that while other solutions were better, this one at least assured that "no political party can claim it will control the Court". One CDS MP described it as "very artificial and extremely negative in terms of the Court's politicization". And a PSD MP argued that, after all, "we should not attribute the Constitutional Court an excessively important role". In the final vote, the constitutional articles relating to the appointment of justices were passed with the votes of AD and the PS MP's alone, with several Socialists formally declaring that they voted in favor of this Court's composition strictly because of party discipline.
Outside parliament, reactions were even harsher. In the media, the future Court was described as a potential instrument of "more or less ephemeral majorities" or, alluding to the parliamentary monopoly of judicial appointments, "a judge in its own cause." Sousa e Castro, a member of the Council of the Revolution, argued that, with this kind of composition, "the Assembly of the Republic will be simply scrutinizing itself (...) and all decisions will be the exclusive jurisdiction of political parties." Finally, Eanes himself did not neglect to attack this arrangement. In November 1982, in a televised address to the country in which he criticized the entire constitutional revision process and outcomes, the President warned where he would exercise his powers in the future: "now that the question of the President's political confidence in the Prime-Minister cannot be clearly posed, the use of the legislative veto will cease to be exceptional". And about the Court, Eanes argued that,

"although a priori, a posteriori and 'omission' scrutiny of constitutionality have been preserved, the solution found for the Court's composition is unreasonable. Of all imaginable solutions, from a democratic point of view, the strangest one was ultimately picked (...), since the Court will be scrutinizing the laws produced by very ones who appointed it."

With these words, Eanes showed that he understood quite well that the essence of another of his main institutional resources, the use of a priori constitutional litigation, had been partially lost. Eanes could refer as many bills and decrees to the Constitutional Court as he wished, but the Court was much less likely to rule according to the President's wishes than the Constitutional Committee and the Council of the Revolution had been in the past.
The final stages in the implementation of the Portuguese Constitutional Court were the approval of the *Lei de Organização, Funcionamento e Processo do Tribunal Constitucional* (LOFPTC) and the appointment of the Court's justices. The importance of the former was relatively limited, considering that, contrary to what happened in Spain, most relevant rules concerning appointments, litigation, jurisdiction and adjudication in abstract review had already been bargained and formalized in the Constitution. However, there was still some room to tinker with institutional details in LOFPTC, and the AD government tried to use it as much as possible.  

In its preamble, the draft bill presented in parliament in late September 1982 defended the "tendential limitation of the Court's intervention to the main issues of constitutional life" and the need to honor "the wise principle of self-restraint," and suggested that, "in a well organized democratic regime, declaring the unconstitutionality or illegality of laws and other statutes will always have to be a rare decision". This conception of the Court's role was reflected in two innovations introduced by the bill. One of them established that litigants in abstract *a priori* review had to specify in the brief which norms they were arguing to be unconstitutional, forcing the President to juridically justify his positions and thus restricting the object of both litigation and judicial rulings. Another innovation concerned decision-making rules within the Court: a minimum quorum of nine justices was proposed, and the unconstitutionality of legislative norms could only be declared through the favorable vote of seven justices, regardless of the number present at deliberations. From "a theoretical and academic point of view", these provisions resulted from the notion that "declaring a law as unconstitutional requires deep reflection, cannot be made lightly (…) and requires adequate legitimization by the Court". However, the leaders of
the governing coalition seemed, again, to share more strictly political motivations. The Minister of Parliamentary Affairs went as far as to suggest exactly what was expected from the Court in the near future in terms of its jurisprudence:

"Our understanding is that the meaning of each constitutional norm varies in relation to the global meaning of the Constitution. The constitutional revision introduced such changes in the fundamental law that we cannot easily hold a decision by the Constitutional Committee equivalent to any future ruling the Constitutional Court will make on the same issues."  

Understandably, the opposition's reaction was overwhelmingly negative. From the point of view of the Communists and other parties to the left of FRS coalition, this just served to confirm how the Court's creation was part of a conspiracy not only against Eanes, but also — and most importantly — against the Socialist and collectivist ethos of the 1976 Constitution: "a body destined to confirm and impose the aberrant notion that, after the constitutional revision, we are in presence of an entirely new Constitution, in which even norms that have not been changed have acquired a new meaning." The position of the Socialists and of their smaller partners in FRS was less critical, but equally skeptical of the very notion of a "restrained" Court that presided over the entire draft bill.

In the meantime, the opposition did not neglect to remind the government that, unlike with the constitutional revision, Eanes still preserved his ability to veto LOPFTC, a veto that could only be overridden by a 2/3 qualified majority in parliament. Thus, in order to neutralize Eanes's veto powers, the center-right coalition was forced, again, to make concessions and seek a negotiated solution with the Socialists. First, the government dropped the quorum requirements and the need for a majority of seven
justices for norms to be declared unconstitutional, provisions that had been unanimously rejected by all opposition parties from the start. Second, in exchange for accepting a mitigated version of the rule that forced referrals in a priori review to specify the norms argued to be unconstitutional, the Socialists forced AD to drop a series of other controversial proposals, including one in which the parliamentary election of justices was to take place through a vote on "closed lists" previously negotiated among the parties, instead of name by name (Araújo 1995, 943-945).

The installment of the Portuguese Constitutional Court was finally concluded with the parliamentary election of the first ten justices and the selection of the remaining three by those elected by parliament. In this respect, is useful to quote Marcelo Rebelo de Sousa, then Minister of Parliamentary Affairs, in his an apt summary of the process that had taken place right up to November 1982:

"The negotiation was extremely complex: party leaders made essential decisions, there were great difficulties in obtaining acceptance of the multiple invitations made [to prospective justices], and the government had to assume a constitutionally unorthodox intervention in the invitations made to justices in the AD area. Everything culminated in a phone invitation made by a PSD Minister, in the name of the party's parliamentary group, to a future justice, then absent from Lisbon and few hours before the deadline for the presentation of candidates expired" (Sousa 1995, 225).

Thus, as in Spain, the relevant negotiations regarding judicial appointments were made outside parliament, led by party leaders (in the case of AD, cabinet members), and involved dealing with three difficult tasks: finding suitable candidates close to each of main political forces in parliament (AD and PS); ensuring that those candidates accepted the invitations; and hope that the opposing political bloc did not veto their election. But
unlike what had occurred in Spain, where PSOE and UCD had followed a self-imposed moratorium regarding the recruitment of candidates among party cadres, the only limits imposed by PS and AD in this regard were the respect for a rather flexible LOPFTC, the revised Constitution and, allegedly, a veto imposed by the Socialists on the proposal of Menéres Pimentel (the PSD Minister of Justice), a candidate they described as "excessive".  

The Socialists were the first to settle on their contingent of justices, composed of four highly respected political figures, including former members of Socialist cabinets, former members of the Constitutional Committee and, in the case of Nunes de Almeida, one of the "(re)founding fathers" of the 1982 constitutional revision (and thus, of the Court itself). Additionally, and mirroring the concession that the PSD would inevitably have to make to its coalition partner (the CDS) in terms of judicial appointments, the Socialists also decide to make a concession to the Communists: they invited a Communist constitutional law scholar, Vital Moreira, to be a part of the leftist-bloc within the Court. After initial hesitation and intense discussion within the party, Moreira and the Communists accepted the invitation.  

The governmental coalition had more difficulties in filling its predetermined quota of justices. Judging from the short-lists leaked to the media between September and November 1982, the first name on which AD settled was Cardoso da Costa, who was invited by Freitas do Amaral, CDS's deputy Prime Minister. However, a broad variety of names was then advanced, including Barbosa de Melo and several PSD MPs, until, plagued by successive refusals, AD ultimately settled on two legal scholars (Cardoso da
Costa and Marques Guedes) and three judges from the ordinary courts that had previously served as members of the Constitutional Committee.

<table>
<thead>
<tr>
<th>Proposed by or seen as close to PSD</th>
<th>Elected by Parliament (November 1982)</th>
<th>Co-opted career judges (April 1983)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Armando Marques Guedes (President) (law professor)</td>
<td>Messias Bento (Appeals Court judge, former member of the Constitutional Committee)</td>
<td>Raul Mateus (judge, former member of the Supreme Judicial Council and the Constitutional Committee)</td>
</tr>
<tr>
<td>José Manuel Cardoso da Costa (law professor, former member of the Constitutional Committee, one of the drafters of LOPFTC)</td>
<td>Joaquim Costa Aroso (Appeals Court judge and former member of the Constitutional Committee)</td>
<td></td>
</tr>
<tr>
<td>Luis Nunes de Almeida (former PS MP, former member of the Constitutional Committee, top negotiator for PS in the constitutional revision of 1982)</td>
<td>Jorge Campinos (former PS MP, member of cabinet and of the Constitutional Committee)</td>
<td></td>
</tr>
<tr>
<td>José Magalhães Godinho (Vice-President) (lawyer, former Ombudsman, former member of the Supreme Judicial Council)</td>
<td>Antero Monteiro Diniz (judge, former junior member of a Socialist cabinet)</td>
<td></td>
</tr>
<tr>
<td>Vital Moreira (law professor, former PCP MP)</td>
<td>Mário de Brito (Supreme Court judge)</td>
<td></td>
</tr>
<tr>
<td>“Neutral”</td>
<td>José Joaquim Martins da Fonseca (Appeals Court judge)</td>
<td></td>
</tr>
</tbody>
</table>

Table 3.6. The first composition of the Portuguese Tribunal Constitucional

In late November, the Portuguese parliament went through the motions of electing the ten previously agreed-upon justices, whose very first task was now to appoint three additional judges from ordinary courts in order to complete the Court. This proved to be an extremely difficult task. After no less than eleven meetings, the ten justices elected by
parliament finally agreed upon the name of three judges, but two of them simply refused the invitation, bringing the process back to square one.\textsuperscript{79} In the meantime, the political situation in the country was rapidly degenerating. Following AD's disappointing results in the December local elections and the subsequent tension within the coalition, the Prime Minister resigned and Eanes dissolved parliament and called for new elections. And while the seeming inability of the justices to complete the Court's composition only seemed to confirm the previous criticisms made of the 1982 constitutional revision,\textsuperscript{80} the media began reporting the increasing impatience of party leaders and the will to strike a political bargain also upon the names of the three coopted members of the Court.\textsuperscript{81} In fact, and although the first ten justices had not been elected under any commitment to coopt judges agreed upon by the parties, that was precisely what ultimately happened. In an interparty "gentlemen's agreement", the final composition of the Court was ultimately settled under the following informal clauses: of the 13 justices, 12 would be "indicated" by the parties, including two of the co-opted justices; the thirteenth justice would be "neutral"; PSD and PS allowed, respectively, the CDS and the PCP to indicate a minority of justices within each "leftist" and "rightist" blocs within the Court; and the Court's president would be a PSD appointee, while its Vice-President would be a PS appointee (Araújo 1997, 36-39).\textsuperscript{82} By April 1983, a full seven years after the approval of the first Constitution of democratic Portugal, a Constitutional Court was finally in place.

**Conclusion of Part One**

In the Introduction to Part One, we sketched three different explanations of the creation of judicial review institutions. The first, the *cultural-historical* explanation,
typically focuses on the role of legal cultures and traditions — as well as on other past historical legacies — as explanations of whether (and what kind of) judicial review institutions end up being created in new democracies. The second explanation, the functionalist one, relates the creation of different types of judicial review to the need to solve different social, political or legal problems, such as "assuring the supremacy of the rule of law", foster credible commitments in policy-making, and resolve ambiguities in incomplete constitutional contracts. Finally, the strategic explanation focuses on bargaining processes between political actors who seek to shape institutional rules in order to reap distributional benefits.

The analysis made of the inception of judicial review in Spain and Portugal in previous three chapters suggest that these different explanations do not necessarily exclude each other. First, the new Spanish and Portuguese democracies ultimately adopted a system of judicial review by constitutional courts, separated from ordinary courts of civil and criminal jurisdiction, totally or partially appointed by political actors, and placed in charge of testing the constitutionality of laws passed by the legislature and vetoing them entirely or in part with general binding force when unconstitutionality were found. This corresponds to the hypotheses that would result from a cultural-historical approach: this convergence took place in a post-World War II setting, in two post-authoritarian regimes with previous failures of parliamentary rule, and sharing very similar historical, legal and institutional legacies, including civil law judicial systems. Second, we also saw that concerns with the inadequacy of previous forms of the judicial review of legislation, particularly regarding the supremacy of the constitution and the rule of law, were expressed even before the Spanish and Portuguese democratic transitions
took place, and they also deeply permeated the debates about democratic institutional design in the two countries. At different points in time, all major political actors involved in the institutional design of constitutional justice in Portugal and Spain expressed, at least rhetorically, the need to find adequate arbiters who would adjudicate conflicts between different institutional bodies and levels of government, protect primary political rights from abuses of power by majorities and state authorities, and resolve disagreements in the interpretation of constitutional rules. In other words, a functionalist explanation can also be, so some extent, helpful to understand the inception of the Spanish and Portuguese constitutional courts.

However, neither a cultural-historical nor a functionalist approach explains why, in each country, political parties exhibited such different preferences about how to ensure the supremacy of the constitution, to find a role in judicial review for an untrusted ordinary judiciary, or to design an arbiter for conflicts between majorities and oppositions or between different levels of government. In both countries, political actors espoused sharply different views on how broad the jurisdiction of constitutional courts should be, and on the extent to which litigation rights should be given to opposition parties and other government officials. Spanish and Portuguese political parties and officials struggled to impose rules of judicial appointment that would maximize their own influence in the courts, or at least minimize that of their opponents. They bargained over the extent to which individual justices and courts in general were likely to remain responsive to the interests of those who appointed them as well as to those of the legislature as a whole. And they did so under varying constraints imposed by their bargaining power in the relevant decision-making arenas, by the degree of uncertainty about the effects of
institutional choices, and by the need to obtain the acceptance of all democratic institutions in the new Spanish and Portuguese democracies.

By failing to address these factors, cultural-historical or functionalist approaches also fail to explain why the paths followed towards the consolidation of an arena for the rule of law, although ultimately convergent in so many respects, ended up being so different in two countries with as many similarities such as Spain and Portugal. In Spain, the institutional design of judicial review immediately took place in a context where no single political actor or party was able simply to impose its institutional choices on others, and where uncertainty about future electoral outcomes prevailed. Thus, in one of the patterns predicted by the strategic approach, judicial review emerged as mechanism through which any single political actor was prevented from enjoying complete control over how constitutional rules would be interpreted in the future.

In Portugal, by constrast, even after the military countercoup of November 25, 1975 — and the dramatic reversal of fortune it represented for the more radical forces in the Portuguese revolution — the military retained a close control over the political process. That control was used to impose several constitutional rules, including the conversion of the legacies of the revolutionary process into detailed constitutional regulation, and a role for the military as guardian of those rules. The attribution to the Council of the Revolution of constitutional review powers was all the more crucial if we consider that the military was certain that it would lack direct control over either parliament or the judiciary. The potential danger, therefore, was that the legacies of the revolution might be undone. Thus, in this respect, 1976 Portugal fits another general pattern predicted in the Introduction to Part One: the creation of judicial or constitutional
review institutions purposefully designed by a currently dominant political actor (the military) against legislative elective institutions it knew it would not control in the future. Only by 1982 did the Spanish and Portuguese paths in direction of an arena for the "rule of law" began to converge, and that was largely a result of changed conditions of institutional bargaining. As AD's attempt to override any opposition vetoes to its desired constitutional amendments floundered, the center-right was forced to pact the revision of the 1976 Constitution with the Socialists. This power-sharing context, in a situation of increasing political uncertainty about the public and political support of AD's government, facilitated the creation of a constitutional court that provided access of opposition parties to abstract review litigation and with a composition that would now have to be determined by extensive inter-party bargaining.

The contrast between, on the one hand, the Spanish and Portuguese experiences and, on the other hand, the Greek, is particularly illustrative of the importance of the balance of power and electoral uncertainty for institutional design processes and outcomes. Unlike those in Spain or Portugal, the Greek constituent process was dominated by a single party, Constantine Karamanlis's New Democracy. ND enjoyed more than 70 percent of seats in the assembly, and did not have to worry about elections following the approval of the new Constitution. The result was that Greece, with similar authoritarian and civil law legacies and involved in an almost simultaneous democratic transition, remained the only new Southern European democracy without constitutional review of legislation. Instead, it returned to the pre-dictatorship system of concrete and diffuse judicial review, and created only a Special Highest Court (SHC) in charge of settling controversies between the highest courts in the land (the Council of State, the
Areos Pagos, and the Court of Auditors) concerning concrete review decisions, composed mainly of career judges enjoying reduced independence from the executive (Spiliotopoulos 1983; Magalhães, Guarnieri, and Kaminis forthcoming). In contrast, in 1978-79 Spain and 1982-83 Portugal, while power-sharing in the constituent assemblies prevented incumbents (UCD and AD) from blocking the adoption of judicial checks upon majority rule, electoral uncertainty gave them every incentive to "hedge their bets" against the future. Oppositions were given access to constitutional justice, and conservative incumbents agreed to a lesser role for the equally conservative career judiciaries in the selection of constitutional court justices than initially intended.

Having said this, it is also necessary to remark that not all aspects of this process were equally conducive of the adoption of institutions favoring the imposition of strong judicial checks on majority rule. The need to pact every single institutional choice resulted — especially in Spain — in important aspects of constitutional courts' institutional regulation ultimately being left out of constitutions, giving future majorities a chance to use their legislative powers in order to shape the future development of judicial institutions. In addition, in both countries, consensus was to a great extent limited to the largest parties. That was increasingly the case in Spain where, as the arena of institutional decision-making changed from the constituent assembly to the parliament elected in 1979, mutual concessions became more difficult and political and electoral clout was more often converted into institutional advantage in the approval of LOTC and the election of the Court's justices. And in both Portugal and Spain, although the largest parties — present and future incumbents — obtained mutual assurances that present or future majorities would not enjoy complete control over the interpretation of
constitutional rules, they also obtained similar assurances against the future conversion of courts into full-fledged countermajoritarian actors. The way these contradictory pressures both for and against the expansion of judicial power played out in the "normal" politics of Iberian democracies will be our theme of inquiry in Part Two.
PART TWO

THE POLITICS OF JUDICIALIZATION

In Part One, we saw how the institutions of constitutional review of legislation came about in the new Iberian democracies. Now, we can start looking at how they interacted with the post-transitional politics of Spain and Portugal, and appreciate some of their consequences. Those consequences concern the extent to which political controversies and policy decisions ended up being transferred to the judicial arena of each country’s constitutional court and the extent to which those courts were ultimately both able and willing to take on the role of autonomous policy-makers.

A crucial precondition of judicial power and its expansion is litigation. In order to be able to scrutinize the constitutionality of statutes before or after they have been enacted — and therefore to have the opportunity to place vetoes upon bills or nullify legislation with general binding force — courts and their justices must wait until those statutes are referred to them. As Mény puts it, "[Constitutional] Courts can only react to the appeals that are made to them. (...) To pronounce their judgements, they are obliged to wait for a favorable opportunity to arise" (Mény 1993, 370). In other words, they are mostly "passive" institutions, whose scope of decision-making depends upon actual litigation against bills or statutes. In fact, even if the impact of constitutional courts in policy-making is primarily conceived as indirect and taking place regardless of actual referrals and judicial rulings —— with majorities sacrificing "their initially held policy
objectives in order to reduce the probability that a bill will be either referred to the Court, or be judged unconstitutional" (Sweet 2000, 75) —, determining the opportunities and incentives for litigation remains a most crucial endeavor. If such "indirect effects" ultimately result from an attempt to reduce the "probability of referral," then it is obviously the case that such probability plays a central role in the calculations of law-making majorities, and must therefore be explained. And even when we have determined the actual scope of the jurisdiction of constitutional courts that results from litigation, a second question arises: what do those courts do with the jurisdiction and powers that they enjoy? Do they tend to use to thwart the will of legislative majorities, preventing the adoption of policies and reforms desired by the later? Or is it the case that courts are more like rubber-stamps to the decisions of dominant political coalitions?

The prevalent explanation for the alleged "expansion of judicial power" in contemporary democracies is that both oppositions and courts are unconstrained actors, the former able and willing to place majority policy under the constant shadow of constitutional review, and the latter able and willing to do whatever they see fit, facing no credible threats on the part of majorities. The first part of this argument consists in what we could call a policy-seeking approach to litigation, where the expansion of constitutional courts' jurisdiction over policy-making is seen as resulting from the ability and willingness of political actors who are "losers" in the legislative process to provoke judicial rulings over the constitutionality of policies passed by parliamentary majorities. What those "losers" seek is simply the judicial veto or transformation of bills and statutes that deviate from their policy preferences, something that is much more likely to occur in political contexts where oppositions lack influence over policy-making. According to this
approach, the temptation to involve constitutional courts in the legislative process is irresistible for oppositions: litigation is generally costless and goes politically unpunished, either because judicial decisions have low public salience or because oppositions have an intrinsic interest in showing the electorate an uncompromised allegiance to their policy commitments. What is potentially punishable is not the manipulation of judicial institutions for political purposes, but rather the unwillingness to pursue policy goals by all legal means available.

The second argument behind the "expansion of judicial power" is what we could call the *unconstrained courts approach* to judicial decision-making. From this point of view, courts function as free agents in their relationship with political parties and legislative majorities, and justices care mostly about "expanding the relevance (and therefore the legitimacy) of constitutional law and review" (Sweet 2000, 200). Thus, once systematic countermajoritarian litigation provides constitutional courts with extensive jurisdiction over legislative politics, although justices may find it occasionally useful to portray themselves as neutral — justifying their rulings normatively and avoiding zero-sum decisions for the parties involved (Sweet 2000, 141-144 and 199-200) —, they remain basically free to pursue their goals, whatever they may be. Constitutional courts are unconstrained because the political actors that might be affected by their decisions lack the ability to act in a coherent and sustained way to reverse those decisions, curb the court's powers, or punish the justices individually or collectively (Sweet 2000, 89). In other words, the institutions of constitutional review of legislation constrain legislative majorities and the governments they support. They are the ones that see "reform routes that would otherwise be open to reform-minded governments" closed off (Stone 1992a,
242) and are led to tailor their proposals to the real or divined preferences of oppositions, constitutional courts, or their justices.

The next four chapters will be dedicated to examining the overall contention that a judicialization of politics is taking place in contemporary parliamentary democracies, a contention that is based upon the notion that oppositions are strict policy-seekers and courts generally unconstrained actors. In Chapters 4 and 5, I start by testing the implications of the policy-seeking approach to litigation in the Spanish and Portuguese contexts, determining whether abstract review referrals have been systematically used by oppositions for countermajoritarian purposes, particularly in periods of more intensely majoritarian politics in either country. In Chapter 6, I depart from that policy-seeking approach to litigation and discuss alternative assumptions about the behavior of constitutional litigants, particularly political parties, treating them as sophisticated actors facing potential conflicts between the search for policy outcomes and electoral benefits. Finally, in Chapter 7, I examine judicial decision-making in the Spanish and Portuguese constitutional courts following the use of litigation by political actors. Focusing on the extent to which justices in the Spanish and Portuguese constitutional courts are likely to the declare the unconstitutionality of scrutinized statutes, I examine whether justices and courts are indeed unconstrained actors interested in assuring the supremacy of constitutional law, However, in alternative, I test two alternatives views of judicial behavior: one that explains judicial decision-making on the basis of the personal attributes of justices; and another that sees justices as sophisticated actors under political and institutional constraints. In the conclusion to Part Two, I will then combine the previous findings about the dynamics of constitutional litigation and judicial decision-
making and assess the plausibility of the overall hypothesis that the consequence of the creation of constitutional courts with abstract review powers is an increasing "judicialization of politics."
CHAPTER 4

ABSTRACT REVIEW LITIGATION: INSTITUTIONAL OPPORTUNITIES AND POLICY INCENTIVES

Although the number and range of entitled litigants in abstract judicial review systems varies, one of the main features of almost all "Kelsenian" constitutional courts is that opposition parties (and some of the political actors affiliated to them) typically enjoy access to abstract review litigation. This suggests that such litigation may become a useful weapon for parliamentary oppositions in order to veto policies with which they disagree. In this chapter, I focus on this particular approach to abstract review litigation and some of its implications. This policy-seeking approach is based upon two basic assumptions. First, litigants refer legislation to constitutional courts in order to prevent the passing of policies distant from their preferences. Second, there are no costs whatsoever associated with such use of abstract review litigation, or, at least, the potential benefits of litigation always outweigh the potential costs. The major theoretical implication of these assumptions is that levels of litigation should be particularly high in those contexts where institutional and political variables allow unfettered majority rule, a strong concentration of power in executives, and where oppositions are left devoid of other means of influence in the policy-making process. To a great extent, these conditions have been found in both Spain and Portugal since either country's transition to
democracy. As we shall see, particularly since the 1980s, the lack of relevant institutional veto-players in policy-making, the weakness of legislatures, and the majoritarian turn experienced by both countries has often created the conditions favorable to intense countermajoritarian litigation and, thus, to the increasing judicialization of legislative politics.

The policy-seeking approach to constitutional litigation

According to the policy-seeking approach to litigation, the major incentive to refer legislation to courts lies in the ability to obtain more favorable policy outcomes than what might otherwise occur: "where abstract review exists, interparty competition to control policy outcomes generates referrals of the majority's statutes to the Court." (Sweet 2000, 89). Given that constitutional courts can veto bills and/or nullify legislation with their abstract review powers, political actors that enjoy access to courts and whose policy preferences are distant from those enshrined in approved bills or statutes are likely to use that access in order to reduce the chances that undesired policies become law. In other words, abstract review litigation is fundamentally countermajoritarian in its purpose. Political actors use abstract review litigation in order to introduce an additional veto point in the legislative process, guaranteeing that courts, instead of legislative majorities, will have the last word in the policy-making process.¹

From this point of view, it is for parliamentary minorities and oppositions excluded from government that constitutional litigation may become a particularly relevant political resource, usable "in order to win what they would otherwise lose in a 'normal', unjudicialized process" (Sweet 2000, 55). In what concerns a priori review of
legislation, "if [the opposition] prefers the status quo to the situation that would be produced if the legislation were to be promulgated, then [the opposition] has an incentive to make (and threaten) the referral" (Sweet 1998, 331). The same logic applies to a posteriori review, if the opposition prefers the previous legislative status quo to the new situation produced with the passing and promulgation of new legislation.

The case of France provides the most commonly used illustration of the way political actors use abstract review litigation as a countermajoritarian weapon. Maurice Duverger was one of the first political scientists to remark how the referral of bills for a priori review by the French Conseil constitutionnel had become "an essential weapon of the opposition since 1974," the year when a constitutional amendment awarded sixty deputies or senators (i.e., the major opposition party) the right to refer legislation to the Council (Duverger 1982, 210). In the 1980s, the rhythm of referrals rapidly accelerated. In 1985, Keeler detected an exceptional rise in litigation levels referred to the Council in the first half of the decade: in that period, and on average, 13.7 bills had been referred per year, against 6.7 between 1974 and 1981, and 0.6 before (Keeler 1985). According to the most observers, this trend has been sustained and accentuated ever since. Referrals to the Constitutional Council have become increasingly viewed as "effective means to obstruct or enforce changes in legislation proposed by the government and its parliamentary majority" (Stone 1992a, 236). "Since 1981, about one-third of all legislation adopted has been referred, an extraordinary ratio given the fact that most legislation passed is politically uncontroversial" (Sweet 2000, 63). In other words, "nearly every law that evokes significant controversy in Parliament goes to the Constitutional Council for pre-promulgation review" (Provine 1996, 192). Although evidence concerning other
countries is sketchy, in Germany, *a posteriori* review litigation has also arguably become a way to extend the legislative dispute over policy outcomes beyond the legislative arena, "a common weapon in Germany's political arsenal" (Komers 1994, 474), and it has been suggested that at least two recently created Eastern European constitutional courts have been the recipients of similar levels of litigation.²

According to the policy-seeking approach to constitutional litigation, the incentives for the use of referrals in order to block majority policies are reinforced by the fact that this pursuit of policy goals is congruent with other objectives opposition parties might have. Although there might be "administrative costs" attached to referring legislation to constitutional courts (writing the brief, gathering the signatories, filing the brief), the electoral costs of referring bills to the Court "are virtually zero" (Sweet 1998, 333; Sweet 2000, 58). In fact, parties are more likely to incur in electoral penalties when they *fail* to use the means at their disposal to obtain policy outcomes congruent with their preferences (Sweet 1998, 331-332). In other words, for political oppositions and parliamentary minorities, litigation aimed at decreasing the control of majorities over policy entails no electoral punishments, something which has an obvious implication: oppositions, particularly when devoid of other means of influence over policy-making, tend to be "voracious" in their use of abstract review referrals (Sweet 1998, 333).

**Access to courts**

Obviously, this approach is applicable when oppositions indeed have the institutional opportunities to refer legislation to constitutional courts. Both Spain and Portugal easily fulfill that necessary condition. In fact, we can see in Table 4.1 that, as in
almost all other countries with constitutional courts with abstract review powers (the exceptions being Belgium, Estonia, and Italy), the Spanish and Portuguese systems provide sizeable opposition parties and relevant oppositional political actors with ample opportunities to resort to abstract review litigation. In Portugal, 1/10 of MP's are enough to file a request for *a posteriori* review of legislation. Besides, the popularly elected President enjoys the right to refer legislation both for *a priori* and *a posteriori* review. In Spain, the criteria are only somewhat more demanding: abstract review referrals must be filled by at least 50 MP's or senators, representing only, and respectively, 14 and 19 percent of all seats in the *Congreso* and the *Senado*. 
### Table 4.1: Access to abstract review litigation against statutes in European democracies (Continued)

<table>
<thead>
<tr>
<th>Country</th>
<th><strong>A PRIORI REVIEW AGAINST CENTRAL/FEDERAL LEGISLATION</strong></th>
<th><strong>A POSTERIORI REVIEW AGAINST CENTRAL/FEDERAL LEGISLATION</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>—</td>
<td>State Governments 1/3 of Lower House members 1/3 of Upper House members</td>
</tr>
<tr>
<td>Belgium</td>
<td>—</td>
<td>Government Governments of Regions and Communities 2/3 of Regional Assemblies’ members</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>—</td>
<td>President of the Republic 20% of MP’s Government Supreme Court of Cassation Supreme Administrative Court Chief Prosecutor</td>
</tr>
<tr>
<td>Croatia</td>
<td>—</td>
<td>President 1/5 of MP’s Parliamentary committees Ombudsman Supreme Court</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>—</td>
<td>President Approx. 20% of MP’s (41) Approx 21% of Senators (17) Government Panel of Constitutional Court</td>
</tr>
<tr>
<td>Estonia</td>
<td>President</td>
<td>Legal Chancellor</td>
</tr>
<tr>
<td>France</td>
<td>President Prime Minister President of Lower House President of Upper House Approx. 10% of MP’s (80) Approx. 19% of Senators (60) <em>Ex ante</em> review compulsory for organic laws</td>
<td></td>
</tr>
<tr>
<td>Germany</td>
<td>—</td>
<td>Federal Government State Government 1/3 of Lower House members</td>
</tr>
<tr>
<td>Hungary</td>
<td>President</td>
<td>All persons</td>
</tr>
<tr>
<td>Italy</td>
<td>—</td>
<td>Regional Governments</td>
</tr>
<tr>
<td>Latvia</td>
<td>—</td>
<td>President 1/3 of MP’s Government Plenum of Court</td>
</tr>
<tr>
<td>Lithuania</td>
<td>—</td>
<td>President Government 20% of MP’s</td>
</tr>
</tbody>
</table>

Countries included are all members of the Council of Europe clarified as free electoral democracies by Freedom House by 2001 and with constitutional courts.
<table>
<thead>
<tr>
<th></th>
<th><strong>A PRIORI REVIEW AGAINST CENTRAL/FEDERAL LEGISLATION</strong></th>
<th><strong>A POSTERIORI REVIEW AGAINST CENTRAL/FEDERAL LEGISLATION</strong></th>
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<tr>
<td><strong>Poland</strong></td>
<td>President</td>
<td>President of Lower House</td>
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<td></td>
<td></td>
<td>President of Upper House</td>
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<tr>
<td></td>
<td></td>
<td>Prime Minister</td>
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<td></td>
<td></td>
<td>Approx. 11% of MP's (50)</td>
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<td></td>
<td></td>
<td>30% of Senators (30)</td>
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<td></td>
<td></td>
<td>President of Supreme Court</td>
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<tr>
<td></td>
<td></td>
<td>President of Chief Administrative Court</td>
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<td></td>
<td></td>
<td>Ombudsman</td>
</tr>
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<td></td>
<td></td>
<td>Units of local self-government</td>
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<td></td>
<td>National Council of the Judiciary</td>
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<td></td>
<td></td>
<td>Trade Unions</td>
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<td></td>
<td></td>
<td>Employers Associations</td>
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<tr>
<td></td>
<td></td>
<td>Churches</td>
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<tr>
<td><strong>Portugal</strong></td>
<td><strong>President</strong></td>
<td><strong>President of Parliament</strong></td>
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<tr>
<td></td>
<td>Prime Minister (organic laws) - since 1989</td>
<td>Prime Minister (organic laws) - since 1989</td>
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<tr>
<td></td>
<td>20% of MP's (organic laws) - since 1989</td>
<td>10% of MP's</td>
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<td></td>
<td></td>
<td>Ombudsman</td>
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<td></td>
<td></td>
<td>Attorney-General</td>
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<td></td>
<td></td>
<td>Ministers of the Republic</td>
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<td>Regional Legislative Assemblies (RLAs)</td>
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<td></td>
<td></td>
<td>Presidents of RLAs</td>
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<tr>
<td></td>
<td></td>
<td>10% of MP's of RLAs</td>
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<tr>
<td><strong>Romania</strong></td>
<td><strong>President</strong></td>
<td><strong>President</strong></td>
</tr>
<tr>
<td></td>
<td>President of Lower House</td>
<td>President of Parliament</td>
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<tr>
<td></td>
<td>President of Upper House</td>
<td>Prime Minister</td>
</tr>
<tr>
<td></td>
<td>Government</td>
<td>10% of MP's</td>
</tr>
<tr>
<td></td>
<td>Supreme Court</td>
<td>Ombudsman</td>
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<tr>
<td></td>
<td>Approx. 15% of MP's (50)</td>
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<tr>
<td></td>
<td>Approx. 17% of Senators</td>
<td></td>
</tr>
<tr>
<td><strong>Slovakia</strong></td>
<td><strong>President</strong></td>
<td><strong>Government</strong></td>
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<tr>
<td></td>
<td></td>
<td>20% of MP's</td>
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<td></td>
<td></td>
<td>Attorney-General</td>
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<td><strong>Slovenia</strong></td>
<td><strong>President</strong></td>
<td><strong>Lower House</strong></td>
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<td>1/3 of MP's</td>
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<td>Government</td>
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<td></td>
<td></td>
<td>State Prosecutor</td>
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<td>Bank of Slovenia</td>
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<td></td>
<td></td>
<td>Auditor General</td>
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<td></td>
<td></td>
<td>Ombudsman</td>
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<tr>
<td></td>
<td></td>
<td>Representative Bodies of Local Communities</td>
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<tr>
<td></td>
<td></td>
<td>Trade Unions</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Any legal person</td>
</tr>
<tr>
<td><strong>Spain</strong></td>
<td><strong>ELIMINATED IN 1985:</strong></td>
<td><strong>Prime Minister</strong></td>
</tr>
<tr>
<td></td>
<td>Prime Minister</td>
<td>Approx. 14% of MP's (50)</td>
</tr>
<tr>
<td></td>
<td>Approx. 14% of MP's (50)</td>
<td>Approx. 19% of Senators (50)</td>
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<tr>
<td></td>
<td>Approx. 19% of Senators (50)</td>
<td>Ombudsman</td>
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<td></td>
<td>Ombudsman</td>
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<td></td>
<td>Governments of Autonomous Communities</td>
<td>Governments of Autonomous Communities</td>
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<tr>
<td></td>
<td>Assemblies of Autonomous Communities</td>
<td>Assemblies of Autonomous Communities</td>
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</table>

Sources: constitutional texts at the International Constitutional Law website (http://www.uni-wuerzburg.de/lawhome.html).
The most important peculiarities about the Iberian systems concern the changes in the jurisdiction of courts since their inception in the early 1980s, the standing of regional governments before the courts, and the effects of party system change on access to litigation. First, neither the jurisdiction nor the rules regulating access to both constitutional courts have remained entirely stable. In Portugal, changes in this respect have been relatively modest. However, the same cannot be said for Spain. In 1984, as we shall see in more detail in the following chapters, the PSOE government proposed and approved by absolute majority an amendment to LOTC that eliminated the so-called recurso previo — the a priori review of organic laws —, an amendment that came into force in 1985 after being itself scrutinized in a priori review by the Constitutional Court.

Second, both Spain and Portugal illustrate the importance of taking into account the role of peripheral government officials and authorities as litigants in abstract review. In Spain, the executives and (by absolute majority) the parliaments of the regional autonomous communities are entitled to refer national legislation "that affects their own scope of autonomy" to the Constitutional Court for abstract a posteriori review. In Portugal, a similar right is awarded to the assemblies (by majority vote or by 1/10 of MP's) and executives of the autonomous insular regions of Azores and Madeira, "when the referral is grounded on the violation of rights of the autonomous regions".

A final relevant consideration when discussing institutional opportunities for litigation in Spain and Portugal concerns the distinction between elected and non-elected litigants. That distinction is potentially important for two main reasons. On the one hand, elected officials are more likely to have their constitutional litigation strategies determined by the kind of incentives which the policy-seeking approach to judicialization...
takes into account. On the other hand, the distinction is also relevant to the very
discussion about the institutional opportunities available for litigation, because the access
of certain political actors — particularly political parties — to courts is directly
contingent upon electoral results and the shape of the party systems (at the national and
regional levels) that results from them.

Tables 4.2 and 4.3 illustrate this point in the cases of Spain and Portugal. Taking
into account the rules of standing that prevail in Spain, Table 4.2 lists not only the Prime
Minister's party but also those parties that have enjoyed, since 1980, a large enough share
of seats in the Congreso de Deputados or the Senate to be able to autonomously present a
recurso de inconstitucionalidad. It does the same for the parties that, at any given point in
time, controlled an homogenous executive in the autonomous communities' executives or
mustered an absolute majority of seats in any of the seventeen Spanish regional
parliaments, the same absolute majority required to approve the referral of national
legislation to the Constitutional Court for abstract review. Table 4.3 provides similar
information for Portugal, including the popularly elected President of the Republic (with
litigation rights in a priori and a posteriori review) and his party.
### Table 4.2: Spain: access to court for abstract review litigation

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<tr>
<td><strong>UCD</strong></td>
<td>UCD</td>
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<td>PSOE</td>
<td>PP</td>
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<td><strong>PSOE</strong></td>
<td>AP</td>
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</tr>
<tr>
<td>Parties in control of homogeneous regional executives or with absolute majority in regional parliaments</td>
<td>AP</td>
<td>CIU</td>
<td>CIU</td>
<td>CIU</td>
<td>CIU</td>
<td>CIU</td>
<td>CIU</td>
</tr>
<tr>
<td>Other litigants</td>
<td>Ombudsman</td>
<td>Ombudsman</td>
<td>Ombudsman</td>
<td>Ombudsman</td>
<td>Ombudsman</td>
<td>Ombudsman</td>
<td>Ombudsman</td>
</tr>
</tbody>
</table>

*As dominant coalition partner

CIU: Convergència i Unió
PNV: Partido Nacionalista Vasco
PAR: Partido Aragonés Regionalista
UPCA: Unión para el Progreso de Cantabria

Sources: for the composition of the regional parliaments and executives in Spain, the chapters in Alcántara and Martínez 1998 and Aja 1999; for Portugal, Comissão Nacional de Eleições (www.cne.pt).

### Table 4.3: Portugal: access to court for abstract review litigation

<table>
<thead>
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</thead>
<tbody>
<tr>
<td><strong>PS</strong> (of a PS/PSD coalition)</td>
<td>PS</td>
<td>PS</td>
<td>PS</td>
<td>PS</td>
<td>PS</td>
<td>PS</td>
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<tr>
<td><strong>PSD</strong></td>
<td>PSD</td>
<td>PSD</td>
<td>PSD</td>
<td>PSD</td>
<td>PSD</td>
<td>PSD</td>
</tr>
<tr>
<td>President (a priori and a posteriori review)</td>
<td>Ramalho Eanes (military)</td>
<td>Mario Soares (PS)</td>
<td>Mario Soares (PS)</td>
<td>Jorge Sampaio (PS)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Parties with at least 1/10 of MPs (a posteriori review)</td>
<td>PS</td>
<td>PSD</td>
<td>PS</td>
<td>PS</td>
<td>PS</td>
<td>PS</td>
</tr>
<tr>
<td>Parties with at least 1/5 of MPs (a priori review of organic laws)</td>
<td>A priori review of organic laws non-existent</td>
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</tr>
<tr>
<td>Parties in control or regional executives or with 1/10 of MPs in regional assemblies of Azores and Madeira (a posteriori review)</td>
<td>PS</td>
<td>PSD</td>
<td>PS</td>
<td>PSD</td>
<td>PS</td>
<td>PSD</td>
</tr>
<tr>
<td>Other litigants</td>
<td>Ombudsman</td>
<td>Attorney-General</td>
<td>Ombudsman</td>
<td>Attorney-General</td>
<td>Ombudsman</td>
<td>Attorney-General</td>
</tr>
</tbody>
</table>

Sources: for the composition of the regional parliaments and executives in Spain, the chapters in Alcántara and Martínez 1998 and Aja 1999; for Portugal, Comissão Nacional de Eleições (www.cne.pt).
Looking at both tables, we can immediately detect several important common patterns, as well as relevant differences. From the creation of the Spanish and Portuguese constitutional courts to today, the two largest national parties in each country have consistently enjoyed a large enough share of seats in the national parliament to autonomously refer legislation for abstract review. In Spain, that was the case with UCD and PSOE until the 1982 legislative elections, and with AP/PP and PSOE ever since. In Portugal, the same is true of the PS and the PSD since 1983. Conversely, smaller parties without regionally concentrated support have been sidelined in their access to both courts. In Spain, as we saw in chapter two, that was the case from the very beginning, as the rules designed in the constituent process purposefully excluded all but the largest opposition party from direct access. In Portugal, the same outcome has been a function of the sharp drop in party system fragmentation that, starting in 1987, left the PRD and the CDS first, and the Communists later, with a parliamentary representation below 10 percent of seats, and thus without autonomous access to the constitutional court for \textit{a posteriori} review litigation.

On the other hand, awarding court access to sub-national executives and parliaments has only partially contributed to the expansion of the opportunities available for abstract review litigation beyond the two largest parties. In Portugal, the Socialists and the Social Democrats have shared control of the regional executives of Azores and Madeira throughout the history of Portuguese democracy, and not even the relatively generous 10 percent rule applicable also to the members of regional assemblies was enough to allow any other party autonomous access to the Court. However, in Spain, the
existence of partially autonomous political and electoral arenas at the sub-national level has indeed allowed some partisan diversity in terms of access to the Court.

Such diversity is perhaps not as great as one might expect given that all seventeen executives and parliaments of the Spanish autonomous communities enjoy abstract review litigation rights. In fact, in most comunidades, the largest parties at the sub-national level have also been those that have remained dominant at the national level. In ten of the seventeen cases, PSOE or AP/PP have been either electorally hegemonic since the early 1980s (in Andalucía, Castilla-La Mancha, Castilla y León, Extremadura, and Galicia) or alternated in power in a pattern that closely resembled that at the national level (Asturias, Comunidad Valenciana, La Rioja, Madrid, and Murcia). In five other cases, important regionalist parties have emerged, but have also consistently failed until now to muster enough electoral support to avoid being forced to share power in executive coalitions with one of the largest national parties, AP/PP or PSOE (in Aragón, Canarias, Cantabria, Baleares, and Navarra). However, in Catalonia and the Basque Country, truly distinct sub-national party systems emerged, turning, respectively, Convergència and Unió and the Partido Nacionalista Vasco into the pivotal parties in each region, able to form cabinets from which both PP and PSOE (with the exception of the 1986-91 period in Euskadi) could be excluded as coalition partners.

Therefore, in Portugal, standing before the constitutional court has been increasingly restricted to two main political actors, PS and PSD, in other words, always including the largest opposition party. Although other parliamentary opposition groups initially enjoyed direct access to the Court for abstract review litigation, a shift towards increasing bipolar competition and the decline of the Communist party has limited
partisan standing before the Court to the Socialists and the Social Democrats since 1991. In addition, since 1986, also the popularly elected President, who enjoys important litigation rights in *a priori* and *a posteriori* abstract review of legislation, has been affiliated to one of the largest political parties. Finally, for all political actors lacking litigation rights against national legislation at the central level, the use of sub-national litigation as a proxy has remained unavailable, as the parties that enjoy autonomous access to the Court through their weight in the national parliament have been the same that enjoy that access as majorities in sub-national parliaments and executives. Spain displays an only partially similar pattern. On the one hand, in what concerns parties with access to litigation through their representation in the Spanish Congress or the Senate, access to Court has been restricted to the two largest parties since the very beginning. However, there are two consistent exceptions to this pattern. Both CiU and PNV (and, during brief periods, regionalist parties in Aragón and Cantabria) have, through their dominance in the Catalan and Basque party systems, enjoyed relatively open access to the Spanish Constitutional Court.

**Veto-points and legislative institutions**

Even if we assume that parliamentary minorities and oppositional political actors are single-minded policy seekers, the fact that they have access to courts does not mean they will always have the necessary incentives to refer systematically every major piece of legislation for abstract judicial review. In fact, a crucial implication of the notion that litigation is the result of a competition between majorities and oppositions over policy outcomes is that, in spite of the broad similarities between European parliamentary-type
regimes, the observed levels of litigation against bills and statutes are likely to vary across different political systems, and also within a single country under varying political contexts. If parties are driven to litigate by the approval of bills and statutes that operate radical policy changes — or at least that are further from their preferences than the legislative status quo —, then levels of litigation should be higher when and wherever the interests of opposition parties (particularly those with access to the court) are not taken into account. Conversely, the presence of several institutional or partisan "veto-players" in policy-making (symmetric and incongruent bicameralism, presidents with effective veto powers, and coalition or minority governments) is likely to withdraw the incentives to litigate, contrary to what is likely to occur, for example, in the presence of single-party majority executives in unicameral or weak bicameral parliamentary systems (Sweet 2000, 54-55).

Similarly, even powerful single-party majority executives may be prevented from turning their preferences into policy if policy-making rules and practices within legislatures are such that the government is required to negotiate and compromise with parliamentary oppositions, i.e., when legislative "resistance" or "viscosity" is high (Blondel 1990, orig. ed. 1970; Cooter and Ginsburg 1996). Low levels of party discipline, the requirement of special majorities for the approval of several important types of legislation, the lack of governmental control over the plenary agenda, the existence of legislative specialization through and within committees, non-majoritarian rules of appointment of committee members and chairs, and committee powers of legislative initiation and amendment are all features likely to reduce the levels of abstract review
litigation, to the extent that they reduce the concentration of power within the legislature and maximize opposition influence in policy-making.¹

This general hypothesis relating legislative policy-making institutions and abstract review litigation finds some empirical support in the existing literature. In Germany, for example, from 1951 to 1996, only 128 laws have been referred for abstract review. This is an average of 2.8 laws per year, against the more than ten in France. Another way of looking at these data is to determine the percentage of laws passed by the German parliament that have been referred to the court: only about 3 percent of all legislation passed by the Bundestag has found its way to the Bundesverfassungsgericht in abstract review, against one-third (by the most conservative estimate) in the case of the Conseil Constitutionnel.² Why? According to the policy-seeking approach to litigation, the only possible answer is that this has less to do with the different modes of judicial review exercised in both countries (a posteriori versus a priori) than with the fact that, unlike what occurs in France, "the German policy making process is heavily veto laden, with multiple structural impediments serving to filter audacious or nonincremental legislation" (Stone 1994, 446). Similarly, in Austria, "abstract review is exceedingly rare (…), and, indeed, insignificant," something that seems to result partially from "the consensual nature of Austrian politics" (Stone 1992b, 46). More generally, the institutions of consensual democracy have been empirically related to an overall less important role for courts and judicial review in political life (Alivizatos 1995, 581).

On the basis of this hypothesis, what should we expect to find in the Portuguese and Spanish cases? In order to answer to this question, we need to examine the policy-making institutions and the evolution of the party system in both countries. In fact, the main
common element about the post-transitional politics of Spain and Portugal is that, in the 1980s, both countries have experienced a decisive majoritarian turn in the way political power is distributed among parties and institutions, suggesting that the intensity of constitutional scrutiny to which legislation is submitted in both countries should be much closer to French than to German or Austrian levels.

In the last two decades, and without having experienced any important changes in electoral rules, Portugal displayed, in two different periods, pre- and post-1987, two basically different types of party system and predominant formats of governmental support. Ever since the first free elections in 1975, Portugal has preserved a closed list PR electoral system, and although district size has declined in some areas and the overall number of MP's was reduced from 250 to 230 in 1991, the average threshold of representation has changed very little, from 6 percent in 1983 to 6.5 percent in 2002. As we can see in Table 4.4, this has resulted in relatively stable and low levels of disproportionality throughout the entire period under examination, from the early 1980s to the late 1990s, ranging from 3.2 to 6.3 (high for PR systems, but still low in a comparative perspective).
Table 4.4: Portugal: votes, seats, disproportionality and effective number of parties, 1983-95

However, the lack of important changes in electoral rules or in their effects did not prevented Portugal from having experienced an acute reduction in party system fragmentation in 1987. That reduction, visible on the abrupt shift from 4.2 to 2.4 in the effective number of parties from the 1985 to the 1987 elections, was not the result of pre-electoral coalitions, but simply of an increasing concentration of the vote in the two largest parties, PSD and PS. Besides, in 1987, following a successful motion of censure against a minority cabinet that was riding high in the public opinion polls, the Social Democrats obtained Portugal's first single-party majority, as the electorate of the Partido Renovador Democrático (PRD) — created by President Eanes in order to dispute the center-left vote with the Socialists in 1985 — shifted massively to the PSD (Bacalhau 1989, 247-250; Magone 1998, 228-230). Four years later, the Social Democrats repeated that victory, with vote transfers taking place mainly within the left, from the Communists and the remnants of the PRD both to the PS and to abstention. This emergence of single-party government, often supported by absolute majorities, has been described as "by far,
the most dramatic shift" experienced by any Southern European democracy (Bruneau et al. 2001, 31), and compounds Portugal's other singularity, this time among all consolidated industrialized democracies: "the only example of a clear trend towards fewer parties" (Lijphart 1999, 77).

Spain's majoritarian turn took place at an earlier point in time and was perhaps less surprising, considering the higher levels of disproportionality engendered by electoral rules that tend to punish small parties with regionally dispersed support and clearly favor the party with most votes. However, 1982 — the year PSOE obtained its first absolute majority — represented a remarkable "electoral earthquake" in terms of the remaking of the party system. Characterized by massive electoral volatility, those elections brought not only the absorption of about half of the previous Communist electorate by PSOE, but also the annihilation of UCD and the conversion of Alianza Popular into the main opposition party. For the first time since the transition, the Congress and the Senate were under the control of a single-party, absolute majority. Although the 1990s saw a return to minority cabinets, most of the key indicators in this respect have continued to place Spain at the majoritarian end of the consensual-majoritarian continuum: an impressive record of cabinet durability, single-party cabinets, and continuously low levels of party system fragmentation, where the weight of nationalist and regionalist parties has served only to mitigate what at the national level is, fundamentally, a two-party system (Colomer 1996; Bruneau et al. 2001).
Table 4.5: Spain: votes, seats, disproportionality and effective number of parties, 1983-96

This move towards majoritarianism, shared by the post-transitional Spanish and Portuguese democracies, has found little resistance in either countries’ political institutions, which place almost no obstacles in the way of the concentration of power in executive majorities. Portugal is a unicameral system, thereby lacking a second chamber that might work as an institutional veto player in policy-making. This leaves, nonetheless, a potentially relevant institutional actor to consider: the President of the Republic. Formally, Portuguese presidents enjoy some "legislative" powers, as they are allowed to veto bills emanating from parliament as well as governmental decrees (Shugart and Carey 1992, 148-156). However, unless the government lacks the support of an absolute majority, those veto powers do not make any major difference in the extent to which the executive is able to convert its preferences into policy. First, because the presidential veto of legislative bills can be overridden by an absolute majority in parliament, in which case the President is constitutionally forced to promulgate the previously vetoed bill in its
entirety. Second, because although the President's veto over government decrees is final and cannot be overridden, a cabinet supported by a cohesive majority can simply (re)introduce the previously vetoed decrees as bills in parliament, and have them relatively easily approved. In fact, the only type of legislation in which a President facing an absolute majority is a veto-player is that which regulates elections and referenda, national defense, state or emergency, and the Constitutional Court, in which a presidential veto can only be overridden by a 2/3 majority. In all remaining issues, the President cannot be counted as an effective veto player.6

What is left is the case in which the President faces a cabinet supported by a parliamentary minority. However, as we can see in Table 4.6, from 1983 to 1999, this only occurred in two periods, and the longer of them (1995-1999) was one in which the cabinet and the president belonged to the same party, the Socialists. The only period of "cohabitation" between a president affiliated to one party and a minority government of another took place during the 16 months from January 1986 to August 1987. Therefore, in terms of being both able and willing to raise obstacles to majority will — other than through the use of his powers of constitutional litigation —, the Portuguese President cannot be described as having sufficiently mitigated the strong majoritarian turn Portuguese politics took in the mid-1980s.
<table>
<thead>
<tr>
<th>Periods</th>
<th>President</th>
<th>Ruling parties (%) share of seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>June 1983-November 1985</td>
<td>Ramalho Eanes - 2nd term (military)</td>
<td>PS/PSD coalition (70)</td>
</tr>
<tr>
<td>November 1985-January 1986</td>
<td>Ramalho Eanes - 2nd term (military)</td>
<td>PSD minority (35)</td>
</tr>
<tr>
<td>January 1986-August 1987</td>
<td>Mário Soares - 1st term (PS)</td>
<td>PSD minority (35)</td>
</tr>
<tr>
<td>August 1987-January 1991</td>
<td>Mário Soares - 1st term (PS)</td>
<td>PSD majority (59)</td>
</tr>
<tr>
<td>January 1991-October 1995</td>
<td>Mário Soares - 2nd term (PS)</td>
<td>PSD majority (59)</td>
</tr>
<tr>
<td>October 1995-January 1996</td>
<td>Mário Soares - 2nd term (PS)</td>
<td>PS minority (49)</td>
</tr>
<tr>
<td>January 1996-October 1999</td>
<td>Jorge Sampaio - 1st term (PS)</td>
<td>PS minority (49)</td>
</tr>
</tbody>
</table>

Table 4.6: Portugal: presidential parties and ruling parties/coalitions

Unlike Portugal, Spain is a bicameral system, but the Senado also hardly constitutes an important veto point in policy-making. Spanish bicameralism clearly deviates, for example, from the German model of "strong bicameralism" (Lijphart 1999, 212). First, because it is clearly asymmetric, with a second chamber that can be placed at the lowest level of a continuum ranging from "co-equal with the Lower House" to "subordinate to the Lower House" (Patterson and Mughan 2001, 42). Although it is entitled to propose constitutional reforms and even to amend or veto bills coming from the Congreso by an absolute majority, decisions by the Spanish Senate can always be overridden by a plurality in the lower house. Second, the composition of both chambers of the Spanish parliament is only formally incongruent, as methods of selecting legislators...
are indeed different: four-fifths of the Senate is elected directly by voters (four senators by each province plus twenty by the islands), while the legislative assemblies of the autonomous communities designate the remaining 48 senators. However, the practical effects of the Senate's electoral system — basically proportional and held at the same time as lower house elections using the same electoral districts — have been that "parties get very similar percentages of votes at congressional and senatorial elections; the ones winning the largest percentage of the popular vote get a significantly larger share of the seats in the Congress of Deputies and then an even greater percentage in the Senate" (Flores Juberías 1999, 270). This we can clearly see in Table 4.7. Moreover, the composition of the Spanish Senado has lacked any substantial representation of the autonomous communities and, especially, the nationalist parties. While the former designate only one-fifth of the senators, the major Basque and Catalan nationalist parties together never obtained, from 1979 to 1996, more than 14 of the 208 directly elected seats. Altogether, the strongest combined representation ever enjoyed by the Catalan CiU and the Basque PNV was 22 of the total 256 senators, in the 1982 elections (Flores Juberías 1999, 276-277). These features of the Senado have spurred numerous — and yet inconclusive — debates about future paths for reform, but the starting point of those debates is always the same and remains broadly consensual: the Spanish upper chamber is a largely powerless institution, with little ability to exert autonomous influence over policy-making to impose any substantial delays upon the enactment of bills passed by majorities in the lower house, or even to serve as a forum through which the Spanish regions might be able to exert influence over policy.\(^7\)
<table>
<thead>
<tr>
<th>Legislature (Years)</th>
<th>Ruling party</th>
<th>Share of seats in the Congress of Deputies (%)</th>
<th>Share of seats in the Senate (%)</th>
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</thead>
<tbody>
<tr>
<td>1st (1979-82)</td>
<td>UCD</td>
<td>48</td>
<td>57</td>
</tr>
<tr>
<td>2nd (1982-86)</td>
<td>PSOE</td>
<td>58</td>
<td>65</td>
</tr>
<tr>
<td>3rd (1986-89)</td>
<td>PSOE</td>
<td>53</td>
<td>60</td>
</tr>
<tr>
<td>4th (1989-93)</td>
<td>PSOE</td>
<td>50</td>
<td>51</td>
</tr>
<tr>
<td>5th (1993-96)</td>
<td>PSOE</td>
<td>45</td>
<td>46</td>
</tr>
<tr>
<td>6th (1996-2000)</td>
<td>PP</td>
<td>45</td>
<td>53</td>
</tr>
</tbody>
</table>


Table 4.7: Spain: elections results for Congress and Senate by percentage of seats

The policy-making rules prevailing in the lower chambers of parliament in Portugal and Spain have also provided only modest resistance to the concentration of power in executives and the parties that support them, particularly when that support is majoritarian. Although the rules determining the plenary agenda in either country do not favor the parties supporting the executive per se — unlike what occurs in countries such as Ireland, Greece, France or the United Kingdom —, they also fail to give minorities agenda-setting powers in cases of cohesive majority governments. This is because majority rule ultimately prevails in the bodies in charge of setting that agenda, the Junta de Portavoces in Spain and the Conferência de Líderes in Portugal. In Spain, the control of the Spanish executive over the parliamentary agenda is reinforced by the "prior consideration" (toma en consideración) procedure: after a previous consultation of the cabinet, there is a plenary vote through which the chamber decides the "opportunity" of Private Members' bills (Guerrero Salom 2000, 162). Furthermore, in both countries, the articulation between the use of available urgency and/or priority procedures for government's legislative initiatives, the executive's monopoly over the presentation of bills that increase expenditure or taxation, and the availability (and abundant use) of
decree powers have reinforced the government's dominance over the entire legislative process.\(^8\)

It is also true that both the Spanish and the Portuguese parliaments have specialized committee systems with important formal legislative powers and proportionally allocated chairs, a pattern that sets both countries apart from the extreme majoritarian institutions and practices found in typical Westminster democracies (Mattson and Strøm 1995; Powell 2000, 31-34; Bruneau et al. 2001, 31-34). However, it is doubtful that has made any significant difference in policy outcomes, particularly in periods of majority government. As Maurer notes, in an appraisal of the factors explaining the degree of parliamentary influence, "the committee system has little effect on [the parliament's] policy-making influence", since, at most, committees have become "weak arenas" where bargains made elsewhere are formally introduced (Maurer 1999, 35). Similarly, in Portugal, although the strengthening of the role of committees has been the object of several parliamentary reforms in the 1990s, legislative behavior in committees remains highly partisan and totally pliant to the overall correlation of forces in parliament (Freire et al. 2002, 42-48). In other words, the strong party discipline that has prevailed in both countries at least since 1982 — stimulated by PR closed list electoral systems and the increasing personalization of electoral competition around party leaders —, makes Spanish and Portuguese committees little more than "miniature parliaments" with little autonomous impact on the extent to which the larger parliaments are actually able to influence policy (Damgaard 1995, 315-321; Colomer 1996, 189-190; Sánchez de Dios, 1999).
The effects of these combinations of legislative policy-making rules are visible when we examine the extent to which government and individual MP's have contributed to the production of law in both countries. In Spain, as we can see in Table 4.8, the percentage of passed laws that originated in executive proposals in each legislature between 1979 and 2000 ranged between 74 and 88 percent. The executive dominated the parliamentary agenda throughout the entire period, with its bills always displaying much higher success rates and providing a far more important contribution to law production than Private Members' bills.\textsuperscript{9} The procedure of "prior consideration" has played a crucial role in the executive dominance over the parliamentary agenda: it has been used by the majority in order to vote down large numbers of Private Members' bills before they even reach the committee phase (Bustos 2000, 53-54). However, the impact of cabinet support in the control exerted by the executive over legislative policy-making in Spain is still visible in the contribution of executive bills to the overall number of laws passed, which reached its highest levels during two of the three PSOE majority cabinets, between 1982 and 1989.
### Table 4.8: Spain: success rates of Private Members' bills and executive bills and origin of passed bills

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<tbody>
<tr>
<td>Private Members' bills introduced</td>
<td>200</td>
<td>188</td>
<td>139</td>
<td>154</td>
<td>140</td>
<td>300</td>
</tr>
<tr>
<td>% of Private Members' bills passed</td>
<td>17</td>
<td>8.5</td>
<td>6.4</td>
<td>10.3</td>
<td>12.0</td>
<td>9.3</td>
</tr>
<tr>
<td>Executive bills introduced</td>
<td>287</td>
<td>200</td>
<td>125</td>
<td>128</td>
<td>130</td>
<td>192</td>
</tr>
<tr>
<td>% of executive bills passed</td>
<td>72.0</td>
<td>91.5</td>
<td>86.0</td>
<td>78.9</td>
<td>86.0</td>
<td>89.6</td>
</tr>
<tr>
<td>% of passed bills originating in executive</td>
<td>76.2</td>
<td>85.3</td>
<td>88.4</td>
<td>73.7</td>
<td>80.0</td>
<td>78.0</td>
</tr>
</tbody>
</table>


*During this period PSOE enjoyed a de facto absolute majority, given the absence from parliament of the MP's of Herri Batasuna (HB), ETA's political arm. After the Speaker of the Cortes decided to expel them for having refused to swear their allegiance to Constitution in the exact formulation imposed by the parliament's standing orders, the Constitutional Court ultimately forced their reintegration in the Cortes in April 1990. However, they still refused to take their seats.

The situation in Portugal is somewhat different. First, Private Members' bills have consistently enjoyed a higher success rate than in Spain, particularly in the two periods of minority government considered (1985-87; 1995-99) when, respectively, 25 percent and 38 percent of those bills were approved in parliament, a high percentage by any comparative standards (Leston-Bandeira 1998, 150). As a consequence, a lower share of laws originate in government bills than in Spain, ranging from the extremely low 15 percent in the 1985-87 PSD minority cabinet to 71 percent in the following PS-PSD cabinet between 1983 and 1985.
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<tbody>
<tr>
<td>Private Members' bills introduced</td>
<td>296</td>
<td>331</td>
<td>451</td>
<td>431</td>
<td>471</td>
</tr>
<tr>
<td>% of Private Members' bills passed</td>
<td>9.8</td>
<td>24.5</td>
<td>20.4</td>
<td>18.3</td>
<td>37.6</td>
</tr>
<tr>
<td>Executive bills introduced</td>
<td>103</td>
<td>44</td>
<td>176</td>
<td>118</td>
<td>262</td>
</tr>
<tr>
<td>% of executive bills passed</td>
<td>68</td>
<td>34.1</td>
<td>95.9</td>
<td>88.9</td>
<td>81.3</td>
</tr>
<tr>
<td>% of passed bills originating in executive</td>
<td>70.7</td>
<td>15.6</td>
<td>64.7</td>
<td>57.1</td>
<td>54.6</td>
</tr>
</tbody>
</table>

Source: Freire et al. 2002.

Excludes all bills concerning the rearrangement of geographical administrative boundaries (municipal bills). These leggine are usually excluded from analysis of law production in Portugal, given their large numbers but diminute importance and purely routinary debate: see Leston-Bandeira 1998, 149.

Table 4.9: Portugal: success rates of Private Members' bills and executive bills and origin of passed bills

However, this apparent display of legislative strength is somewhat mitigated when we consider that a substantial number of the Private Members' bills that passed during the periods of majority government originated directly on MP's of the governing party (Leston-Bandeira and Magalhães 1993). Besides, 1987 marks an unequivocal change in majority-opposition and legislative-executive relations, through which "majoritarian criteria have increasingly replaced consensual ones in deciding on the distribution of rights and responsibilities" (Leston-Bandeira 1998, 144). As analyses of law-production in Portugal have consistently shown, the rise of absolute majorities and stable cabinets changed the role of the Assembleia da República in the political system: it became unable to modify or reject executive bills or to generate alternative policies of its own, in stark contrast with what occurred during the PSD minority cabinet between 1985 and 1987, where the opposition exerted a very substantial influence over the policy-making process (Leston-Bandeira 1999).
Conclusion

The analysis of judicial and policy-making institutions in Spain and Portugal suggests several preliminary conclusions and hypotheses. First, the institutions of judicial review in both countries provide ample opportunities for the countermajoritarian use of constitutional litigation. Both have constitutional courts with abstract review powers, and both provide parliamentary minorities and other oppositional political actors with ample opportunities to use litigation to block majority policies. In Spain, the major opposition party (PSOE first, AP/PP later, and PSOE again since 1996) has continuously enjoyed a direct and autonomous access to the Court, either through its representation in the two chambers of parliament or through its control of the parliaments and governments of several autonomous regions. Until late 1984, that access even included the ability to refer some bills to the Court before they were promulgated. Besides, although the parliamentary representation of smaller nationalist parties has been always insufficient to grant them litigation rights at the national level, their control over the parliaments and governments of their comunidades has consistently given them direct access to the Court in what concerns litigation against legislation that affects the scope of their autonomy. In Portugal, although the smaller parties have been increasingly excluded in terms of their ability autonomously to refer bills and decrees for abstract review, the pattern has broad similarities: the largest parties in the opposition have always enjoyed the ability to litigate against laws passed by parliamentary majorities, including, until 1991, the Communist Party. The President of the Republic, who until 1995 had remained unaffiliated to the party in government, also enjoys both a priori and a posteriori litigation rights.
Second, not only were the institutional opportunities for an intense judicialization of politics present, both so were the structural political incentives. Post-transitional politics in both countries have experienced a decisive "majoritarian turn" in the 1980s. The combination of government stability, low party system fragmentation, unicameralism or weak bicameralism, strong party discipline, and the dominance of the executive over the legislative process has resulted in a strong majoritarian bias in legislative policy-making in Spain and Portugal, particularly during periods of PSOE and PSD single-party majority government. That bias was particularly pronounced in Spain, where rules of agenda-setting have afforded governments very tight control over the legislative agenda. Here, as the decline of role of the Cortes and the erosion of its prestige have become common themes in the specialized literature, there is a system in which "Parliament has become a mere formality" (Capo Giol et al. 1990, 117) and "the government is obviously in charge" (Lancaster 1996, 202).

Combined with what we now know about the Spanish and Portuguese policy-making institutions and political systems, the policy-seeking approach to litigation generates several hypotheses regarding the use of abstract review litigation and the extent to which legislative politics have been judicialized in both countries. First, considering the stricter government control of the parliamentary agenda and the opportunities for the use of litigation by the autonomous communities, particularly those of Catalonia and Euskadi, the frequency with which legislation is submitted to constitutional scrutiny should be generally higher in Spain than in Portugal. Second, levels of countermajoritarian litigation should increase in periods of majority government in both countries, particularly during the PSOE majority cabinets between 1982 and 1993 and the
PSD majority cabinets between 1987 and 1995. Finally, in these periods, litigation in Portugal and Spain should reach particularly high levels from a comparative point of view, considering the overall veto-free nature of their political institutions, the weakness of their parliaments, the reduced opportunities for oppositions to influence the policy-making process, and the overall lack of political punishments attached to a "voracious" use of litigation for policy purposes. The following chapter tests these hypotheses.
The "judicialization hypothesis" (and the policy-seeking approach to constitutional litigation that underlies it) suggests that when oppositions have access to courts, when legislative policy-making institutions are predominantly "veto-free," and when governments are supported by stable and cohesive majorities that neutralize "legislative resistance" and opposition influence, an intense judicialization of politics will inevitably follow. Spain and Portugal, particularly under majority governments, have often met this combination of conditions. To what extent has this caused an intense constitutional scrutiny of legislation? And to what extent do litigants behave according to the assumptions of the policy-seeking approach to litigation?

Who litigates, and how much?

Figure 5.1 shows the number of passed bills referred per year to each Court for abstract review by all constitutionaly entitled litigants. In Spain, a posteriori referrals must take place no longer than three months after the official publication of the disputed law. Thus, in order to measure the extent to which legislation has been submitted to constitutional scrutiny, "passed bills" includes all bills passed by the Spanish parliament since May 1980 (three months before the installation of the Court) that ended up being
referred to the Court. The criterion used to measure the number of referred bills in the Portuguese case is somewhat different, but only in order to make the data fully comparable. In the Portuguese case, only bills referred within the same legislature in which they were passed are considered (what I will call "contemporary referrals"). The need to make this distinction results from the fact that, unlike in Spain, abstract review referrals in Portugal need not meet any specific deadline after the bill has been passed. Entitled litigants can continue referring legislation to the Court for a posteriori review at any time after promulgation. In practice, this has meant, for example, that about 11 percent of all a posteriori abstract review referrals made between 1983 and 1999 in Portugal concerned "pre-constitutional legislation" (passed even before the approval of the 1976 Constitution). Furthermore, of the all the bills or laws passed between 1982 and 1999 that ended up being referred to the Court for abstract review, 12.5 percent were passed by legislatures that, at the time of the referral, had already been dissolved. In other words, the Portuguese Court's docket includes referrals of legislation passed by parliaments and majorities that no longer exist, something that clearly escapes the notion of the Court becoming a "third chamber" or a veto-player in everyday law production.
Figure 5.1: Passed bills referred to the Spanish and Portuguese constitutional courts by year of approval, 1980-1999

In keeping with last chapter's predictions, the more imperfect control of the plenary agenda by the Portuguese cabinet and higher levels of opposition influence overall do seem to have resulted in lower levels of litigation than in Spain. In Portugal, only about seven per cent of the 925 bills passed in parliament from 1983 to 1999 — an average of 4.5 bills per year — have been referred by the President for *a priori* review or (if those bills ultimately became laws) for *a posteriori* review by the President, the Speaker of Parliament, the Prime Minister, opposition MP's, the Ombudsman, and the
Attorney-General, as well as by the parliaments, governments or MP's in the Azores and Madeira autonomous regions within the same legislature in which those bills were passed. The only two years in which this overall pattern of low litigation was broken were 1988 and 1991 when, respectively, 13 and 9 bills were referred. However, for most of the period, the numbers of bills referred remains consistently low, something that is confirmed by the data available on litigation against governmental decrees.

In Spain, the constitutional scrutiny of legislation has been more intense. Of the 1028 bills approved in parliament from May 1980 to the end of the 6th legislature in 2000, fully 13.9 percent (143) have been referred to the Constitutional Court through abstract review litigation (including seven bills that were referred for a priori review between 1982 and 1985), an average of 7.2 bills referred per year. However, although higher than in Portugal, these figures are still low when compared with the French case where, as we have seen, more than one-third of all legislation has been submitted to the Conseil for abstract review, particularly if we consider the similarly "veto-free" nature of the legislative policy-making processes and the much broader range of entitled litigants in both Iberian systems.

One possible countervailing argument against this assessment could be that these low percentages might be deceptive if Spain or Portugal had, in fact, been displaying high levels of legislative inflation, presumably manifesting itself in a larger legislative output of less relevant and uncontroversial bills than in other countries. However, the argument does not hold, especially because legislative production in both countries — measured by the average number of bills passed — is actually lower than in France. In fact, it is lower than in most Western European democracies, something that neatly coincides with the
strong parliamentary agenda-control exerted by the Portuguese and (especially) the Spanish executives, particularly when enjoying the support of an absolute majority (Döring 1995b, 593-600).

Additional questions about the policy-seeking approach to litigation are raised when we consider who has been responsible for abstract review litigation in both countries. In fact, in neither Portugal nor Spain have opposition parties, through their MP’s or senators, been the main contributors to the constitutional courts' abstract review dockets, compared to other public authorities with access to the Court. In Portugal, as we can see in Table 5.1, the contribution of opposition MP’s to litigation has been extremely modest, as they have made "contemporary referrals" of only 2.1 percent of all laws promulgated since 1983 to the Constitutional Court. In fact, the single most active litigant in Portugal has been the President of the Republic, who nevertheless sent only 32 bills (3.5 percent of all bills passed) to the Court for a priori review in the 16 years between 1983 and 1999 (Araújo and Magalhães 2000, 222-224).

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<thead>
<tr>
<th></th>
<th>A priori review</th>
<th>A posteriori review</th>
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<td></td>
<td>Bills passed</td>
<td>% of bills passed</td>
</tr>
<tr>
<td></td>
<td>referred for a</td>
<td>that ultimately</td>
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<td></td>
<td>prior review</td>
<td>became law</td>
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<tr>
<td>Spain (1980-2000)</td>
<td>1028</td>
<td>-</td>
</tr>
<tr>
<td>Portugal (1983-1999)</td>
<td>925</td>
<td>3.5</td>
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*In Spain, seven organic bills were referred between 1980 and 1985, before recurso previo of organic bills was abolished.
Sources: see Appendix. Passed bills and laws in Portugal exclude all pieces of legislation covering the rearrangement of geographical administrative boundaries (municipal bills). "Laws" in Spain and Portugal exclude passed bills that never became law, due to judicial vetoes of presidential vetoes that were not overridden.

Table 5.1: Abstract review litigation against legislation in Spain and Portugal
Abstract review litigation has indeed been more intense in Spain than it has in Portugal. But what mainly accounts for this difference is the role played by the governments and parliaments of the autonomous communities as constitutional litigants. On their own, they have referred about 10 percent of all bills promulgated between 1980 and 2000 to the Constitutional Court. And among the regional authorities, the government or parliament of Catalonia clearly take the lead over all the others, having referred no less than 53 laws to the Tribunal since 1980, followed by the authorities in Euskadi (39) and, at greater distance, in Galicia (16). The importance of litigation by the autonomous communities in the Court's constitutional review docket is mirrored by the role of the conflictos de competencia (conflicts of competencies) in the overall non-judicial review tasks of the Tribunal. When the governments of the autonomous communities believe that the central government has issued administrative (non-legislative) norms or acted in infringement of their jurisdiction, they may also challenge those norms before the Court. Between 1980 and 1999, the comunidades have brought before the Court no less than 418 conflicts of competencies against the central government (an average of 21 per year), a spectacular amount considering that, in Germany, only 26 of such conflicts were docketed between 1951 and 1994.

Thus, as Bon aptly summarizes, the Spanish recurso de inconstitucionalidad "has essentially served to solve the problems of distribution of competencies between the national and the regional legislatures (…), as the most active litigants have not been the 50 MPs or senators, as one might expect given similar experiences in other constitutional jurisdictions, but rather the autonomous communities" (Bon 1993, 59).
disproportionate contribution to the Tribunal's docket since 1982 seems to be fostered by
the combination of two structural factors already discussed in chapters two and four: the
vagueness and flexibility of Title VIII of the Constitution, and the congruent and
asymmetric nature of Spanish bicameralism. On the one hand, as soon as the Spanish
democratic parliament began issuing new legislative frameworks covering a variety of
public functions, the complexity of the constitutional system of assignment of central and
regional competencies, the potential violation of the comunidades' exclusive legislative
powers, and the ambiguity of the constitutional notions of "general interest" or "basic
legislation" opened broad opportunities of contestability of legislation's conformity to the
Constitution and the estatutos, fostering the use of constitutional litigation by the regional
governments as a means to expand their powers and/or preserve them from centralist
invasions. On the other hand, the weakness of the Spanish Senado has prevented policy-
making at the national level from being made by institutions that allow the representation
of regional interests and central-peripheral cooperation in policy-making (Colomer 1998,
48-50). The result, at least until the 1990s, was the creation of "a judicial state of
autonomies" (López Guerra 1989, 64), in which abstract review litigation and the use of
conflicts of competencies worked as a last resort for the comunidades to struggle about
the definition of the boundaries of central and regional powers.

In comparison with litigation by comunidades, referrals made by the major
opposition parties were much less frequent: they involved only about 4.3 percent of all
promulgated laws. In the last two decades, an yearly average of only three abstract review
referrals have been made by parliamentary opposition groups against laws approved by
the Cortes (Blanco Valdés 1999, 26), a figure that brings Spain much closer to German
than French levels of litigation. And as we shall see next, not even the intense judicialization of the autonomic process on the part of some comunidades was to become a permanent fixture of the Court's life.

**Government support, legislative politics and countermajoritarian litigation**

Thus, the main parties of the parliamentary opposition in Spain or Portugal — or, for that matter, the Portuguese President — have generally made little use of abstract review litigation in comparison with nations where an intense judicialization of politics has indeed taken place. However, from these low aggregate figures, we should not rush to conclude that has been always the case at all times, since acute variation in the frequency of constitutional scrutiny of legislation from the early 1980s until today is possible. The policy-seeking approach to litigation suggests that such variation is likely the result of shifts between periods of majority government (especially if single-party majorities) and minority cabinets. The strength of executive support is likely to make a difference in levels of countermajoritarian litigation because parliaments controlled by disciplined and cohesive majorities are able to shut out oppositions from the policy-making process, giving them greater incentives to use referrals as a defensive or countermajoritarian weapon. Besides, considering the rules prevailing in both the Spanish and Portuguese parliaments examined in the previous chapter, the extent to which the executive’s party controls the parliamentary agenda and shuts out opposition parties is crucially dependent upon whether that party enjoys an absolute majority or not. To what extent have shifts in government type been reflected in the patterns of countermajoritarian litigation?
Spain

In the history of post-transitional Spain, the period in which we should expect the constitutional scrutiny of legislation to reach particularly intense levels was inaugurated by the 1982 elections that produced the first PSOE absolute single-party majority and concluded by 1993, as the Socialists lost that majority and were required to systematically seek the support of other parties in order to form government and pass legislation.

The 1982 elections caused a dramatic change in executive-legislative and majority-opposition relations in Spain. During the First Legislature, between 1979 and 1982, the UCD executive had been forced to moderate and accept changes in its legislative proposals in order to obtain the required parliamentary support or, at the very least, the abstention of the opposition parties (Capo Giol et al. 1990, 108-109; Maurer 1999, 38). This was a function not only of its minority status, but also of the extreme party disunity exhibited by UCD during that period. Torn by personal and ideological divisions between several groups and their leading figures, and forced to accommodate the interests of powerful party members in control of local electoral machines, UCD remained a highly uncohesive force that was required to obtain agreements on policy changes from the various factions within its own parliamentary party and even, sometimes, to form ad hoc alliances with PSOE in order to offset defections within UCD itself (Román Marugán 1999, 261). In fact, some of the deepest conflicts about legislative proposals in this period took place less between the UCD and opposition parties and more within the governing party. This was the case, for example, with legislation regulating
divorce and public funding and autonomy for private schools and universities, cases in which the struggle between UCD's Christian and social democratic factions was particularly acrimonious, laying the ground for the future desertion of party cadres to both PSOE and AP and contributing to the Catholic Church's growing hostility to Suárez's leadership.

This pattern of policy-making was reinforced by the legacies of the Spanish transition. As the first post-constituent cabinet, UCD's executive was inevitably required to advance an important number of legislative proposals for organic laws that implemented a myriad of constitutional rules approved in 1979, a task that, in fact, seemed to exhaust Suárez's entire political platform in this period (Powell 2001, 280-291). Although both UCD and the Socialists were initially eager to get rid of the constraints posed by the demands of "consensus" on their policy goals and electoral strategies — something that, as we have seen in chapter two, had been already visible in the very discussion of the Constitutional Court's organic law —, an attempted military coup on 23 February 1981 raised again their awareness of the importance of prolonging some version of the constituent consensus in order to deal with the transition's unfinished tasks. Suárez's successor, Leopoldo Calvo-Sotelo, saw the Socialists' proposal of a "grand coalition" between both parties as a somewhat excessive concession, but the signing of the "autonomic pact" between UCD and PSOE in July 1981 (framing the future access to autonomy of the Spanish regions and their political institutions) was one of the several examples of how, after the failed coup attempt, the major government and opposition parties felt constrained to delay the adoption of a more purely adversarial style of interaction.\(^9\)
These factors combined to turn the First Legislature into a period characterized by a particularly high level of opposition influence in legislative policy-making, with extensive and detailed inter-party negotiations taking place often at the earliest stage of legislative discussion (Capo Giol et al. 1990, 108). In the final votes in parliament, "the general tone was unanimity and, whenever this did not take place, opposition parliamentary parties acted in a joint fashion, either voting together against the bill [and thus blocking it] or abstaining altogether" (Capo Giol 1994, 97).

As PSOE came to power in 1982, everything changed. The Socialists were forced neither to seek the support of other parliamentary parties to pass any kind of legislation nor to deal with significant intra-party conflicts, since the party as a whole — and particularly the parliamentary party — was clearly subordinated to the executive.10 Besides, PSOE's triumph was also the triumph of a platform por el cambio ("for change"), advocating sweeping political, economic, and social reforms that transcended by far the modest agenda of constitutional implementation espoused by UCD in the previous legislature. According to Prime Minister Felipe González,11 the four axes of this platform were the completion of the map and institutional configuration of the estado de autonomías, moving "towards a freer and more egalitarian society" (in a social democratic approach to citizenship rights that might reduce social inequalities and transform Spain into a modern welfare state), preparing Spain for integration in the European Community and "restudying" integration in NATO, and, finally, dealing with the immediate economic crisis, manifested in a resiliently high inflation rate, slow economic growth, a public deficit above 5 percent of GDP, and, most prominently, a rate of unemployment that had already reached 16.5 percent by 1982.
One of the consequences of this combination between an absolute majority enjoyed by a cohesive party and a political agenda of profound economic and social change was an "avalanche of legislative initiatives and executive decisions" (Prego 2000, 193), accompanied by the effective neutralization of legislative resistance to executive proposals and the demise of the previous consensual practices of parliamentary policy-making. As Maurer notes, the Second Legislature was the period in Spain's post-transitional history in which the opposition was least able to influence the legislative agenda and policy-making, as PSOE used its newfound majority to "unilaterally implement its platform" (Maurer 1999, 39). Unanimity in the final vote of bills simply "disappeared," levels of consensus dropped remarkably to the lowest levels before or since, and PSOE made little effort in this period to seek agreements with other parliamentary groups (Capo Giol 1994, 97).

The second consequence of PSOE's majority governments was an increase in the intensity of constitutional scrutiny to which the largest opposition party and the regional governments and parliaments subjected legislation. Between the creation of the Court and the end of the First Legislature (1980-82), only about 2 percent of all laws (4 in total) and two decrees had been referred by PSOE to the Court for abstract a posteriori review. On the whole, the overwhelming majority of a large number of bills implementing constitutional rules about civic rights, public liberties, and the organization of the State — including judicial independence, the regulation of referendums, freedom of expression and religion, national defense and military justice, criminal procedure, and the creation the Council of State, the Ombudsman, and the Court of Accounts, just to provide a few examples — were passed, in spite of their utmost constitutional relevance and
complexity, without any calls for intervention by the Constitutional Court. In contrast, during the Second, Third, and Fourth Legislatures of PSOE majority government, AP/PP referred a total of 7.5 percent of all laws passed for abstract \textit{a posteriori} review.

During the Second Legislature (1982-86), AP/PP referred 13 laws to the Court, touching on a large variety of issue areas, among them, the 1984 and 1985 budget laws, the new labor relations legislation (the \textit{Estatuto de los Trabajadores}), the reform of the \textit{Consejo General del Poder Judicial} (which moved for the parliamentary appointment of all of its members and, thus, weakened the presence of career judges elected by their peers), a law affecting civil service appointments and retirements, and a highly controversial decree nationalizing RUMASA, the largest industrial and banking conglomerate in Spain.\footnote{In the following years, \textit{a posteriori} litigation by PP's deputies and senators still remained at higher levels than during UCD's minority government, although it became more focused on the defense of specific interest groups,\footnote{the excessive regulation of private sectors of the economy,\footnote{and taxation issues.\footnote{However, the single most visible case of \textit{a posteriori} litigation in this period was one where, curiously, the conservative PP made a point of presenting itself as the champion of civil rights and liberties against a center-left government. Approved in February 1992 by PSOE with the support of the Catalan and Basque nationalist parties, the Law of Citizens' Security (better known as \textit{Ley Corcuera}, after the Minister of Internal Affairs, José Luis Corcuera), made it compulsory for citizens to carry their national identity card, allowed the police to detain citizens for identification, and empowered several investigative authorities to carry out house-searches without consent of a judge, in presence of "well-founded suspicion of a}}}}
flagrant crime against the security of the State or against provisions on narcotics."

(Article 21.2). Criticized by human rights and judges' associations and even several eminent Socialist Party figures, and publicly deemed "a mistake" by the Constitutional Court's Vice-President, Francisco Rubio Llorente, the *Ley Corcuera* became "the most contested bill of all presented by the socialist government in nine years." Since PNV and CiU supported the bill — making it unlikely that the Catalan or Basque parliament or government would refer the *Ley Corcuera* to the Court —, the only possibility of the law reaching the Court lay in litigation by PP. The irony did not escape observers that "a leftist party forced the law's passage while a rightist party, committed in principle to defending the values or order and authority, opposed it and emerged as defender of civil rights and liberties." But this was precisely the kind of opportunity that the *populares* — who had adopted a strategy of displaying ideological centrism and moderation since the party's "refoundation" in the early 1990s (López Nieto 1999, 242-246) — were now unwilling to miss. As a result, the PP duly joined the Communist Party and the civil liberties movement in the chorus of protests against the law, ultimately referring it to the Constitutional Court. Almost one and a half year later, in a major defeat for the government, the Court, in its ruling 341/1993, declared several aspects of the law unconstitutional (including article 21.2), and Corcuera, as he had promised, resigned from the cabinet. Of course, for the *populares*, "this was not the *Ley Corcuera* but rather the *Ley González*, and it is he who should go."  

Nevertheless, this increase in the use of abstract *a posteriori* review by the *populares* during PSOE's governments totally pales in comparison to what ended up being the most dramatic changes in the use of litigation as a countermajoritarian weapon
in that period: the activism of the parliaments and governments of the Spanish autonomous communities and the use of *a priori* review of legislation between 1982 and 1985. During the First Legislature, the single most prominent case of an abstract review referral by the comunidades was the *Ley Orgánica de Armonización del Proceso Autonómico* (LOAPA), the legislative translation of the UCD/PSOE 1981 autonomic pact. Following the report of a committee of experts charged by Leopoldo Calvo-Sotelo after the February 1981 coup,^21^ LOAPA's ostensive aim was to stop the process of devolving powers to the regions, that to that point had taken place mainly through bilateral negotiations that threatened to result in a wholly incoherent system. However, under the guise of fostering a degree of homogeneity in the powers and institutions of the new comunidades, LOAPA also contained several dispositions that, by interpreting the concept of "basic norms," delimiting the content of the regions' "exclusive competencies," developing notions of "precedence" of central legislation, and introducing oversight of its implementation by the regions, threatened to reduce the prerogatives of all comunidades, and particularly those that had assumed a higher level of competencies. In spite of several attempts to build a broader base of support, only UCD and PSOE ended up voting for LOAPA, which was duly sent for *a priori* review by the Basque and Catalan governments and parliaments and by MP's of several parliamentary groups.

However, even after the Court ruled LOAPA as unconstitutional in 1983 (arguing that the parliament had, in practice, attempted to amend the Constitution by means of an ordinary law),^22^ the PSOE majority proceeded to guide its autonomic policies under the same principles that had oriented LOAPA in the first place, namely, the homogeneization of powers and functions among all autonomous communities and the attempt to place the
use of their competences under constraints defined by basic central legislation. The reaction was, predictably, an explosion of regional abstract review litigation, particularly on the part of Basque and Catalan "historical" comunidades unwilling to abandon the "head start" they had enjoyed in the assumption of competencies. In this period, invoking the provision in the Court's organic law through which the communities can refer national laws that "affect their sphere of autonomy" — a constraint that was absent from the Constitution itself and of which the Court made an increasingly liberal interpretation — the Basque and the Catalan governments and parliaments opened a pipeline of referrals of national legislation to the Court. The comunidades referred, on the whole, 72 laws during the Second, Third and Fourth Legislatures (about 16 percent of the entire legislative production in that period), covering not only legislation specifically addressed at the redistribution of competencies and funding of the comunidades, but also challenging the invasion of regional powers and competencies made by "basic" legislation in a wide variety of policy areas, including university education, public health, consumer protection, and police functions, among many others.

The second major change in constitutional litigation after 1982 concerned the use of a priori review. Initially conceived in 1980 as a mechanism of "constitutional consultation," to allow the central government to constrain the negotiation of the future estatutos de autonomia, the recurso previo was transfigured by the populares during the Second Legislature. The first of these cases took place in 1983, when AP (joined by CiU) referred for a priori review a local elections law that affected the composition of provincial representative bodies (diputaciones provinciales) by determining party representation on the basis of their share of the vote in each province instead of their
representation in city councils. This law was likely to reduce both AP's and CiU’s weight in the diputaciones. Although it had already been published in the official journal — and was therefore, in theory, beyond the possibility of a priori review —, the Court ended up accepting the referral. Unlike what was specified in LOTC, however, it made the ad hoc decision not to suspend promulgation of the entire law to avoid the forthcoming local elections being postponed.25

This awkward juridical imbroglio was only the first sign of much greater problems posed by the transfiguration of abstract a priori review operated by the populares. In the following two years, they would refer several other organic bills: a reform of the penal code that decriminalized therapeutic, eugenic, and ethical abortions; a bill that retroactively restricted the ability of senators and MP's to receive wages from other public sector employments; the Ley Orgánica del Derecho de Educación (LODE), PSOE's answer to UCD's Estatuto de Centros Escolares, which preserved generous public aid to Catholic schools but increased scrutiny and control over funded entities; and a law on unions, on the grounds that it prevented the formation of "business unions" and implicitly favored the organizational model espoused by the Unión General de Trabajadores (linked to PSOE).26 What made these recursos previos such powerful weapons for the major opposition party was not only the possibility of obtaining a judicial veto on grounds of unconstitutionality, but also that such referrals immediately suspended the bills' entry into force, pending the actual judicial ruling. And with the exception of the appeal against the constitutionality of the local elections law, which the Court resolved in little more than two months, the remaining a priori review referrals revealed that the Court was unable (or unwilling) to deal with such cases swiftly: they
were never resolved in less than five months and, in the cases of LODE and the abortion law, it took the Court no less than one year and a half to reach a final decision.\textsuperscript{27} By the mid-1980s, this use of abstract \textit{a priori} review litigation as a countermajoritarian weapon seemed to confirm the worst fears that, back in the constituent process, had been inspired by the creation of a centralized constitutional jurisdiction in Spain: the "government of judges," the politicization of constitutional justice, and the conversion of the Constitutional Court into an actual third chamber of parliament. Abstract review litigation put the Constitutional Court on the front pages and in editorials of the Spanish major newspapers, in an atypical level of exposure that, in the words of another of its former presidents, put a definitive end to the "idyllic" times of the Tribunal's public image following the LOAPA ruling (Tomás y Valiente 1995, 18).

PSOE's first reaction to this use of litigation by Fraga's party consisted in presenting as ordinary legislation anything that could conceivably be kept out of organic laws, a tactic that was put to use, for example, with the legislation on unions, whose original contents were split between a \textit{Ley Orgánica de Libertad Sindical} and an ordinary \textit{Estatuto de los Trabajadores}.\textsuperscript{28} However, the opposition simply answered by stepping up the use of \textit{a posteriori} litigation. Ultimately, PSOE resorted to a more decisive remedy: in late 1984, the Socialists used their absolute majority in parliament to eliminate \textit{recurso previo} from LOTC. This amendment to the Court's organic law became, ironically, the object of a very last \textit{a priori} referral, but the justices posed no obstacles to that curtailment of the Court's jurisdiction and unanimously agreed to declare the bill's constitutional conformity in May 1985.\textsuperscript{29}
This stark contrast between the periods of UCD minority and PSOE majority cabinets shows that the use of abstract review litigation as a countermajoritarian weapon can vary substantially through time within a single country, suggesting that the strength of executive support and the level of consensus in policy-making have a decisive impact on the extent to which oppositions were likely to involve constitutional courts into the legislative process. Figure 5.2 confirms this assessment for the whole 1980-1999 period:

Figure 5.2: Spain: *a posteriori* litigation against legislation (% of laws referred in each legislature in relation to total promulgated)

Litigation on the part of both opposition parties and the *comunidades* reached its highest levels during the Second, Third, and Fourth Legislatures, corresponding precisely to PSOE’s three consecutive absolute majorities between 1982 and 1993. In Table 5.2, the
relationship between government status and resort to abstract _a posteriori_ litigation becomes clearer. Under minority cabinets, litigants reacted against 8 percent of laws passed, as opposed to 19.5 percent under single-party majority governments.

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<th>Government status</th>
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<th>Minority</th>
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<td>Not referred (%)</td>
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<td>91.8 (514)</td>
</tr>
<tr>
<td>Referred (%)</td>
<td>19.5 (91)</td>
<td>8.2 (46)</td>
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<tr>
<td>By opposition MP's or senators</td>
<td>7.5 (35)</td>
<td>2.1 (12)</td>
</tr>
<tr>
<td>By the autonomous communities</td>
<td>15.5 (72)</td>
<td>6.3 (35)</td>
</tr>
<tr>
<td>By others</td>
<td>1.7 (8)</td>
<td>0.9 (5)</td>
</tr>
<tr>
<td>Total</td>
<td>466</td>
<td>560</td>
</tr>
</tbody>
</table>

Numbers in parenthesis are laws. Sum of referrals by "Opposition MP's or senators", "Autonomous communities" and "Others" may be greater than the percentage of laws referred, because a single law can be be referred by several litigants.

Source: see Appendix.

Table 5.2 Spain: government status and _a posteriori_ litigation

It must be noted that, as far as regional litigation is concerned, this stark contrast is somewhat deceptive, since under the UCD minority cabinet most of the _estatutos_ of the seventeen communities had not yet been approved and their institutions had not been established. However, the abrupt drop in regional referrals experienced during the last two minority governments clearly coincides with the growing influence of the "historical communities" in national policy-making, as "the Catalan CiU and, to a lesser extent, the Basque Nationalist Party (…) became the only regional-nationalist parties that have been able to convert their regional dominance into a significant source of power at the national level" (Bukowski 1997; see also Heller 2002). In fact, following the loss of their absolute majority in the 1993 elections, the Socialists' obtained the Catalan nationalists'
commitment to support the investiture of González, in exchange for a reform of the financing system of the autonomous communities that entailed the transfer of 15 percent of income tax receipts directly to regional governments, an arrangement that was withdrawn only in 1995 (as the Catalans feared that the succession of corruption scandals involving the government might affect their own electoral prospects). In 1996, Aznar went even further, signing an investiture pact with PNV and a full agreement with CiU to support PP's minority cabinet, in areas such as taxation, health, and employment, in all cases entailing increased funding and competencies for the autonomous communities.\(^\text{30}\)

The impact of CiU's entry into "national politics as a power broker since 1993" (Bukowski 1997, 97) on the use of litigation is further visible in Figure 5.3: the Catalan and Basque governments and parliaments — once predominant as regional litigants — have been overtaken by other autonomous communities. Besides, since 1996 and PP's accession to government, litigation by the \textit{comunidades} has been mostly initiated by Castilla La Mancha, Andalucia, and Extremadura, in other words, PSOE-dominated regional governments and parliaments. It is true that not even these \textit{comunidades} have been able or willing to match the litigiosity of the Basques and Catalans in the 1980s, but their overall behavior remains quite consistent with some of the assumptions of the policy-seeking approach to litigation.
By the Basque or Catalan governments and parliaments
By any of the other 15 autonomous communities

Figure 5.3: Spain: autonomous communities' *a posteriori* litigation against national legislation (% of laws referred in each legislature in relation to total promulgated)

It therefore seems clear that periods of more unfettered majority rule coincide with greater levels of countermajoritarian litigation in Spain. This trend was particularly clear in the use of *a priori* review referrals against organic laws during the Second legislature and in the litigation by the Basque and Catalan governments and parliaments in the 1980s. Nonetheless, a basic question remains unanswered. One remains struck by how *exceptional* the Second Legislature was in terms of the extent to which oppositions judicialized the policy-making process. In that period, one out of every four organic bills passed was referred to the Court for *a priori* review. However, the capacity of oppositions to "judicialize" legislative politics displayed in this period, "prolonging political debates (...) on those issues upon which majority and opposition failed to
agree" and transposing "opposition's defeats to a jurisdictional instance" (Tomás y Valiente 1996, 120) was severely constrained after the definitive elimination of *recurso previo* in 1985. Besides, it is true that parliamentary oppositions did resort more often to *a posteriori* litigation under PSOE's majority cabinets — when many of the conditions fostering an intense use of referrals as a countermajoritarian weapon were clearly present — than in any other period before or since. But the striking phenomenon is that, even in this period of maximum intensity of constitutional litigation in the history of democratic Spain, the overall level of abstract review referrals by the opposition between 1982 and 1993 was comparatively low: no more than 7.5 percent of all laws passed (see Table 5.2).

In more substantive terms, this meant, for example, that several of the crucial PSOE's policies in those years of the *cambio* remained totally outside the scope of the Constitutional Court's abstract review jurisdiction. This was the case with almost every piece of legislation in the Second and Third legislatures that concerned the restructuring of the public health and social security systems, a large package of legislative measures on military reform, and, most significantly, seven of the eleven budget laws passed between 1982 and 1992. And this is all the more striking if we consider that, although PSOE did attempt to shift its legislative strategy after 1986, seeking understandings with other parties more systematically (particularly the CDS of Adolfo Suárez and the Catalan nationalists), the purely adversarial nature of their relationship with the largest opposition party, *Alianza Popular*, experienced little to no change: as Giol notes, the *populares* "maintained stable patterns of rejection [of executive proposals] throughout the Second, Third, and Fourth Legislatures" (Capo Giol 1994, 100).
As for regional litigation, the question also remains relevant. On the one hand, this additional avenue for pursuit of strategies of countermajoritarian litigation, when it was systematically used, was not by PP or PSOE regional governments against, respectively, Socialist or PP cabinets, but rather by the Basque and Catalan authorities throughout the 1980s. On the other hand, as Figure 5.3 shows, the decline in the use of referrals by Catalonia and the Basque country started taking place before PSOE's loss of an absolute majority. That phenomenon is even more clearly visible in what concerns the use of conflicts of competencies against the central government. Between 1983 and 1989, the number of such conflicts averaged no less than 45 per year, while after 1989 that yearly average dropped to seven.

Figure 5.4: Spain: conflictos de competencia initiated by the autonomous communities against central government, 1980-99
Thus, the policy-seeking approach to constitutional litigation leaves several questions unanswered in what concerns the Spanish case. Why, functioning under generally "veto-free" legislative policy-making institutions, have the main opposition parties in Spain made a more modest use of countermajoritarian litigation than might be expected? Why did even the "voracious" Basque and Catalan authorities basically abandon the resort to abstract review litigation even before they started exerting substantial influence in national policy-making institutions?

Portugal

We have seen that, in spite of the majoritarian bias in Portuguese legislative institutions, presidents and oppositions have, for the entire period between 1983 and 1999, remained cautious in their use of abstract review litigation since the creation of the Constitutional Court. But as in the case of Spain, we also need to ask if this caution also extended to periods of clearly majoritarian legislative politics. In fact, since 1983, there has been two periods in which governments and the majorities that supported them might have good reason to fear the systematic use of constitutional litigation as a powerful countermajoritarian weapon. The first took place between 1983 and 1985, during the government of the so-called Bloco Central, a "grand coalition" between the Socialists and the Social Democrats. The second occurred between 1987 and 1995, during which the PSD ruled with two consecutive single-party majority cabinets.

The first common feature of these two periods is that the executive enjoyed the support of an absolute majority in parliament. Between 1983 and 1985 a PS-PSD coalition, formed in the aftermath of elections where the Socialists obtained a
parliamentary plurality, governed. This time, unlike in 1976, the PS was simply unwilling to govern alone in a minority cabinet, as it faced — recall from chapter three — what had become an hostile President, still able and potentially willing to use his legislative veto powers. Besides, by 1983, the new government faced an economic crisis of enormous proportions. AD's electoralist economic policies and international recession had led to a situation comparable to that of the mid-1970s: real wages had increased between 1978 and 1983, (1.9 percent per year on average), but at the expense of a dramatic jump in public expenditures (from 38 percent to 49 percent of GDP), huge public and balance of payments deficits (financed by escalating foreign debt), and an inflation rate of 26 percent (Franco 1996, 234-238; Lopes 1996, 239-243). Thus, the PS-PSD coalition was also born out of a Socialist concern to avoid repetition of its 1976-78 experience, where it had ended up assuming sole electoral responsibility for the adoption of severe austerity policies.

An absolute majority also characterized the period between 1987 and 1995, this time the first single-party majority in Portuguese democratic history. The PSD's rise to power can be traced back to 1985, when Cavaco Silva, its new leader, withdrew his party from the Bloco Central coalition and forced new elections. Helped by the fractionalization of the leftist vote brought on by the emergence of the Partido Renovador Democrático (PRD), that had been created by President Eanes to dispute the center-left vote, the PSD obtained a parliamentary plurality and formed a single-party minority cabinet. For the next two years, the Social Democrats had enormous difficulty turning their platform into a feasible legislative agenda, facing a fractionalized parliament where the left (PCP, PS, and PRD) enjoyed a majority used not only to impose several
parliamentary defeats to the governing party, but also to form negative coalitions passing legislation against the government's preferences (Filipe 2002, 237-242). However, on the electoral front, the Social Democrats were highly successful. They took advantage of the favorable international context, the beginning of EC transfers, and the benefits of the Bloco Central's stability policies to reduce taxation and raise salaries, pensions and benefits (Corkill 1993b, 118-212; Lobo 1996, 1110). They thereby turned the obstructionism of the parliamentary opposition during the 1985-87 period to their advantage, making governability their main campaign issue. In the 1987 elections, the PSD won Portugal's first ever single-party majority, and then repeated the feat in 1991.

Besides enjoying majoritarian support in parliament, another similarity between the Bloco Central and the post-1987 PSD cabinets was that their political platforms intimated an intense political struggle that might easily spillover to the constitutional arena. Recall from chapter three that, back in the 1982 constitutional revision, electoral constraints and internal party pressures had prevented the PS's Mário Soares from accepting any other major constitutional amendments than the elimination of military tutelary rule and the (already highly contested) curtailment of presidential powers (Vitorino 1991, 19). Thus, the main "conquests of the revolution," such as central planning, agrarian reform and the prohibition of reprivatizations, had remained basically intact in 1982. Article 83 of the Portuguese Constitution still described all nationalizations made in 1975 as "irreversible conquests of the working class", while Article 85 stated that the (unspecified) "basic sectors" of the economy should remain closed to the "activity of private enterprises". Article 97 stated that agrarian reform should take place by "the transfer of the useful possession of the land to those who work
on it, to be obtained by expropriation of latifundia and large capitalist properties."

Finally, Article 53 prohibited the dismissal of workers without "just cause," a concept which legislation and jurisprudence had always interpreted as "guilty conduct" on the part of employees.

The platform Mário Soares presented to parliament in 1983 potentially collided with some of these constitutional rules. Besides reflecting the need for quick economic stabilization in anticipation of Portuguese accession to the EC, which was to be achieved by short-term measures aimed at shrinking domestic demand and reducing both the public and balance of payments deficits, the Bloco Central's program contained measures aimed at the restructuring of the Portuguese economy, for example, revamping the entire fiscal system, the possibility of privatizing minority shares of public enterprises, opening up more sectors of economy to private initiative, and "adjusting labor legislation to the standards prevailing in EC countries".33

The PSD's platform in 1987 was even bolder in terms of testing the extent to which the constitutionalized "conquests of the revolution " remained a constraint on economic liberalization. Between 1985 and 1987, the PSD, lacking an absolute majority or even the possibility of obtaining it through parliamentary agreements with other parties of the right, had resorted to decree powers to subject state-owned enterprises to private law and allow for their partial privatization. Those decrees did end up in the Court and were ultimately vetoed as unconstitutional on the grounds not of their substantive incompatibility with the rules of the "economic constitution" — an issue on which the Court remained silent — but of abuse of decree powers.34 Now, in a far more favorable context — enjoying cohesive and majoritarian parliamentary support — Cavaco Silva's
government proposed a massive package of economic reforms. Its first element was the
revival of the previous attempt to "open the capital of public enterprises to the private
sector within constitutional limits," i.e., keeping the majority of shares in the hands of
the state and making sure than the privatized shares concerned only capital that had not
been nationalized in 1975. Second, the PSD aimed at reducing further the number of
sectors of the economy closed to private initiative, protecting only a few "basic sectors"
(which, in most cases, were unprofitable) while nonetheless allowing for private
management (if not ownership) in all areas of economic activity. To this, among other
measures, was added a bold reform of labor legislation (allowing for the dismissal of
individual workers for reasons other than disciplinary ones and replacing the court-
ordered reintegration of dismissed workers by financial compensation).

The last similarity between both periods was the way in which both the Bloco
Central and the PSD used their absolute majorities in parliament to exert strict control
over the legislative agenda and to reinforce the centrality of the cabinet in the system of
executive-legislative relations. During the Third Legislature, the percentage of successful
bills originating in the executive rose to a record 71 percent, as the cabinet steamrolled
through parliament bills and budget laws creating extraordinary taxes and raising
already existing ones, cutting public subsidies and investments, raising prices of publicly
produced commodities, and cutting public sector wages — a series of measures that had
been agreed upon with the IMF. And on the economic restructuring front, the Bloco
Central successfully opened up the banking, insurance, and cement sectors to private
enterprise and liberalized the commercialization of wheat (two measures previously
attempted by the AD coalition and vetoed by the Council of the Revolution as
unconstitutional), allowed for the temporary lay off of workers, and created fixed term contracts in the civil service (Franco 1996, 245-253).

During the eight years of PSD majority government, between 1987 and 1995, the neutralization of "legislative resistance" and the conversion of executive-legislative relations into a basic majority-opposition mode were taken to new heights. The PSD began by using its new-found power to reinforce the majoritarian bent of Portuguese legislative institutions, amending the parliament's standing orders in order to reduce the opposition's agenda-setting rights. Thus armed, the Social Democrats exerted a nearly perfect control over the parliamentary agenda and made an increasing use of bills delegating decree authority to the government in areas where parliament lacked exclusive jurisdiction, reducing the Portuguese parliament, according to some observers, to a purely "subordinate" and "rubber-stamp" role (Barreto 1992, 157-164; Cabral 1997, 169). Finally, about half (46 percent) of the bills passed in parliament during the Fifth and Sixth Legislatures were approved either with the exclusive support of the PSD or with the additional support of only the CDS. These bills were systematically opposed by all parties of the left, and included not only the entire legislative package of economic liberalization that was the centerpiece of PSD's platform, but also a large number of bills on issues as diverse as the financing of political parties and public universities, freedom of the press, electoral legislation, judicial organization and independence, immigration, and several reforms of the civil and penal codes. And all the while, at least one party of the left always enjoyed access to the Court, and at the same time the PSD faced a potentially more formidable foe in the president; Mário Soares, himself. He had been
elected in 1986 with a narrow victory over the PSD-sponsored candidate (Freitas do Amaral) and had easily won a second term in 1991.

This combination of majority government, low "legislative viscosity", the frequent conversion of political actors with access to the Court into "losers" in the legislative process, and broad (and constitutionally contested) policy change would suggest a sharp increase in the levels of countermajoritarian litigation in both periods. However, this expectation is only partially met. Figure 5.5 displays, for each legislature, the percentage of bills submitted to *a priori* review by the president and the percentage of laws submitted to *a posteriori* review by opposition MP's.

Figure 5.5: Portugal: abstract review litigation against bills and laws, 1983-99 (% of bills and laws referred in each legislature in relation to total passed or promulgated)

Source: see Appendix.
As suggested by the policy-seeking approach, minority governments (between 1985 and 1987 and since 1995) saw lower levels of litigation by both presidents and opposition parties. In addition, among majority governments, litigation was more intense under single-party cabinets (PSD between 1987 and 1995) than it was under the Bloco Central coalition. Predictably, *a priori* review referrals by the President of the Republic were more frequent during the PSD majority cabinets (in cohabitation with a Socialist President, Mário Soares), and reached their lowest level during the PS minority government (in coexistence with a President belonging to the same party, Jorge Sampaio). Data in Table 5.3, comparing litigation patterns under majority and minority government, confirm this pattern: under majority governments, presidents litigated against 5.7 percent of all bills passed, while under minority governments that percentage dropped to 0.9. *A posteriori* litigation was also sensitive to government status, mainly in regard litigation by opposition MPs.
However, several aspects of the behavior of both presidents and oppositions in Portugal explicitly challenge the expectations of a policy-seeking approach. Even more unambiguously than in Spain, the first is the low level of constitutional scrutiny to which legislation was submitted, even in the periods of most intense majoritarian politics: the percentage of bills referred to the Court in either a priori or a posteriori review never surpassed seven percent in any legislature. Particularly striking was the restraint of President Eanes during the Bloco Central government. In effect, Eanes saw his legislative veto powers neutralized and faced a coalition whose very first legislative measure was to approve the same expansion of the sectors open to private enterprise that had been vetoed by the Council of the Revolution, a veto in which Eanes himself had played no small part.
(Aguiar 1996, 1261). However, vis-à-vis a hostile cabinet that implemented an unpopular and constitutionally contestable political platform, Eanes made a surprisingly moderate use of the only weapon he had left to oppose the policies passed by the Bloco Central, the use of abstract *a priori* litigation. Only about 2 percent of all bills passed during that period were referred to the Court.

The second major anomaly concerns the behavior of Mário Soares in his two terms as President, particularly in a 1987-1995 period when he faced a absolute PSD majority. Although previous experiences of premier-presidential cohabitation suggested the possibility of an "unstable equilibrium," or even open conflict between presidents and prime-ministers of a different party, the cohabitation of the Socialist Soares with the PSD majority between 1987 and 1991 was unanimously (and unexpectedly) seen as harmonious (Corkill 1993a, 24-27; Cruz 1994, 351-368; Magone 1997, 40-43). It seemed that, with the completion of the democratic transition in 1982 and the election of a civilian president, the uncertainties of Portuguese "formal" semi-presidential government had been resolved with its conversion, in practice, into a purely parliamentary format. One prominent author argued that the cohesion of PSD's majority and the acute personalization and concentration of powers in its leader Cavaco and his cabinet had actually transfigured semi-presidentialism to the point of turning it into a "Prime Ministerial Presidentialism" or a *Kanzler* democracy (Moreira 1989, 31-37; Sousa 1991, 17-18). This also seemed to confirm Duverger's assessment of the potential disparities between the president's formally prescribed constitutional powers and political practice. Coherent and stable majorities, for him, place "the president either in a dominant position [when he leads that majority], or in a situation of a parliamentary head of state, reduced
to symbolic status" [as it seemed to be the case with Soares] (Duverger 1992, 148; see also Bahro, Beyerlein, and Vesser 1998). In fact, between 1987 and early 1991, Soares first term was generally seen as "non-partisan," and his cohabitation with Cavaco Silva as "distended and balanced" (Cruz 1994, 257) or "peaceful" (Frain 1995, 655). Together with Soares's extremely high approval ratings, this perception seems to have encouraged the Social Democrats not even to put up their own candidate in the 1991 presidential elections, instead lending their support to the incumbent (who won by a 70 percent landslide).

However, Soares's second term ended up being entirely different. This time, and quite unlike in his first term, Soares' use of abstract review litigation was clearly seen as a form of "institutional obstructionism." In 1991, in the months between his reelection in January and the legislative elections of October, Soares bombarded the Court with eight abstract review referrals covering issues as diverse as labor legislation, conscientious objection to military service, local elections and privatization. In the following years, as Corkill puts it, "the main tactic employed by the President in his 'guerilla war' with the government has been to refer legislation to the Constitutional Court" (Corkill 1993a, 26). Premier-presidential relations rapidly became the storm center of Portuguese politics, in what some observers described as a return to the "guerrila warfare" that had characterized the relationship between Eanes and the AD government (Cruz 1994, 258). The consequences of this litigation were far-reaching, particularly in regard to attempted (and frustrated) legislative changes with implications to the independence of the career judiciary and the prosecution. The Court ultimately vetoed projected changes in the mode of the election of the Supreme Judicial Council members, the curtailment of the Attorney-
General's term, and the expansion of police autonomy in corruption investigations, just to give a few examples. A question, however, remains: why was abstract review litigation used (even if only occasionally) as a countermajoritarian weapon in Soares's second term and not in his first? An approach to litigation that focuses exclusively on the policy goals of litigants and the impact of majority rule on litigation does not account for this contrast.

Conclusion

The previous chapter was concluded with a series of hypotheses about the use of abstract review litigation in Spain and Portugal. Let us recall them. First, the intensity to which legislation is submitted should be generally higher in Spain than in Portugal. Second, levels of countermajoritarian litigation should increase under majority governments, particularly the PSOE between 1982 and 1993 in Spain and PSD between 1987 and 1995 in Portugal. Finally, in these periods, the use of referrals should reach particularly high levels, considering the overall veto-free nature of both countries' political and legislative institutions and the congruence between the policy and electoral incentives assumed by the policy-seeking approach to litigation.

Generally speaking, the first two hypotheses are confirmed. Stricter government control of the parliamentary agenda in Spain has resulted in higher levels of abstract review litigation than in Portugal, further fostered by the inability of the Spanish Senate to function as a federal cooperative institution and the incentives this has provided for intensive abstract review litigation by the comunidades. Besides, in both countries, referrals by the major opposition parties have been more frequent during majority cabinets than minority ones. The use of litigation for countermajoritarian purposes by
opposition actors with access to the Court has been inversely proportional to the degree of influence they have exerted in national-policy making and to the overall levels of consensus in legislative politics. In Spain, for example, the period of more intense judicialization of politics corresponds to the first PSOE absolute majority, when the demise of the norms and practices of consensus in legislative policy-making resulted in Alianza Popular seizing upon the instrument of *a priori* review of organic laws with previously unseen vigour. In contrast, the growing influence of CiU and PNV in national-policy making and executive politics partially coincides with a decline in the use of referrals by the Basque and Catalan authorities. As for Portugal, both periods of more intense constitutional scrutiny of legislation promoted by opposition parties or the President both occur during the PSD single-party majority governments. In fact, between 1991 and 1995, *a priori* review of legislation would become the centerpiece in the conflicts between the President and the PSD's absolute majority that characterized that period. Conversely, litigation dropped to almost irrelevant levels during minority governments or when the President was affiliated to the governing party.

Having said this, it is impossible not to remark that the anomalies in the patterns of abstract review litigation that a policy-seeking approach would lead us to expect are too important to be treated as merely residual phenomena. Most crucially, Spain and Portugal have frequently displayed the ideal conditions for a particularly intense judicialization of politics: opposition parties' unrestrained access to constitutional courts; single-party cabinets supported by disciplined and cohesive absolute majorities; legislative policy-making institutions fostering a strong concentration of power in executives, particularly in periods of majority government; the absence of strong
institutional veto-players in policy-making; and elected governments and leaders committed to platforms of profound political, social, and economic change. And yet, even under these conditions, oppositions have most of time remained anything but "voracious" litigants. Indeed, high levels of litigation were the exception rather than the rule. Even in the presence of majority cabinets, the main opposition parties in Spain and Portugal, the Portuguese President, and even the *comunidades* since 1989 have made rather infrequent use of constitutional litigation, particularly when we compare it with other systems where a similarly veto-free legislative policy making process and much less institutional opportunities for litigation — such as France — end up engendering a far higher numbers of referrals and percentages of laws referred.

Thus, in Spain and Portugal, litigation and the scope of judicial decision-making seem to have remained, most of the time, within relatively strict boundaries: constitutional courts have typically acquired abstract review jurisdiction over a relatively small number and percentage of all laws approved by the elected branches. In other words, they have been kept out of most of the everyday legislative process. Therefore, what is most remarkable about abstract judicial review in Spain and Portugal is not the way oppositions have turned constitutional courts into *de facto* third chambers. Rather, the puzzling question is why they have not, and how the policy-seeking approach to litigation fails to account for their restraint. Regardless of the seemingly strong incentives to use access to constitutional courts for the purpose of obtaining policy benefits, the opposition parties and political actors have often resisted opting for that manipulation. "Why would political actors in the legislative opposition forego the use of such a policy-
making tool as recourse to the Court through abstract review?" (Scribner 2000) That is the question addressed in the following chapter.
CHAPTER 6

STRATEGIC LITIGANTS, CONFLICTING GOALS, AND THE POLITICS OF CONSTITUTIONAL LITIGATION

If politicians with access to the Spanish or Portuguese constitutional courts were unconstrained single-minded policy seekers, a large percentage of bills and laws issued by either parliament should be submitted to constitutional scrutiny, oppositions should be willing to bring courts into the legislative process whenever majority policies deviate from their preferences, and courts should enjoy a broad jurisdiction over law production, basically becoming "third chambers" in the legislative process. As it happens, even in contexts of intensely majoritarian politics — supposedly favorable to an equally intense judicialization of legislative politics — these phenomena seem to be the exception rather than the rule.

Explaining the sources of this reluctance to judicialize politics on the part of potential political litigants is a crucial endeavor in order to understand the role of constitutional courts in modern democracies. In fact, one of the cornerstones of the argument about the expansion of judicial power, both in terms of the direct (legislative annulments) and indirect (autolimitation) impact of constitutional courts, is the notion that the potential for countermajoritarian litigation is a permanent shadow over legislative
politics. However, oppositions in Spain and Portugal seem to be much less willing to bring courts into the legislative process than the policy-seeking approach to litigation would suggest, with the result that the overwhelming majority of legislative production passes outside the scope and scrutiny of constitutional courts. Why?

This chapter will try to answer this question, by addressing two general hypotheses and their implications. First, that even if political actors cared exclusively about policy, strategic (rather than naïve) oppositions cannot be expected to become voracious litigants, since referring legislation to constitutional court is not always likely to bring policy benefits, but also policy costs. Second, that constraints felt by some types of strategic political litigants become even stronger if we consider other goals they may have besides policy as well as the potential conflicts posed between those goals in everyday legislative politics.

**Who wants to lose in the Court? From naïve to strategic litigants**

The first assumption upon which the policy-making approach to litigation rests is that, in deciding whether to refer legislation to the Court, litigants care primarily about whether policies proposed by majorities deviate from their policy preferences. More specifically, "the more C's [the opposition's] preferred policy outcome differs from that proposed by I [the government and the majority], the more likely C will be to attack I's proposal in Parliament and, if the proposal is not amended to C's satisfaction, to refer the proposal to the Council for review" (Sweet 1998, 332). From this point of view, litigants are naïve policy-seekers. Either because they lack the necessary information about judicial preferences and likely judicial decisions or simply because they do not care much
about what happens after laws are referred to the Court, it is the distance between the
bills proposed (and laws passed) and their ideal policies that affects their decision to
litigate, rather than the distance between the policy outcomes of litigation and ensuing
judicial rulings and their own preferences.

To what extent is this assumption realistic? At first sight, it could be argued that
constitutional litigants are too nearsighted to be able to make strategic calculations about
the preferences of justices, how courts are likely to rule on the constitutionality of
legislation, and the consequences of those rulings. However, that argument would hardly
be credible. As a large body of literature has documented, legislative politics in several
European democracies have become positively "infected" with arguments of
constitutionality, and legislators extensively use constitutional arguments in political
debates. Moreover, in the Spanish and Portuguese cases (as in several other constitutional
courts), justices can cast dissenting and concurring opinions, thus providing even more
information to both oppositions and majorities about prevailing jurisprudential
orientations, individual preferences of justices, and the internal balance of powers within
the Court. Therefore, politicians do seem to have an important amount of information
about judicial preferences, constitutional arguments, and likely judicial decision-making
outcomes.

Nevertheless, it could still be argued that, although litigants do have some
information about judicial preferences and likely rulings, they simply do not have to care
much about those rulings when deciding whether to refer legislation to the Court. At first
sight, a judicial defeat may not look like such an undesirable outcome for litigants. For an
opposition party devoid of any significant influence in the legislative process — as those
we often find in the Spanish and Portuguese cases, particularly under majority governments — referring legislation for abstract review may remain the last (if not the single) alternative to unfettered majority rule, and losing in the Court seems to yield no more negative consequences than not referring legislation in the first place.

However, again, such arguments would collide with both available evidence and reasonable theoretical expectations. Activating courts, particularly when judicial preferences are known to be closer to the lawmaking majority's than they are to the opposition's, is not a risk-free proposition in terms of policy outcomes. Courts may take advantage of this opportunity to expand on broad constitutional interpretations in directions undesired by litigants, placing the judicial and legislative development of entire policy areas under the shadow of their jurisprudence. In fact, although politicians have incentives to litigate because "both [the opposition] and [the government and the majority] care deeply about constitutional development," this is also precisely the reason litigation may not take place at all: referrals "may be avoided for fear of provoking an unwanted constitutional innovation" (Sweet 1998, 333).

This is particularly so because many of the constitutional issues raised by the judicial scrutiny of bills and statutes concern not only their substantive policy content, but also the distribution of powers between executives and parliaments and arbitration in national regional-conflicts. By soliciting judicial decisions that end up confirming the constitutionality of legislation passed by majorities or of decrees approved by executives, political oppositions may unintentionally contribute to strengthening both the executive branch as a whole and thus the majority supporting it, with far-reaching effects for the control over major policy-making areas. We know, for example, that by conceding the
extensive use of decree-laws by the executive, the Italian constitutional court became a major "accomplice" in the increasing marginalization of parliament in policy-making in the 1960s and 70s (Volcansek 2000, 34-41). And in the United States, one of the major contributions of Supreme Court jurisprudence has been to shift the balance of power from Congress to the executive branch in what concerns unilateral action in foreign policy (McCann 1999, 74).

Judicial decisions have thus potentially important distributive effects: they determine not only which policies are adopted, but also the way power is ultimately allocated among political actors. It is therefore only natural that potential litigants care deeply about the likely outcomes of judicial decision-making. Strategic political actors who care about control over policy outcomes are, at the very least, unlikely to act with blind litigatory fury when faced with important policy changes. If they are anything other than naïve, they will think twice before bringing a known judicial ally of the lawmaking majority into the legislative process, especially if that ally's decisions that can only be reversed by a qualified majority, as happens with rulings issued by constitutional courts in parliamentary democracies.

Losing in the Court becomes an even riskier proposition if we consider other consequences of judicial decisions. One famous speculation about the effects of the U.S. Supreme Court's rulings is that the Court, by reaffirming majority’s policies, provides them with increased legitimacy (Dahl 1957). Although disputed by subsequent studies (most notably by Adamany 1973), the hypothesis has actually found empirical support in an incipient but growing body of survey-based and experimental research, which has produced "evidence that the Court does exert some positive influence on the attitudes that
people hold," at the very least in the eyes of particularly interested and attentive constituencies (Hoekstra 1998).¹ These purported effects rely on the notion that the Supreme Court is a credible institution enjoying high and — in spite of some sensitivity to longitudinal shifts in specific support and differences among members of the public — relatively stable levels of diffuse support, a notion that has also been confirmed by most research (Caldeira 1986; Caldeira and Gibson 1992). Although we know precious little about the dynamics of public support for constitutional courts, and much less about the effects of their decisions outside the United States, we do know that several European constitutional courts (such as those in Germany, Poland, Portugal, and Italy, for example) enjoy levels of diffuse support that almost match or even surpass those enjoyed by the U.S. Supreme Court (Gibson, Caldeira, and Baird 1998, 531). Thus, if the findings in the United States hold in any way in a comparative context, constitutional courts that are favorable to majorities' preferences may give legislation a judicial "stamp of approval" that it would otherwise lack, increasing public support for them and causing even greater losses to policy-minded oppositions.

The plausibility of these hypotheses as applied to the Spanish and Portuguese cases can be assessed in two ways. First, by focusing on the almost obsessive efforts made by political actors to ensure that judicial preferences are close to their own. And second, by testing whether their success or failure in that endeavor actually affected their litigation strategies.
Struggling about judicial preferences

Recall from chapter two that one of the institutional rules that PSOE had successfully pushed for during the constituent process was the staggered appointment of one-third of the Court's justices every three years. Understandably, as an opposition party at the time, the Socialists wanted to make sure that any future electoral realignments might be reflected in the Court's composition sooner rather than later. Since the constitutionally imposed term of the justices was nine years, one of the transitional dispositions of the Spanish Constitution established that, after three and six years had passed since the first appointment, one-third of the court's justices each time would have to be either confirmed or replaced. Only then would their nine-year term become effective.

As it happened, the need to appoint new justices to the Tribunal arose even before those first three years had been completed, with the December 1982 death of Plácido Fernández Viagas, who had been one of the two justices elected by the Consejo General de Poder Judicial (CGPJ) back in 1980. The CGPJ replaced him with Francisco Pera-Verdaguer, a Supreme Court judge since 1967 who, unlike Fernández Viagas, belonged to the more conservative faction of the judiciary. Thus, as the date to confirm or replace the four justices that had been elected by Congress in 1980 drew nearer, the stakes involved in judicial appointments increased substantially: although the Socialists now enjoyed an absolute majority in parliament, the balance of forces within the Court had become even more unfavorable to them. From a 7-5 relationship between "conservative" and "progressive" justices, that balance had shifted to 8-4, with García Pelayo, Angel Latorre, Tomás y Valiente, and Díez de Velasco as the remaining center-left stronghold.
In January 1983, the Socialists made a first attempt to address the problem, and proposed a "compromise solution" about the four justices to be appointed by Congress: while two would be replaced, two would be reappointed. However, that particular "compromise" was anything but naïve: while PSOE was more than willing to confirm Díez de Velasco and Tomás y Valiente, the same was not true with Francisco Rubio Llorente and Antonio Truyol, both seen as farther away from the Socialists. In fact, high ranking Socialist officials made no secret of their intention: that "the new parliamentary majority should reflect itself in a more progressive composition of the Tribunal" or, more bluntly put, and that "the distribution of votes in the 1982 elections should influence the composition of the Court". The utmost importance given by PSOE to this issue is particularly striking when we consider that the Socialists had had no trouble displaying their "impartiality" by supporting the appointment of people like Hernández-Gil and Joaquín Ruiz-Giménez — two center-right figures — as, respectively, president of the Consejo del Estado and Ombudsman.

The distribution of seats among parties in Congress gave PSOE an important advantage: in order to obtain the necessary three-fifths vote to elect the justices in Congress, the Socialists could negotiate the appointments either with Alianza Popular or, alternatively, strike a bargain with the Catalan or Basque nationalists. However, no party in the opposition seemed to think the issue any less crucial than PSOE. AP immediately declared its unwillingness to support any "partial" change in the composition of the Court, arguing that either no justice should be replaced (maintaining the current balance of forces unfavorable to the Socialists) or, alternatively, that all would have to leave (allowing, conceivably, for the populares to propose justices of their own for the very
first time). In fact, the possibility of Fraga (AP's leader) or Herrero de Miñón (leader of the Coalición Popular parliamentary party) accepting PSOE's proposal became increasingly remote as the Tribunal began to slowly move to the storm center of Spanish politics in early 1983. While the ruling on the constitutionality of LOAPA was still pending, the populares had referred the decree expropriating RUMASA for a posteriori review and made their first attempts at the use of a priori litigation against organic laws: the local elections law had already been referred to the Court and, as the parliamentary discussion about the partial decriminalization of abortion proceeded, Herrero announced that "in all likelihood, this issue will only be solved with a ruling by the Constitutional Court."

Thus, following several failed attempts at securing the support of nationalist parties in order to dispense with AP's support for the election of new justices, the Socialists decided to quit. By September 1983, already two months after the Court had completed its third anniversary, they simply proposed the reappointment of all the four justices, including Truyol and Rubio Llorente, which were rapidly confirmed by Congress.

However, the Socialists' setback was only temporary. Two years later, while several rulings resulting from a priori litigation by AP were still pending, PSOE officials made clear they intended to make serious changes in the near future in what concerned the composition of the Constitutional Court. This time, luck was on their side, since the next contingent of justices to be confirmed or replaced in 1986 corresponded to those appointed by the executive (2) and elected by the CGPJ (2). In other words, PSOE could swiftly move to unilaterally replacing Jerónimo Arozamena and Goméz Ferrer (who had been appointed by UCD’s government back in 1980). Their additional hope was that the
new CGPJ, in which both PSOE and the progressive association *Jueces para la Democracia* had recently increased their representation, might help to reestablish the balance between "progressive" and "conservative" appointees that had been broken with the election of Pera-Verdaguer in 1982. Finally, since the term of 73-year old García Pelayo as President was coming to an end (making it unlikely we would continue in the Court) and Díez de Velasco had also resigned, there were now six full vacancies in the Court, in whose replacements the Socialists could now make their political clout clearly felt.\(^6\)

In fact, although they manifested a willingness to reach a "limited consensus" with the opposition on the appointment of the new justices,\(^7\) the Socialists simply sidestepped AP in what concerned negotiations for the replacements of García Pelayo and Díez de Velasco, and pacted the election of the justices appointed by both chambers of parliament with PNV instead.\(^8\) In March 1986, Tomás y Valiente — which the conservative newspaper ABC summarily described as the "government's candidate"\(^9\) — was elected President of the *Tribunal* by his peers.
In a swift move, the Socialists had managed to reverse the balance of power within the Court, not only placing the old UCD appointees in a minority but also preventing the *populares* from appointing justices on their own. It is also useful to recall that this had been preceded by the elimination of *recurso previo* and the approval of the new organic law of the judiciary, allowing the parliamentary appointment of all 20 members of the CGPJ (instead of only eight), with the specific aim of reducing the influence within this judicial management body of conservative judges elected by their peers while, in turn, increasing the influence enjoyed by the Socialists (as well as the likelihood of the CGPJ appointing more "progressive" judges to the Constitutional Court itself). In May 1985, the elimination of *a priori* review was ruled by the Court as being constitutional, and the same occurred with the judiciary's organic law in July 1986. Therefore, by the mid-1980s, both through legislative changes and judicial appointments, the PSOE government had successfully redesigned several interrelated secondary
characteristics of the regime, allowing "non-majoritarian" judicial institutions to reflect much more clearly the majoritarian turn that had taken place in the 1982 elections.

Throughout the following years, the combination of the rule of staggered appointments, the three-fifths majority rule required for the election of the justices by Congress or Senate, the executive's own appointment prerogatives, and the sheer political clout enjoyed by PSOE allowed the preservation of at least a plurality of Socialist-appointed justices on the Court. In fact, by February 1989, the Socialists had already converted that plurality into a majority, and until 1998, justices proposed or seen as close to the Socialists remained the dominant force inside the Tribunal, as can be seen in Table 6.2. The partisan-political composition of the Court would only suffer any significant changes two years after PSOE had been sent to the opposition. In 1998, and unlike what had occurred since 1980, only an agreement between the two largest parties would suffice for the election of the Senate appointees, as even the combined vote of PP and the Basque and Catalan nationalists would remain four votes short of the necessary 155 senators. Thus, following ten months of painstaking negotiations, in which the names of a large number of candidates were circulated, a final solution was agreed upon by the leaderships of PP and PSOE, with the former proposing two justices (Vicente Conde and Fernando Garrido) and the latter one (Maria Emilia Casas), while a fourth justice deemed as consensual, Jiménez Sánchez, was also elected. Thus, the electoral change of 1996 was ultimately reflected in the 1998 renewal of the Court: for the first time since the mid-1980s, the justices proposed by PSOE were again in the minority inside the Court.
Table 6.2 The composition of the Spanish Tribunal Constitucional, 1989-99 (in bold, new justices in each period; in italics, President)

In Portugal, the political struggle over the composition and preferences of the Court has been no less intense than in Spain. Recall from chapter three that, back in 1982 — set on reducing President Eanes's influence in the Court and, at the same time, on mitigating the potentially negative reaction of the judiciary to a Tribunal strictly elected by parliament — the PS and the ruling PSD-CDS coalition had concocted a complex solution for judicial appointments, containing two main "formal" clauses. First, ten of the thirteen justices would be appointed by parliament by a two-thirds majority, while the remaining three would be co-opted by the first ten justices from among career judges (who would have to be represented in the whole Court in six out of the thirteen seats).

Second, the justices served terms that were not only short (six years) but also renewable.

In practice, during the difficult process of cooption that had extended well until 1983,
the political arrangement around the Court's composition ended up becoming even more complex and including a series of informal arrangements: of the thirteen justices, twelve were "indicated" by the parties in parliament, including two of the co-opted justices; the leftist and rightist blocs in parliament proposed the same number of justices each; PSD and PS allowed the CDS and the PCP to propose a minority of justices within each bloc; the thirteenth justice would be "neutral"; and the Court's president would be a PSD (government) appointee, while its Vice-President would be a PS (opposition) appointee. The main objective of this surgically (un)written "gentlemen's agreement" was, in the words of two of its justices, to make "the predictable composition of the Court (...) such that its decisions could not be predicted" (Almeida 1995, 248) and creating a "Tribunal sheltered from any possible fluctuations of majorities in the Assembleia da República."¹²

However, the terms of this agreement were submitted to important tensions throughout the following years, that played out whenever justices had to be replaced and terms went up for renewal. The major source of those tensions ended up being, precisely, the fluctuations in the balance of powers in parliament and their effects on executive-legislative relations. The first disturbance in these equilibria was the formation of a PS-PSD grand coalition after the April 1983 elections. What had been conceived as a Court composed by the same number of justices proposed by the majority and the opposition parties became, at least from the point of view of its composition, a seriously unbalanced Court in favor of the government well until October 1985, as no less than eight out of thirteen justices had been appointed by either the PS or the PSD.
The end of the *Bloco Central* in 1985 reestablished, at least partially, the previous balance, taking away from the government of the day a majority within the Court. However, this did not put an end to the tensions surrounding its composition. As we can see in Table 6.3, the four vacancies opened by the death or resignation of justices in the *Tribunal* between 1984 and August 1989 were followed by the appointment of only a single justice, Costa Mesquita (proposed by the CDS). In other words, between 1983 and 1989, the Court's composition remained incomplete, as the PSD showed little hurry to pact the replacement of Jorge Campinos (who had resigned in 1985) with the PS. However, by 1988, after Costa Mesquita's death and anticipating the exit of PSD-appointee Mário Afonso, the Social Democrats became increasingly concerned about the effects of the increasing litigation brought by the President and the opposition against their absolute majority's policies. In May 1988, the PSD suffered a major setback in the Court, as the bill that would allow the government to liberalize labor legislation —

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(C) Coopted justices

Table 6.3: The composition of the Portuguese *Tribunal Constitucional*, 1983-89 (in bold, new justices in each period; in italics, President)

The end of the *Bloco Central* in 1985 reestablished, at least partially, the previous balance, taking away from the government of the day a majority within the Court. However, this did not put an end to the tensions surrounding its composition. As we can see in Table 6.3, the four vacancies opened by the death or resignation of justices in the *Tribunal* between 1984 and August 1989 were followed by the appointment of only a single justice, Costa Mesquita (proposed by the CDS). In other words, between 1983 and 1989, the Court's composition remained incomplete, as the PSD showed little hurry to pact the replacement of Jorge Campinos (who had resigned in 1985) with the PS. However, by 1988, after Costa Mesquita's death and anticipating the exit of PSD-appointee Mário Afonso, the Social Democrats became increasingly concerned about the effects of the increasing litigation brought by the President and the opposition against their absolute majority's policies. In May 1988, the PSD suffered a major setback in the Court, as the bill that would allow the government to liberalize labor legislation —

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extending the concept of "just cause" in job dismissals to encompass non-wrongful conducts — was ruled as unconstitutional. Reasoning that, "in all likelihood, the Court's decision would be completely different if the two vacancies had already been filled,"\textsuperscript{13} this defeat stiffened the Social Democrats' resolve to change the Court's composition, arguing that they should be able to fill the two vacancies on grounds of their absolute majority in parliament.\textsuperscript{14} Although the Socialists clearly announced their unwillingness to cooperate in such a solution — arguing this would cause an "inversion in the correlation of forces within the Court"\textsuperscript{15} — the government went ahead anyway with submitting the names of its two candidates to parliament. However, in February 1988, the original deal struck back in the early eighties proved its resilience: Tato Marinho and Vítor Nunes de Almeida failed to obtain the necessary two-thirds majority in parliament and the Court remained incomplete.\textsuperscript{16}

Five months later, with Mário Afonso's resignation, the Tribunal, supposedly composed of 13 justices, had already been left with no more than ten. Only in 1989, when the six-year term of the serving justices came to an end, did negotiations advance. And there, again, the effects of the mutual veto powers exerted by PSD and PS in the appointment of the Constitutional Court justices continued to be felt. The Socialists were able to resist all pressures exerted by the Social Democrats in order to obtain a majority within the Court, and their only concession was to award its Presidency to a justice of PSD's choice (but not without having vetoed one of the names proposed by the Social Democrats for the office).\textsuperscript{17} Ultimately, the solution — reportedly concocted in a high level meeting including the Prime Minister, PS's leader Jorge Sampaio, and even one of PS's new judicial appointees —, was to cut into PCP's and CDS's "quotas": previously
entitled to indicate two justices for each of the "leftist" and "rightist" blocs, the smaller parties were now left with only one justice each, while both larger parties increased their "share" to five justices each, including two young former-MP's, Assunção Esteves (PSD) and António Vitorino (PS). In October 1989, the cooptation of the remaining three justices — with one of the justices picked consensually as "equidistant" from the two major parties (Araújo 1997, 102) — finally filled the Court for the first time since 1986.

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(C) Coopted justices

Table 6.4 The composition of the Portuguese Tribunal Constitucional, 1989-94 (in bold, new justices in each period; in italics, President)

Most of the main features of the process of judicial appointments in Portugal — extensive interparty negotiations between PS and PSD about all names, including the coopted justices; mutual veto powers on the candidates presented by each party; and frequent paralysis in negotiations, leading to frequently "incomplete" courts — have remained basically intact until today. For example, the following round of reappointments — which should have occurred in 1995 —, only took place in March
1998 (!), after negotiations having been constantly frustrated by deadlocks created on the pretense of a variety of issues, such as which party should be entitled to indicate the Court’s President (after the Socialists claimed that presidency following their victory in the October 1995 elections), the constitutional revision of 1997 and the amendment to the Court's organic law, the 1998 referendum on the decriminalization of abortion, or the profiles of various candidates presented by each party.¹⁹

By the end of this convoluted process, only two things had changed. One was the regulation of the justices' terms, which, under a previous agreement signed between PS and PSD, was rendered not-renewable and increased to nine years in the 1997 constitutional revision,²⁰ leading the parties to negotiate a "rotating" presidency for the Court (four and half years by a "rightist" justice and the remaining period by a "leftist" justice). The other was the basic profile of the justices that ended up being appointed to the Court in 1998. After PS and PSD systematically vetoed names which, according to the press, were perceived as "lacking the profile to become justices of the Constitutional Court"²¹ (namely, several former MPs or party cadres from both parties) the justices appointed in March 1998 were generally perceived as producing a "depoliticization" of the Court, since they lacked any previous formal partisan affiliations and careers.²² However, the basic terms of the deal between the PS and the PSD — an equal number of "left-leaning" and "right-leaning" justices and the maintenance of an "equidistant" justice — were not changed. In fact, they have remained practically intact from 1982 until today.
Table 6.5 The compositions of the Portuguese Tribunal Constitucional, 1994-99
(in bold, new justices in each period; in italics, President)

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(C) Coopted justices

This account of judicial appointments in Spain and Portugal allows us to point out the basic similarities and differences between both cases. The first similarity is the extent to which political parties, at the highest level, have remained directly involved in judicial appointments whenever the process kept being reopened either by institutionalized rules (the staggered appointments in Spain or the short and renewable six-year term in Portugal) or by unexpected vacancies caused by the resignation or death of justices. The second similarity is that, in those negotiations, all parties made systematic efforts to place in either court justices whose political preferences were close to their own, and in some cases even figures with political and personal ties to parties and their leaders. In those efforts, parties ended up being more or less successful according to the prevailing rules and the political contexts under which judicial appointments took place. In Spain, for example, the Socialist government enjoyed important advantages in this respect: first, it was able to resort to agreements with smaller parties — IU, CiU or PNV — in order to
bypass deadlocks in their negotiations with AP/PP; second, it enjoyed powers of direct
appointment of two justices, that could be used to make unilateral choices whenever the
rule of staggered appointments opened opportunities to politically "update" the Court's
composition. Thus, while in government, the only period when the Socialists faced a
potentially hostile majority in the Court was between 1982 and 1986, and even then it
was a majority composed of justices that had not been nominated by AP/PP, but rather by
UCD. After the *populares* came to power in 1996, it was their turn to benefit from the
same rules that, in Spain, typically prevent the congruence between the preferences of the
opposition and those of the *Tribunal*. Between 1996 and 1998, the *populares* did face a
potentially hostile Court, but the new round of appointments by the Senate in December
quickly changed that, allowing PP to neutralized the previous domain of PSOE-appointed
justices.

What makes the Portuguese case somewhat different is not the importance
political parties place on judicial appointments, nor their almost obsessive concern with
preventing their adversaries from populating the Court with a potentially hostile judicial
majority. Instead, the difference lies in the fact that no single judicial appointment could
be made without the agreement of the two largest parties. This has produced frequent
paralyses in negotiations and the existence for extended periods during which the Court
remained "incomplete", especially when that incompleteness happened to suit the
interests of one of the major parties. This mutual veto power enjoyed by PS and PSD also
helps to explain why the 1982 "gentlemen's agreement" and most of its (largely informal)
clauses have remained basically intact until today: that agreement has become a focal
point to which oppositions can (and majorities are forced to) resort after their veto power
over appointments render any substantive changes impossible (Araújo 1999, 154-155). Finally, this has produced an additional outcome of utmost importance: even more constantly so than what occurred in Spain, there has not been a single moment since 1982 when an incumbent party was forced to face a Court composed of a majority of justices appointed by parties of a different ideological bloc in the party system. As we shall see next, this holds crucial implications for the politics of constitutional litigation in both countries.

**Strategic litigation**

The ideological and political outlook of either Tribunal, with which the political actors with access to the Spanish or Portuguese courts have been so evidently concerned, has mattered for litigation strategies. In fact, the willingness to refer laws to the court for abstract review has been determined not only by what kind of policies majorities have passed, but also by the likelihood of judicial annulments, as assessed by the partisan-political composition of the courts.

The intense abstract review litigation that characterized the Second Legislature in Spain, as well as its later decline both on the part of AP and the autonomous communities, are good examples of this phenomenon. In his memoirs, referring explicitly to PSOE's failure to replace Rubio Llorente and Truyol Serra back in 1983, Herrero de Miñón notes how "this triumph led to an excessive confidence in the Court, as well as to our referring many of the laws that, against the will of the **populares**, had been approved by the Congress and the Senate, treating the Court as a third chamber" (Herrero de Miñón 1994, 291). Thus, in the words of AP's parliamentary party leader in the early 1980s, the
frequent use of abstract review litigation by the opposition in that period was caused not only by the majoritarian turn in Spanish politics and the decline of opposition influence in policy-making, but also by the perception on the part of the *populares* that the Court — given its unchanged composition — could remain an ally of the center-right.

However, this was not to remain a permanent feature of AP's attitudes towards the *Tribunal Constitucional*. A succession of rulings issued on *a priori* review cases in the mid-eighties were not as favorable to the *populares* as they had expected. Although the abortion and right to education laws were indeed ruled partially unconstitutional (events that were hailed at the time as opposition victories), as soon as the dust settled it became clear that what had been ruled unconstitutional in those cases did not in any way prevent the adoption of the fundamental tenets of each law.\(^{23}\) Besides, the opposition’s litigation against both the elimination of *recurso previo* and the union law proved totally fruitless, since the Court judged them to be entirely according to constitutional rules.\(^{24}\) Thus, by 1985, AP's vice-president Ruiz Gallardón was already accusing the *Tribunal* of "reinterpreting legislation in order to declare it according to the Constitution."\(^{25}\)

But it was the February 1986 renovation of the Court — in which AP was prevented from making any appointments and Socialist-appointed justices became a plurality — that made the center-right opposition seriously reevaluate their previous enthusiasm about the virtues of litigation. Now, from the point of view of the *populares*, the Court had become "a third jurisdictional instance disturbing the constitutional equilibrium",\(^{26}\) and PSOE's operation of judicial reappointments "risked putting an end to the institution itself".\(^{27}\) Perceiving there was now a potential inimical plurality within the *Tribunal*, the center-right opposition realized that the use of abstract review litigation as a
weapon against the majority had become much less politically profitable: as an official statement by PDP, AP's junior partner in the parliamentary Coalición Popular, put it:

"The renovation of this High Tribunal has been produced without taking into account the demands that derive from the high functions it plays in our system. (...) Its new composition does not reflect independence (...), but rather the proximity to the parliamentary majority and the Government. In this situation, we are in favor of reducing the use of referrals to the indispensable minimum."

PSOE's consolidation of a "judicial majority" in the next few years only served to increase the mistrust of the main opposition party vis-à-vis the Court. The criticism of the Socialists for having "politicized" the Tribunal was slowly converted into attacks against the Court itself, as well as against the rules designed for judicial appointments. For Manuel Fraga, for example, PSOE's government had "created the conditions for the emergence of serious doubts about the possibility of governmental influence over the Court," and Tomás y Valiente, the Court's President, "behaved as a Socialist militant." By 1992, the populares had grown so skeptical about the Tribunal that, in a context of highly antagonistic majority-opposition relations, they moved to use the entire process of judicial appointments to delegitimize the Court rather than actually attempting to influence its composition. When five more seats in the Court became vacant, the populares made the Socialists an offer they would have to refuse, linking any possibility of negotiation to the issue of the treatment of the opposition in the public television's news and demanding to be able to fill three of the five vacancies open. After the Socialists duly refused the deal, PP’s leader José María Aznar immediately moved to contest the legitimacy of the entire appointment system as it had functioned until today, accusing PSOE of "sequestering" the Court and stating that PP would never accept any
sort of agreement on "quotas" of justices to be appointed by each party. After engaging in contacts with the associations of magistrates and prosecutors, PP produced a list of appointees entirely on its own, including highly prestigious judges and law professors. In the end, after a convoluted sequence of events and the inevitable defeat of PP's list, the Socialists did include one of the names proposed by *populares* in their own list — Rafael Mendizábal — and pacted the election of the remaining justices with the Communists and CiU. However, in the end, the whole process resulted, as the outgoing President Tomás y Valiente himself recognized, in serious damage to the Court's prestige, leaving a bitter taste about the "quota system" and placing the blame of an excessive politicization of the *Tribunal* predominantly on the government's shoulders. As for PP, it could now openly claim that the institutions of the rule of law remained entirely penetrated and controlled by the Socialists and that the government had obtained a "*Tribunal Constitucional a la carte.*"

The *Partido Popular* was not the only political force (and constitutional litigant) in the opposition that, as the struggle about the composition of the latter progressed, was led to review its opinion of the Court and the utility of litigation. In the previous chapter, we saw how the early 1990s witnessed a decline in the constitutional conflicts between the central government and the regions, particularly in the case of Catalonia and Euskadi, after both "historical nationalities" had made extensive use of all the avenues of access to litigation that they enjoyed during the 1980s. Several plausible explanations have been advanced for that decline, such as the role of the Court's own jurisprudence in resolving constitutional ambiguities (Tomás y Valiente 1992, 41) or the increased influence of CiU (and, to a lesser extent, PNV) in national-policy making since 1993. However, an
additional explanation lies, again, in the effects of the Court's composition on the way the comunidades perceived the utility of litigation and the overall legitimacy of the Tribunal.

Early on, and in spite of an initial mistrust — motivated by the unwillingness of both UCD and PSOE to emulate the solution of the II Republic and allow the appointment of Constitutional Court justices by the comunidades — a series of rulings between the end of 1981 and 1983 helped improving the Catalonian and Basque authorities’ opinion of the Tribunal. For example, the Court refused the use of notions of "general" and "respective" interests as means with which to invalidate legislation by the comunidades, consistently neglected to apply the criteria of prevalence of central over autonomic law allowed for in Article 149 of the Constitution, allowed regional parliaments to exercise their own legislative powers without having to wait for "basic legislation" issued by the central government, and simply prohibited the national parliament from issuing ordinary legislation with general binding force about the redistribution of competencies between central and peripheral authorities. These and other rulings began to persuade the regional governments "that the Court could be an effective, if not the only, guarantor of their powers" (López Guerra 1989, 62).

However, by the end of the decade, and especially after the Court's recomposition in 1989 had been pacted exclusively between PSOE and AP, the attitude of the nationalist Basques and Catalans began to change, and the chorus of criticisms of the Court's composition and rulings began to increase. The most radical reaction came from the Basques. In fact, one of the main (but often neglected) explanations for the decline in regional litigation in the early 1990s — i.e., before PSOE lost its absolute majority — is simply the fact that the Basque authorities simply ceased to refer legislation to the
Constitutional Court altogether after 1990, protesting the Tribunal's composition (Aja 1999, 135). Until this day, PNV has continuously claimed the need to change the appointment system entirely, allowing for the participation of regional authorities and parliaments. Although the Catalan authorities have not followed the Basques in this self-imposed moratorium, their renewed mistrust of Court began to be openly publicized in the late 1980s, and persisted throughout the following decade. In the "Declaration of Barcelona" signed in 1998 — an attempt to recapture previous historical experiments of alliance between the main forces of "historical nationalism" — CiU and PNV (together with the Galician nationalist party, Bloque Nacionalista Galego) appealed for a constitutional reform that would allow the appointment of justices by the regional parliaments, arguing that, in the present conditions, the Court had become part of an "institutional patchwork" that "failed to recognize cultural specificities and specific singularities" and "prevented the full political recognition of our respective nations."

The Portuguese case provides additional evidence of political litigants adjusting their expectations (and their litigating behavior) to judicial preferences. As we have seen, the composition of the Portuguese Court experienced less abrupt changes than the Spanish, given the absence of the mechanism of staggered appointments and the resilience of the "gentlemen's agreement" established in 1982. However, the effects of the Court's composition on litigation strategies are still detectable. The utility perceived by President Eanes in resorting to a priori referrals during the Bloco Central government provides one of several possible illustrations. Recall, first of all, that the PS and the PSD-CDS coalition had designed the institutions of judicial appointment precisely with preventing Eanes from appointing any justices in mind. So transparent was this objective
that the later formation of the *Bloco Central* in 1983 immediately raised the issue of the Tribunal's autonomy vis-à-vis the interests of this grand coalition. As several newspaper editorials did not neglect to point out, "the governmental majority coincides with the majority inside the *Tribunal Constitucional*,"\(^42\) and "now we will know if the Constitutional Court is composed of magistrates with personal honor and personality".\(^43\)

In this context, the early referral by Eanes of a bill creating a very unpopular extraordinary income tax aimed at reducing the huge public deficit — the first *a priori* referral to the newly created Court — was portrayed by the media as a litmus test of the Tribunal's independence.\(^44\)

As it happened, the Court dismissed Eanes's claim that the tax's retroactivity rendered it unconstitutional.\(^45\) Little attention was paid to the fact that only the justices indicated by the Communist Party, Vital Moreira and Mário de Brito, had cast dissenting votes. For the media, the opposition parties, and the sectors close to the President, this "unbelievable"\(^46\) ruling was the required proof that "the apprehension with which the Court's composition had been viewed from the beginning was entirely justified."\(^47\) To the President, however, this also provided additional information. In the past, Eanes, either directly or through the Council of the Revolution, had resorted to litigation in order to place obstacles in the path of the PSD-CDS coalition in the late seventies and early eighties. Now, as one of his chief political advisers eloquently put it in answer to a question about Eanes’s moderate use of *a priori* litigation in that period,

"By then [1983], Eanes quits, he simply lost interest. (...) The creation of the *Partido Renovador Democrático* [as an alternative means for Eanes's political intervention] had already been decided. And we need to take into account the composition of the Constitutional Court: in practice, even before it had managed to pass the bills in
parliament, the government had already successfully tested those bills for their constitutionality."

In fact, after 1983, Eanes’s only additional referral of legislation to the Court concerned the bill that partially decriminalized abortion, which had caused one of the few internal splits in the Bloco Central coalition. As for his litigation against governmental decrees, it was restricted to only five cases: one reforming a specific tax, three concerning the extinction of nationalized merchant navy companies, and another decree reintegrating a civil servant in the administration.

The context faced by President Soares as constitutional litigant was quite different from that faced by Eanes, starting with the fact that, during his two terms, the Court’s composition was never as seriously unbalanced in favor of the government as it had been during Eanes’s presidency. However, Soares's approach to litigation, particularly after 1991, seems to have been influenced by similar strategic considerations. For example, in 1992, the Portuguese parliament passed a bill with PSD and CDS support aimed at reducing the number of military personnel through compulsory retirements, causing high levels of discontent in the military establishment. After Soares's first veto of the bill had been easily overridden by the PSD majority, the Presidency considered the remaining options available, but immediately rejected its referral to the Court: "the series of small unconstitutionalities it contains do not justify the use of a priori review nor would they guarantee that the law will be vetoed [by the Court]." However, it is important to note how the Presidency's reasoning was not limited to whether the bill might be considered unconstitutional in the abstract, but rather whether a specific composition of the Court might result in such a ruling or not. As a senior member of Soares's staff put it,
"Dr. Soares needed our arguments to be convincing. (…) In what concerned abstract judicial review, he always said that our reasoning in the referral had to be sufficiently convincing to persuade him that the Constitutional Court could be persuaded. Afterwards, we did a sort of lotto: we knew the composition of the Court, and weighted, considering what we knew about each one of the justices, how things might work out… One thing is for sure: we never went and asked any of the justices 'what will you do about this?' This simply never crossed our minds. But we certainly evaluated, in each case, if they would 'chew the rope' or, instead, accept our arguments. We looked at previous rulings, about the same issues or similar. We saw that 'this fellow in such date voted thus, therefore it is unlikely he or she will vote differently'. And so on."  

The ability to anticipate judicial rulings and calculate the utility of litigation was facilitated by the publicity of the parliamentary law-making process and the use of constitutional arguments as political weapons in legislative debates:

"Obviously, before the bill gets there, parliamentary debates have already taken place and it is already known in Belém [the Presidential palace] that there might be problems with constitutionality."  

"Of course, in what concerns parliamentary bills, we accompanied the process of drafting and the debates. (…) And in what concerns government decrees, there were leaks, no use pretending there weren't. We knew what was in store for the Council of Ministers, even when he did not have the decree's full text."  

Legal scholars were often invited to participate as informants in the President’s decision-making process, generally on an informal basis. And as a Constitutional Court justice puts it,  

"I don't exclude that one time or another there have been discussions with justices about what was the jurisprudence of the Court about certain issues. But never actually asking the question of 'what would the Court do.' But simply knowing what is the tendency of the Court about this or that issue."
Figures 6.1 and 6.2 allow an assessment of the impact of the political-partisan composition of the Spanish and the Portuguese constitutional courts at any given moment on litigatory behavior. Figure 6.1 shows, for both periods of minority and majority government in Spain, the percentage of bills referred to the Court in whenever it was composed by less than six (less than half of the court) or, conversely, six of more of justices (half or more of the court) appointed by the party currently in government (based on Tables 6.1 and 6.2).
Government status does have, as we had already seen, an apparently strong and decisive impact on the intensity of litigation. But the composition of the Court at any given moment also affects litigation: litigants resort more often to referrals in periods when the less than half of the Court's justices were appointed by the incumbent than when the weight of government appointees is greater, particularly within periods of minority government. The evidence of strategic litigation is also present in Portugal, as we can see in Figure 6.2. Again, either in periods of majority or (especially) minority government, the number of justices appointed by the party currently in government makes a difference in the likelihood of oppositions or the President resorting to litigation.
Table 6.6 displays a more systematic analysis of these phenomena. It shows the results of logistic regressions in which the dependent variables take the value one if a bill passed by the Spanish or Portuguese parliaments was ultimately referred for abstract \textit{a priori} or \textit{a posteriori} review and zero otherwise.\textsuperscript{56} On the left-hand side are the constant term and two independent macro-level variables. The “policy-seeking hypothesis” is generically tested by the variable "Majority government," which takes the value one if the bill was passed during a period of majority government and zero otherwise: we should expect that the probability of any given bill being referred should increase for bills passed
in periods when the government is supported by absolute majorities in parliament. If the hypothesis is correct, the coefficients should be positive.

The hypothesis that litigants behave strategically, taking into account the Court's composition, is tested by the variable "Number of government justices": it is measured by counting, at the time each bill was passed, the number of justices in each Court who were proposed by the government party. If litigants indeed behave strategically, taking into consideration the composition of the Court and the likelihood that their litigation results in favorable rulings, the coefficients should be negative: the larger the number of justices in the Court affiliated to the current majority, the less likely it becomes that oppositions will litigate against the bill.

<table>
<thead>
<tr>
<th>Independent variables</th>
<th>Coefficient</th>
<th>Standard Error</th>
<th>Coefficient</th>
<th>Standard Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>Majority government</td>
<td>1.18***</td>
<td>.20</td>
<td>.88**</td>
<td>.28</td>
</tr>
<tr>
<td>Number of &quot;government justices&quot;</td>
<td>-.13*</td>
<td>.06</td>
<td>-.24*</td>
<td>.12</td>
</tr>
<tr>
<td>Constant</td>
<td>-1.84</td>
<td>-1.96</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

N=1,028. \( \chi^2=35.795^{***} \) Corr. predict=86%
N= 925. \( \chi^2=13.074^{**} \) Corr. predict=93%

Table 6.6 Logistic regression analyses of the effects of majority government and the composition of the Court on abstract review litigation

The results in Table 6.6 confirm that, in both Spain and Portugal, the two explanatory variables have the expected sign and are statistically significant. The meaning of the coefficients can be expressed in terms of changes in probabilities,
calculating the effects of changes in each independent variable. Thus, in Spain, for a bill passed during periods of majority government (a one-unit increase in the independent variable), the likelihood of it being referred increases by about 21 percent points.\textsuperscript{57} The same happens with litigation in the Portuguese Constitutional Court, although the impact of this variable is somewhat weaker than in the Spanish case: for a bill passed during periods of majority government in Portugal (a one-unit increase in the independent variable), the likelihood of it being referred increases by about eight percentage points.

The effects produced by changes in the composition of the Spanish or Portuguese courts in litigation are more modest, but still statistically significant. In Spain, that effect is substantively relevant considering that the number of justices affiliated to the government party has ranged from seven (1989-92) to two (1996-98) throughout the entire period. Thus, a decrease in five justices appointed by the party currently in government increases the probability of a bill being referred by about five percent, controlling for the impact of government status. In other words, regardless of whether the government was supported by a parliamentary majority or not, the smaller the number of justices appointed by the government's party in the Spanish Court, the more likely is that a bill ends up being referred, and vice-versa. As for the impact of the Portuguese Court's composition on litigation, it is actually stronger than in the Spanish case: for each justice proposed by the government added to the composition of the Court, the probability of bills being referred decreases by almost two percent. This is not surprising, considering that, contrary to what occurs in Spain, the opportunity to refer bills for \textit{a priori} review naturally increases the weight that the present composition of the Court is likely to have on the considerations of litigants. Therefore, in Spain and Portugal, the concern of
litigants with judicial outcomes causes them to be neither blind nor necessarily voracious: they tend to shy away from litigation the more courts share the preferences of the lawmaking majority, and to become more enthusiastic litigants when they perceive that justices are closer their own preferences.58

**Electoral goals and the costs of litigation**

Besides treating litigants as naïve, the policy-seeking approach to litigation rests on a second assumption: that by seeking a judicial veto of majority policies, political oppositions are unlikely to endanger other relevant political objectives that may have. In other words, the incentives political actors have to use their access to courts to block majority policies are generally not incongruent with (and may even be reinforced by) the incentives to maximize other objectives, such as office or votes.

In general, it is indeed true that behavior described as policy-seeking litigation may also be as consistent with a vote-seeking strategy. First, as most authors who use spatial models typically assume, the policy preferences of political actors are themselves influenced by electoral concerns. To the extent that voters' choices of candidates and parties are influenced by the issue positions taken by the latter, litigation can be immediately useful for electoral purposes as a means of symbolic "position-taking:" the "public enunciation of a judgmental statement on anything likely to be of interest to political actors" (Mayhew 1974, 53-54). If it is true that parties "worry about the consequences of too much, not too little, compromise" (Sweet 1998, 332) the use of constitutional litigation as the last possible weapon against majority policies shows them at their most uncompromising. Thus, referring laws to constitutional courts starts by
being a fundamentally "rhetorical" activity, through which legislators and parties make their opinions on issues and their opposition to majority policies clearer to voters. Besides, if referrals do result in annulments, the electoral benefits of policy-seeking litigation increase: to the extent that "legislators will be rewarded at election time for obtaining the policy outcome that is as close as possible to the legislator's ideal point" (Huber 1996, 117), litigation that prevents governments from obtaining their ideal policies is also beneficial to oppositions from an electoral point of view.

Furthermore, oppositions may find it electorally advantageous just to obstruct the action of governments through litigation, regardless of how they view the policies passed by majorities. Majorities and the governments they support generally "want to be perceived as efficient and not immobile" (Tsebelis and Money 1992), and timing is of the essence in the production of policy outputs that manipulate economic conditions — such as growth or employment — known to shape the electorate's evaluations of government performance. Therefore, referring laws for abstract review may simply work as a way of placing obstacles in the way of governments' ability to deliver and build support among relevant constituencies and the electorate in general.

Finally, constitutional litigation can even be used as a mechanism to transform the public and political agenda to the advantage of opposition parties. Especially if oppositions have difficulties in espousing a policy platform alternative to that of majorities, they have incentives to convert debates about "position issues" into debates about "valence issues, meaning, those in which there is only a "good" side to be advocated that is shared by a vast majority of the population, such as freedom and human rights, democracy, political corruption, economic growth and productivity, or social
justice (Stokes 1963). By accusing majorities of violating constitutional rules and taking those accusations to their ultimate consequences (referring legislation for abstract review), oppositions can attempt to place themselves on the "right" side (and majorities on the "wrong" one) of a debate about the respect for constitutional rules and values, procedural democracy, and the rule of law.

The case of France has been used, again, to illustrate how oppositions are also moved by the electoral side-benefits of policy-seeking-litigation. Throughout the 1980s and 1990s, after several bills had been heavily attacked during legislative debates on grounds of their alleged unconstitutionality (such as the Decentralization Law of 1982, the Press Law of 1984, the Penal Code reforms of 1986 and 1993), majorities adopted amendments "that were nearly identical to those proposed by the opposition." However, in all these cases, the parliamentary opposition ended up referring the bills anyway. According to Sweet, this occurs basically because oppositions have nothing to lose from an electoral standpoint in using referrals, and may even have something to win. Generally, there is nothing about adjudicating "disputes about the proper scope of legislative authority under constitutional rules" that is necessarily seen as "playing against the rules" and might therefore yield electoral punishments. The public salience of judicial decisions is very low anyway, and "whatever defection [of voters] occurs will not be significant to make a difference." "If electoral constraints play any significant role, they operate in the opposite direction (…). Parties fear being punished by their respective electorates for not making good on their electoral promises" (Sweet 1998, 331-333).

The data available in Spain or Portugal, particularly public opinion data, are clearly insufficient to systematically measure the direct electoral consequences that
litigation yields either for majorities or oppositions. However, elite statements and indirect public opinion data do confirm that electoral considerations do play a role in the politics of constitutional litigation. However, unlike what seems to occur in France, what we know suggests that while the electoral incentives to abstract review litigation might actually be quite small and restricted, its electoral costs might be significant and turn the use of referrals into something of a political liability.

The Spanish case, and particularly AP's "voracious" use of a priori litigation in the Second Legislature, provides an interesting example of this phenomenon. In this period, the populares behaved exactly how the policy-seeking approach would lead us to predict. Facing an overpowering (when not overbearing) PSOE majority government, they referred to the Court several of most important bills passed in the period. We have seen that one of the factors that influenced this behavior was the perception that the Court was populated with justices favorable to the right, who might be more prone to actually veto majority policies. But AP's litigation in this period must also be seen as part of a larger opposition strategy that attempted to paralyze the action of PSOE's cabinet, question the Socialists' allegiance to the constitutional order, and solidify what AP perceived to be a large potential center-right electorate. On the one hand, plagued by profound internal ideological divergences and facing a PSOE government whose policies were less radical that what its previous rhetoric had led to anticipate, the populares had enormous difficulties in articulating an alternative policy platform to that of the Socialists, something that led adopt an opposition strategy that questioned the government's action in "apocalyptic terms" and was mostly focused on "delegitimizing PSOE" (Montero 1989a and 1989b; Pappas 2001). AP's willingness to paralyze the
approval of several organic laws through a priori review was the natural culmination of these predominantly "negative tactics." On the other hand, the populares also perceived the ideological leanings of the Spanish electorare as being generally rightward and believed on a "natural majority" for the center-right (Montero 1986; Powell 2001, 405). Thus, the party focused its litigation efforts on those issues that, since the beginning of the transition and during the constituent process, had sharply divided left and right: church-state relations, particularly in what concerned the funding of private schools; moral issues, such as abortion; and labor-capital conflicts, concretized in the Union Law and AP's claim that it "discriminated against business interests".

However, as it turned out, the end result of this strategy was politically catastrophic for the populares. The 1986 elections, where PSOE comfortably obtained a second consecutive absolute majority, attested that AP's strategy had failed from several points of view. First, it neglected the fact that there was no rightist "natural majority" in the Spanish electorate, which was instead moderate and slightly left of center. Thus, such litigation did very little to change the perception of AP as an extremist party, a perception that remained intact since the late 1970s (Montero 1994, 90; Linz and Montero 1999, 57).

The cases of the litigation against the abortion and right to education laws were particularly relevant, because AP's intransigence showed it to be more extremist than the median voter and, in the case of LODE, even more extremist than the Catholic church itself.  

Second, the use of referrals as a means of obstructionism allowed PSOE to turn AP's strategy of delegitimization against itself: following the lead of Socialist party officials, the media began systematically accusing AP's use of a priori review as pure
fillibustering, leading even the Court's Chief Justice, Manuel García Pelayo, to lament the "excessive use" that was made of constitutional litigation and the "frequent instrumentalization of the Court for problems that could be solved in different ways." In other words, with their use of constitutional litigation, it was the populares who ended up finding themselves on the "wrong" side of valence issues such as moderate and responsible governance and respect for democratic rules. As Montero notes, by 1986, the populares were seen by the majority of the Spanish electorate as a party that "collaborated little or nothing to the resolution of the problems (…) and was unfit to govern" (Montero 1989a, 511). And while PSOE pondered whether to simply eliminate recurso previo from the Court's organic law, the majority of the electorate was already in favor of doing just that: in a CIS poll conducted in May 1984, only 11.6 percent of respondents disagreed with the notion that something should be done to prevent the use of the recurso de inconstitucionalidad with the purpose of delaying legislation from the entering into force. Thus, by using litigation to question the loyalty of the Socialists to the constitutional order, the populares ended up presenting of themselves an image of semi-loyalty to the new democratic regime. And by pursuing by all means available the goals of their hardcore party activists and constituents through constitutional litigation, they pushed their public policy position-taking statements further from the center than what would be desirable in order to avoid the alienation of moderate voters.

It is therefore not surprising that the notion that "excessive litigation" has something of "illegitimate" — and therefore entails political costs in terms of public perception of and support for those who are responsible for such litigation — has become a common fixture of legal-political thinking in Spain. In 1994, Luis López Guerra, a
justice in the Spanish Tribunal Constitucional, advanced his own explanation for the fact that, in Spain, "abstract control is rarely used:"

"This type of procedure is not lacking in certain dramatic overtones. (…) Continuous challenges of the majority party's loyalty to the Constitution does not seem to be an appropriate technique for guaranteeing the stability of a regime. (…). In addition, another aspect of this technique must be considered: a challenge by a minority group to the constitutionality of a law passed by the parliamentary majority must almost inevitably be interpreted as an act of partisan politics" (López Guerra 1994, 25-26).

In Portugal, very similar considerations ended up influencing calculations regarding the use of litigation. In fact, back in 1982, and as a result of the previous experiment with the Council of the Revolution, political actors in Portugal were able to take into account such political costs of litigation even before the Tribunal had come into existence. Between 1976 and 1982, MP's and parties could only refer legislation to the Council of the Revolution indirectly, by making a petition to the Speaker of Parliament to refer laws for a posteriori review (something he invariably did when requested) (Antunes 1984, 316). In 1982, the issue of whether to award MP's direct access to the newly created Constitutional Court raised only mild controversy. The reason was that both Socialist and PSD MP's ultimately converged in predicting that the use of litigation by opposition parties was unlikely to be frequent. As a PS MP (and future constitutional court justice) put it in 1982,

"There are no major risks of a 'trivialization' of constitutional review referrals with this scheme. (…) The practice of the last few years has shown that the deputies have had the perfect notion that, in the day when they trivialize the use of that right, it will have lost its strength. (…) It would be very different if we created a system like the French — giving MP's access to Court in a priori review —, meaning, on top of the legislative process itself. (…) However, in the terms in which we are regulating a posteriori review, the
practice has already demonstrated that there is no risk. *Trivializing referrals entails negative consequences for those who seek unconstitutionality rulings.*”

Although it is not surprising that what was an opposition party at the time could find justifications for giving oppositions access to Court, it rather telling that the center-right PSD arrived at more or less the same conclusion, and even suggested that awarding oppositions the right to refer laws for *a posteriori* review could actually make the use of constitutional arguments in political debates somewhat more responsible:

"Until today, there has been an abuse of accusations of legislation's unconstitutionality. In fact, the possibility of a group of MP's or one-tenth of deputies [referring laws to the Constitutional Court] (...) will contribute to make the Portuguese political environment a bit more sane. An appeal seeking a declaration of unconstitutionality that is not sanctioned by the Constitutional Court will entail very serious political costs for those who make it."”

The practice ended up confirming these predictions. Table 6.7 reveals that, as we already knew, opposition parties in Portugal generally refrained from converting legislative defeats into abstract *a posteriori* litigation: in the entire period, while about 17 percent of all laws passed were supported exclusively by the parties in government, oppositions made "contemporary referrals" of about 2 percent of all laws. The Sixth Legislature is particularly striking in this respect: while about one-third of all laws were exclusively supported by the PSD (and about 43 percent either by the PSD or the PSD and the CDS alone), only about 2 percent of laws ended up being referred.
### Table 6.7 Legislative votes and *a posteriori* litigation in Portugal

<table>
<thead>
<tr>
<th>Legislature</th>
<th>Total number of laws promulgated</th>
<th>Laws passed exclusively with support of the government parties (%)</th>
<th>Contemporary litigation by parliamentary opposition parties (%)</th>
<th>Contemporary litigation by the Communist Party (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>3rd Legislature (1983-85)</td>
<td>92</td>
<td>7.6 (7)</td>
<td>2.2 (2)</td>
<td>2.2 (2)</td>
</tr>
<tr>
<td>4th Legislature (1985-87)</td>
<td>78</td>
<td>- (0)</td>
<td>- (0)</td>
<td>- (0)</td>
</tr>
<tr>
<td>5th Legislature (1987-91)</td>
<td>220</td>
<td>21.8 (48)</td>
<td>5.9 (13)</td>
<td>5.5 (12)</td>
</tr>
<tr>
<td>6th Legislature (1991-95)</td>
<td>165</td>
<td>30.3 (50)</td>
<td>1.8 (3)</td>
<td>0.6 (1)</td>
</tr>
<tr>
<td>7th Legislature (1995-99)</td>
<td>354</td>
<td>13.6 (48)</td>
<td>0.3 (1)</td>
<td>- (0)</td>
</tr>
<tr>
<td>Total</td>
<td>909</td>
<td>16.8 (153)</td>
<td>2.1 (19)</td>
<td>1.7 (15)</td>
</tr>
</tbody>
</table>

Source: see Appendix.

*In this case, although the Communist parliamentary group was already short of the necessary 10 percent of MP's in order to refer laws to the Court, they were joined by MP's of the Socialist Party in the referral of the "Law on Strikes" (Law 30/92)*

As the institutional designers of the Portuguese system had predicted back in 1982, two factors seem to have contributed to prevent *a posteriori* from becoming a means with which to reap electoral benefits. First, unlike what occurs in France (and in Spain until 1985), abstract *a posteriori* review has been practically useless as a means to obstruct the action of majorities. In fact, it was designed precisely *not* to be usable for purposes paralyzing the legislative process: statutes enter into force, remain so regardless of litigation, and are typically only annulled if the Court rules the law to be unconstitutional in its entirety. Moreover, and unlike what occurs in *a priori* review, oppositions are seldom able to reap electoral advantages from judicial annulments in *a posteriori* review. In Portugal, from 1983 to 2001, the average time between the date when referred laws were passed in the final vote in parliament and the corresponding judicial ruling in *a posteriori* review was of 34 months, almost three years.67 In Spain,
that average raises to an even more spectacular 57 months, almost five years (!). In other words, *a posteriori* litigation is simply useless as means of pure legislative obstructionism. As a PS official puts it,

"in the present [2000] state of things, the Constitutional Court simply does not manage its *a posteriori* review docket in useful time. When it[* a posteriori litigation*] was used, it was only as a last resort and a necessary evil. It's simply exasperating."

Second, the perception of potential electoral costs for using litigation also seems to have been involved, especially for some opposition parties. The data in Table 6.7 reveal that only the Communist Party, at least while it enjoyed access to Court, showed any significant appetite for constitutional referrals. Between 1983 and 1991, for example, opposition parties made "contemporary referrals" (referrals made within the same legislature the law has been passed) of a total of 15 laws. PCP MP's were involved in 14 of those cases. This stands in stark contrast with the behavior of the largest center-left opposition party: during the Fifth Legislature, facing a PSD majority, Socialist MP's were involved in the referral of only two laws and, in the entire period between of majority government between 1987 and 1995, a total of six laws.

What may have given the Communists a larger appetite for constitutional litigation that that of other opposition parties? Throughout the 1980s, the PCP's basic political discourse consisted in opposing the dismantlement of the "conquests of the revolution" that had been "constitutionalized" in 1976, accusing the *Bloco Central* first and the PSD government later of trying to amend the Constitution by legislative means (Bosco 2001, 337). Therefore, understandably, the Communists' litigation in this period was systematically (and predictably) directed against policies that cut public services,
restricted public ownership,\textsuperscript{70} and deregulated markets.\textsuperscript{71} This does not mean the Communists believed they had any chance of obtaining judicial annulments of legislation, something that seemed to be as unlikely as it was immaterial for the Communists. On the one hand, they always accused the Tribunal of being little else but a co-conspirator or a scapegoat in \textit{de facto} amendment of the articles of the "economic constitution" even before they were finally amended in 1989.\textsuperscript{72} On top of that, their litigation efforts between 1987 and 1991 \textit{were focused mostly on laws that President Soares had already submitted as bills for a priori review}. The likelihood of the Court seeing such laws declared as unconstitutional in \textit{a posteriori} review was minimal, since most of them had either already been deemed not unconstitutional or amended by parliament according to the Court's rulings.\textsuperscript{73} However, as a semi-loyal party excluded from the Portuguese "inner party system" (Bosco 2001, 337), set in reinforcing the party's image before its encapsulated working-class electorate as one of constant surveillance in relation to the "counter-revolutionary" offensives of the parties to their right (Gaspar and Rato 1992, 202), and with already little to lose in terms of policy outcomes, was free to exhibit before its constituency its uncompromising attitude vis-à-vis the "reactionary offensives" of the right.

In contrast, the restraint used by the Socialists was striking. In parliament, PS MP's and even party leader Jorge Sampaio often joined the Communists in publicly accusing the PSD majority of forcing the approval of unconstitutional norms.\textsuperscript{74} However, when it came to to refer those laws for \textit{a posteriori} review, the Socialists systematically left that task to the PCP. In the entire 1987-1991 period, Socialist MP's — with a single exception — only referred for \textit{a posteriori} review laws that had not been previously
scrutinized by the Court and where a reasonable expectation of success in litigation still existed.  

For the Socialists, whatever the policy and electoral incentives that led them to attack the unconstitutionality of PSD's bills in parliament, they were clearly not enough to outweigh the potential costs of taking the additional step of referring them to the Court.

Finally, the cohabitation between President Soares and the PSD majority between 1986 and 1995, and the former's use of a priori referrals in his two terms, also helps illustrating how electoral goals constrain constitutional litigation. As we have seen in the previous chapter, Soares's first term as President between 1986 and 1991 in cohabitation with a center-right government was unexpectedly peaceful and cooperative. This does not mean that Soares totally abdicated from resorting to his legislative and abstract review litigation powers in that period. As Table 6.8 shows, vis-à-vis PSD's majority governments, Soares referred almost the same percentage of passed bills for a priori review in his first and his second terms.

<table>
<thead>
<tr>
<th></th>
<th>Parliamentary bills</th>
<th>Governmental decrees</th>
<th>% of</th>
<th>% of</th>
<th>% of</th>
<th>% of</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Bills passed</td>
<td>% of vetoed bills</td>
<td>% of</td>
<td>% of</td>
<td>% of</td>
<td>% of</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>bills</td>
<td>bills</td>
<td>bills</td>
<td>reviewed</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>for a</td>
<td>formally</td>
<td>informally</td>
<td>for a</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>prior</td>
<td>vetoed</td>
<td>returned</td>
<td>prior</td>
</tr>
<tr>
<td>Soares 1st term - PSD minority</td>
<td>76</td>
<td>2.6</td>
<td>1.3</td>
<td>1164</td>
<td>0.1</td>
<td>10</td>
</tr>
<tr>
<td>1986-1987</td>
<td>(2)</td>
<td>(1)</td>
<td></td>
<td>(1)</td>
<td></td>
<td>(116)</td>
</tr>
<tr>
<td>Soares 1st term - PSD majority</td>
<td>176</td>
<td>1.1</td>
<td>5.1</td>
<td>2033</td>
<td>0.1</td>
<td>4.2</td>
</tr>
<tr>
<td>1987-1991</td>
<td>(2)</td>
<td>(9)</td>
<td></td>
<td>(1)</td>
<td></td>
<td>(86)</td>
</tr>
<tr>
<td>Soares 2nd term - PSD majority</td>
<td>261</td>
<td>2.3</td>
<td>6.1</td>
<td>2296</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

Source: see Appendix.

Table 6.8: Presidential powers and legislation
However, closer analysis of Soares's constitutional litigation suggests that the contrast between his behavior in the first and second terms was sharper than what the quantitative data suggests. During his first term, Soares's *a priori* referrals mostly concerned, with few exceptions, the PSD's economic liberalization package, the same legislation that, later, the Communists would refer for *a posteriori* review. The rationale, however, had little to do with any substantial opposition of the President in relation to government policies or the willingness to obstruct its action. In fact, Soares himself had pushed for some of these policies as Prime Minister of the *Bloco Central* and now, as President, remained supportive of economic liberalization.\textsuperscript{76} Instead, his motivation was twofold. On the one hand, as one of his political advisers puts it, "to do what any President does in these cases: to defend himself before a controversial policy," very much in the same way that Eanes had did before him in the abortion case.\textsuperscript{77} On the other hand, Soares's referrals were, in some cases, an act of cooperation with the cabinet: they minimized the uncertainty that would follow from this legislation coming into force without being scrutinized by the Court, and almost inevitably being submitted to *a posteriori* referrals by the Communist Party. In fact, in some instances, the advisability of referring the bills to the Court for *a priori* review was mentioned in the government's bill itself\textsuperscript{78} and, at least in three cases, Soares's referrals followed explicit requests by the Prime Minister to that effect (Silva 2002, 325).\textsuperscript{78} Thus, in spite of a few minor tensions,\textsuperscript{79} and as a PSD official stated in 1989, "in the country's recent history, the relations between the President of the Republic and the Government have never have been better."\textsuperscript{80}

All that changed in the Soares's second term. The first sign of trouble in premier-presidential cohabitation arose just a few months before the legislative elections of 250
October 1991, as the President sent a message to parliament alerting for the dangers of an excessive "governmentalization" of the public-owned media, a message that was received by the Social Democrats as an expression of "support for the opposition" and a break in relation to the "political impartiality that should characterize the role of the President." The following years brought a return to the "guerrilla warfare" that had characterized the relationship between Eanes and the AD government. Some of the weapons used by the President (arguably, the most important) were "unconventional," and consisted basically in a sophisticated media strategy, with carefully managed "leaks" and public statements.

The main message the Presidency wanted to pass was simple: the PSD cabinet had squandered the excellent conditions of stability, majoritarian support, and EC integration, failing to deliver the economic and social development needed by the country, and, instead, was abusing its absolute majority in order to weaken the checks and balances of government. Soares use of constitutional litigation was carefully framed within this strategy. From 1991 to 1995, *a priori* review increasingly focused on legislation that affected a series of secondary institutional characteristics of the regime, particularly those concerning judicial and prosecutorial independence, freedom of the press, and the control of public office holders’ wealth.

This stark contrast between Soares's first and second terms has been used as an illustration of the impact of an often neglected variable in the analysis of semi-presidential regimes, whose "alternation between presidential and parliamentary phases" is commonly explained in terms of the relationship between the President and the party with a majority in parliament (Lijphart 1992, 20). According to some observers, that contrast should also be explained by contingent factors such sheer "political will,"
"personality," and the kind of "place in history" that presidents enjoying significant powers wish to carve for themselves (Frain 1995, 667-668). However, electoral constraints are, to a great extent, what determines whether that "political will" is likely to be converted in concrete political action. What made Soares's second term different from the first was the fact that, considering the two-term limit of the Portuguese President, Soares had been "relegitimized with a comfortable majority [in the 1991] elections, [and] did not need again to conquer votes (especially from the PSD) for another reelection" (Cruz 1994, 259). As Joaquim Aguiar — political adviser to both Eanes and Soares — puts it,

"That is the sign of the power without commitments that, on its own, identifies what is different about the first and second terms of a president. That is also why we cannot extrapolate from the degree of 'interventionism' of the first term in order to identify what the second term can turn out to be. But it is precisely because he does not need to conquer votes that the President is free to take care of his image in history" (Aguiar 1996, 1279).

Back in 1990, in the end of his first term, Soares had argued that "the President has a thousand ways of creating difficulties to the government, the parliament, and the parties. But if he does it, he becomes a factor of controversy and tensions, surely putting into question the sound functioning of the institutions." After 1991, with Soares’s "interventionism," the PSD precisely attempted to play that card, openly embracing the conflict with the President and accusing him of having illegitimately become part of the opposition. By late 1992, Cavaco Silva complained that, "nowadays, everything that is important for modernization is accused of being unconstitutional," charged Soares with having become part of "forces of blockade" against "modernization, change, and development," and argued for the need to advance "a political debate about the role of the
political bodies in charge of fiscalizing the state. The result was that, for Soares, as Figure 6.3 shows, moving from "peaceful cohabitation" to "guerilla warfare" entailed a substantial loss in popularity. Since 1991, he never again reached the approval ratings levels he had enjoyed in his first term. Therefore, "interventionism," such as that which consists on referring majority policies for abstract review, is seen as electorally punishable.

Source: monthly panel surveys conducted by Euroexpansão and published in Expresso. "Presidential popularity" is weighted average of the proportion of individuals rating the President's performance as "very good"/"good," "fairly good," "bad"/"very bad," according to: Popularity= (2 * % of "very good"/"good" + % of "fairly good")/3.

Figure 6.3 Presidential popularity, 1986-1995
Conclusion

Back in chapter four, the analysis of the Spanish and Portuguese cases allowed us to detect the kind of political contexts and institutional variables that, under the policy-seeking approach to litigation, clearly implied the likelihood of high levels of countermajoritarian litigation: the permanent access of (at least) the largest opposition party to the Court; legislative institutions that foster the concentration of power in majorities; majority governments and disciplined and cohesive parties; and governmental platforms of sweeping political, economic, and social change. In chapter five, we saw that when those conditions were met, opposition actors were indeed more likely to resort to constitutional litigation as a means to obstruct the action of majorities and seek judicial vetoes of majority policies. However, we also saw that, even in such contexts, constitutional courts were brought much less frequently to the center of the legislative policy-making process that what could be anticipated, and remained very short of becoming "third chambers" of parliament.

Why this reluctance to bring courts into the legislative process? In short, because the policy and electoral costs of litigation may be higher than its benefits, litigants know it, and learn to behave accordingly. The policy-seeking approach to litigation has misspecified the incentives and constraints of actors with access to constitutional courts. On the one hand, oppositions are not naïve litigants at all. Not only do they make enormous efforts at shifting judicial preferences in their favor, but they also consider the likely outcomes of judicial decision-making, and refrain from bringing into the policy-making process courts sympathetic to majority preferences. Besides, oppositions take the electoral consequences of litigation into consideration, and those consequences are
neither irrelevant nor do they always serve as an added incentive to refer legislation to constitutional courts. Lame-duck presidents in semi-presidential systems or extremist or semi-loyal opposition parties may feel they have little to lose from using litigation for purposes of obstructionism, rhetorical position-taking, and policy-seeking purposes. However, large catch-all parties wishing to carve a moderate appeal and capture the centrist vote, or political actors elected on the basis of their arbitral and non-partisan role, have found that resorting frequently to abstract review referrals entails risks. When faced with frequent countermajoritarian litigation, majorities are able to strike back by attacking oppositions for their extremism, illegitimate use of constitutional procedures for partisan purposes, and overall irresponsibility. In Spain and Portugal, all this produced observable diminishing returns on the electoral utility of litigation for opposition agents.

One of the cornerstones of the "judicialization hypothesis" is the notion that the "temptation" to litigate is irresistible, that although "the longer-term costs of going to the court are (...) potentially great, (...) the lure of short-run benefits have generally outweighed long-term concerns" (Sweet 2000, 198-199). In practice, however, strategic concerns with the political costs of litigation do contribute to mitigate the incentives for its use as a countermajoritarian weapon. After all, and in spite of the scarcity of comparative data on these matters, the findings in the Spanish and Portuguese cases ultimately lend support to some of the preliminary empirical assessments about the politics of constitutional litigation already made in the existing literature: "for every European court excepting the French, abstract review processes neither constitute a major source of caseload nor dominate public perceptions about the court's role in the political system" (Stone 1992a, 233).
How can political actors expect courts to behave as a result of abstract review litigation against bills and statutes? In the previous chapter, we learned that political parties make serious efforts at populating courts with justices of their choice, and that their success (or the lack of it) in such efforts seems to affect the utility perceived by oppositions in engaging in countermajoritarian litigation. However, it could be the case that they are working under a profound deception about what actually determines judicial behavior. We have learned nothing yet about what courts actually do when they acquire the ability to declare the unconstitutionality of policies passed by lawmaking majorities, nor about whether the composition of those actors actually makes any difference for judicial outcomes. On the other hand, we know now that the incentives that opposition parties and political actors have had to expand the jurisdiction of constitutional courts through countermajoritarian litigation have been counteracted by important political and institutional constraints. However, this does not mean that courts are themselves constrained in any way whenever they have the opportunity to emerge as powerful policy-makers on their own right and rule against the interests of incumbents.
Many observers of European constitutional courts — especially those that have detected an increasing "judicialization of politics" in parliamentary democracies — have suggested that one of the features that define those courts and their justices is precisely the fact that they are *unconstrained actors*, able to interpret and apply constitutional law entirely as they see fit. This is thought to occur because of the huge difficulties involved in mustering the political support required to pass constitutional amendments reversing judicial decisions or affecting courts' institutional integrity. Besides, students of comparative judicial politics courts have tended to dismiss the importance of the ideological and political outlook of constitutional courts in decision-making. Thus, either because constitutional courts do not need to be responsive to the preferences of lawmaking majorities and/or because whatever congruence between those preferences and those of the courts is of no consequence whatsoever, governments and the legislative coalitions that support them cannot count with any deference from justices and must be therefore be ready to withstand the costs of judicialization. This chapter discusses if that is really the case. It does so by addressing different approaches to decision-making in courts with constitutional review powers, and test them on the basis of data about the behavior of Spanish and Portuguese justices.

**Approaches to judicial decision-making**

The abundant literature on the behavior of U.S. Supreme Court justices and the increasing number of studies about judicial decision-making in high courts elsewhere has typically adopted three generic alternative approaches to the study of judicial decision-making. The first sees justices and courts as unconstrained actors moved by the main goal
of assuring the supremacy of constitutional law. The second treats judicial decisions as being determined by the personal attributes of policy-seeking justices, especially by their ideological preferences. Finally, the third focuses on the constraints that the political and institutional environment in which courts function place upon judicial decision-making. Each of these approaches has important implications for the study of judicial behavior, as well as for the role that constitutional courts are likely to perform in the political systems in which they are inserted.

Unconstrained courts and normative reasoning

A first approach to judicial decision-making in high courts consists in treating them and the justices that compose them as unconstrained actors, fundamentally interested in assuring the supremacy of constitutional law over the production of legal norms. From this point of view, a crucial aspect about courts that review the constitutionality of legislation is that such task releases them from any significant institutional and political constraints. In other words, although political parties and other political actors can perform functions that appear to make them principals of courts (such as appointing justices or overruling judicial decisions through constitutional amendments), theirs is not, in practice, a principal-agent relationship (Sweet 2002, 89-90). First, because regardless of whatever efforts lawmaking majorities make to avoid it, courts can be sure to receive a steady supply of referrals of statutes, providing them with constant opportunities to veto majority policies and develop constitutional law (Sweet 2000, 88). Second, because "political parties may be able to overturn constitutional decisions, or restrict the constitutional court's powers, but only if they can reconstitute
themselves as a jurisdiction capable of amending constitutional law" (Sweet 2002, 89). And in order to be able to do that, they are constrained by the demanding supermajorities required to amend rigid constitutions. As we can see in Table 7.1, contrary to what occurs with most second chambers of parliament, the decisions of judicial "third chambers" can only be reversed by, at the very least, 3/5 of parliament, a support that is normally beyond the reach of any single political party in any democratic European party systems. The result is that the "instruments of direct control [of courts] available to the political parties are difficult or impossible to wield in a consistent or sustained way" (Sweet 2000, 88).
<table>
<thead>
<tr>
<th></th>
<th>REVERSING UPPER CHAMBERS</th>
<th>REVERSING CONSTITUTIONAL COURTS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Decision rule for reversal of upper chamber veto</td>
<td>Decision rule for reversal of declaration of unconstitutionality in ex ante abstract review.</td>
</tr>
<tr>
<td>Austria</td>
<td>Simple majority</td>
<td>—</td>
</tr>
<tr>
<td>Belgium</td>
<td>Mutual veto powers</td>
<td>—</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>Unicameral</td>
<td>—</td>
</tr>
<tr>
<td>Croatia</td>
<td>Unicameral (since 2001)</td>
<td>—</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Absolute majority</td>
<td>—</td>
</tr>
<tr>
<td>Estonia</td>
<td>Unicameral</td>
<td>No specific reversal procedure</td>
</tr>
<tr>
<td>France</td>
<td>Simple majority. Absolute majority for organic laws.</td>
<td>No specific reversal procedure</td>
</tr>
<tr>
<td>Germany</td>
<td>Simple majority. Higher house veto power in federalism and financial matters</td>
<td>—</td>
</tr>
<tr>
<td>Hungary</td>
<td>Unicameral</td>
<td>No specific reversal procedure</td>
</tr>
<tr>
<td>Italy</td>
<td>Mutual veto powers</td>
<td>—</td>
</tr>
<tr>
<td>Latvia</td>
<td>Unicameral</td>
<td>—</td>
</tr>
<tr>
<td>Lithuania</td>
<td>Unicameral</td>
<td>—</td>
</tr>
<tr>
<td>Poland</td>
<td>Absolute majority</td>
<td>No specific reversal procedure</td>
</tr>
<tr>
<td>Portugal</td>
<td>Unicameral</td>
<td>Qualified majority (2/3)</td>
</tr>
<tr>
<td>Romania</td>
<td>Mutual veto powers</td>
<td>Qualified majority (2/3) in both chambers</td>
</tr>
<tr>
<td>Slovakia</td>
<td>Unicameral</td>
<td>—</td>
</tr>
<tr>
<td>Slovenia</td>
<td>Unicameral</td>
<td>—</td>
</tr>
<tr>
<td>Spain</td>
<td>Simple majority. Absolute majority for organic laws</td>
<td>—</td>
</tr>
</tbody>
</table>

Sources: Tsiebels and Money 1997, 46-68; constitutional texts at the International Constitutional Law website (http://www.uni-wuerzburg.de/law/home.html)

Table 7.1: Abstract judicial review in European democracies: decision rules for reversal of upper chamber and constitutional court vetoes
Finally, political parties have incentives to compete for influence over the development of constitutional law, instead of working as a "unified and coherent rational actor" in order to make courts and justices accountable (Sweet 2000, 89). If constitutional courts engaged merely in statutory interpretation, majorities might easily overcome problems of agency loss in their relationship of courts by simply passing new legislation overriding undesired judicial interpretations of statutes (Sweet 2002; see also Tsebelis 2000 and Volcansek 2001). However, in declaring laws null and void for colliding with a rigid constitution, courts become unaccountable and unconstrained: they receive a "massive, virtually open-ended delegation of policy-making authority" from political rulers that "guarantee their independence" (Sweet 2002, 90) with the result that "constitutional law will evolve as the agent [the court] sees fit" (Sweet 2000, 89).

In what directions will these unconstrained courts and justices want constitutional law to evolve? One might think that the direct involvement of political parties in the appointment of justices — and the extent to which they are successful in shaping the political-partisan composition and ideological make-up of courts — might make a difference in the direction courts wish to take legal policy. For example, in a 1992 study of the French Conseil, Stone noted that "a comparativist has good reasons to believe that a Socialist politician appointed to the Conseil constitutionnel does not cease to be a Socialist upon moving across the river to the Palais Royal" (Stone 1992a, 230). However, the proponents of this “unconstrained courts” and “normative reasoning” approaches to judicial decision-making ultimately suggest that all of this is of little interest for the study of judicial behavior. On the one hand, since data about internal and individual decision making in European courts is normally unavailable, "a social science
of the political behavior of European constitutional courts must be constructed on other bases" (Sweet 2000, 49). On the other hand, those bases must not downplay or deny "the power of the law itself, or of normative reasoning," (…) which must be "assumed to be at least partly autonomous from personal preferences, except in so far as a judge's preferences include her desire to legitimize her decisions by appealing to norms" (Sweet 2000, 26). Thus, according to this view, instead of misrepresenting the goals of justices by conceiving them as policy-seekers, students of constitutional courts should treat justices as seeking "both to preserve the normative superiority of the constitutional law and to ensure that the constitution becomes, or continues to be, the essential reference point for the settlement of like cases that may arise in the future" (Sweet 2000, 141). In order to achieve that goal, judges resort to several different techniques, such as "avoid declaring either side a clear loser," "developing balancing and proportionality tests," "portray their decision-making process as inherently 'judicial'" and "a pure exercise in logic," and "push private interests and social facts further into the background, repackaging as inherently normative arguments" (Sweet 2000, 142-144).

**Personal attributes**

A different approach to judicial behavior links it to personal attributes of justices, and most commonly to their personal policy preferences. From this point of view, "legal" explanations of why justices act the way they do are seen, in most cases, as empirically untestable. Assuming that judicial decisions are based on "the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the framers, precedent, and a balancing of societal interests", raises insurmountable problems: the meaning of
legal commands is seldom "plain," "intentions are subjective and personal," and "precedents exist to support the contentions of both parties" (Segal and Spaeth 1993, 32-53). Instead, when justices enjoy some amount of discretion in their decision-making, they are likely to use it in order to convert their policy preferences into law. In fact, the proponents of this so-called "attitudinal model" suggest that, if certain conditions are present, this should be seen as the single most powerful explanation of judicial behavior. In other words, justices operate in an institutional environment that renders them politically unaccountable and withdraws ambition for higher office (when they enjoy life tenure, for example), and if they enjoy discretionary control over the court's docket (contributing to eliminate "easy" and legally unambiguous cases), justices can be safely treated as "single-minded seekers of legal policy" (Rohde and Spaeth 1976).

In the study of the U.S. Supreme Court, this hypothesis has been tested in different ways, both in terms of how the explanatory variable is measured and the level of analysis adopted (individual attitudes or the aggregate preferences of the court). Some studies have used social background and personal attributes variables — such as party affiliation, region of birth, appointing president, or judicial experience — as proxies for attitudes in the explanation of judicial decisions. Others have built indexes of ideological liberalism of the justices, based on content analysis of newspaper editorials, and shown that judicial attitudes do affect judicial decisions on issues such as civil liberties or economic policy. Segal and Spaeth, for example, show that, between 1953 and 1989, "liberal justices obviously supported declarations of unconstitutionality not because they are activists, but because the bulk of the legislation at issue restricted individual liberty," in the same way that what might seem "restraintist" conservative justices "do not hesitate
to declare unconstitutional laws of which they disapprove" (Segal and Spaeth 1993, 322). In other words, the willingness of justices to strike down legislative provisions is explained by the relationship between their political attitudes and the law whose constitutionality they are scrutinizing.

Without necessarily denying the importance of judicial policy preferences, other studies have focused on other personal attributes of justices. "Role orientations" (or "role conceptions") constitute one of such attributes, conceived as a variable that mediates between policy preferences and behavior. Justices can behave differently according to "the relative weight (...) they believe they should give to the state of the law as opposed to their own conception of justice" (Baum 1997, 84). Extant research, mostly focused on American lower courts, has used questionnaires and interviews in order to capture judicial role orientations, and then proceeded to find relationships between those roles and judicial behavior. In the context of courts outside the United States, Tate suggests that both types of personal attribute (policy preferences and role orientations) may be relevant. Although the former are more likely to determine judicial decisions than the latter, "restraintist judges should be expected to resist judicializing politics regardless of their personal policy values, or how those values relate to the values dominant in majoritarian institutions" (Tate 1995, 34).

Empirical evidence supporting these hypotheses outside the United States is in short supply, as the study of judicial behavior in high courts, particularly constitutional courts, remains tentative. However, there is research supporting the notion that the personal attributes of justices do influence their behavior. Among them are studies that, following Pritchett's lead in the use of bloc analysis in the US Supreme Court (Pritchett
1948), have detected subgroups of judges who tend to vote together, suggesting that, at the very least, those judges share one or more personal attributes (attitudes, role orientations, or other) that, in turn, influence their voting behavior. Other comparative studies have found individual-level direct or proxy measurements of policy preferences to have a statistically significant impact in decisions such as support for the underdog in concrete cases or panel assignments in higher courts (Haynie 1999; Hausegger and Haynie 2001).

In any case, if individual-level variables such as policy preferences and role orientations influence judicial behavior, then the understanding of the political role played by courts with judicial review powers, unlike what is argued by the proponents of the "unconstrained courts" approach, requires an analysis of how they are populated by justices with specific attributes. In fact, such analysis might very well be the crucial elements towards the understanding of that role. In his seminal article on the U.S. Supreme Court, Dahl argued that the received notion that judicial review played a countermajoritarian role in American politics did not withstand empirical scrutiny, since the Court, in fact, failed to "stand against any major alternatives sought by a lawmaking majority." And the reason why this occurred was that, "on the average one new justice has been appointed every twenty months," causing that "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States" (Dahl 1957, 284-285; see also Funston 1975). Although others have suggested that the "restraint" or "activism" on the part of the Court have varied more substantially than what Dahl was ready to admit (Casper 1976, 52; Segal and Spaeth 1993, 318-322), they have nonetheless espoused the same basic theory
of judicial behavior that underlies Dahl's conclusion: even if justices were unaccountable and judicial decisions impossible to reverse (allowing justices to develop constitutional law "as they see fit"), provided that courts share the interests of majorities, by sincerely pursuing those interests they will obviously be pursuing those of majorities as well. As Segal puts it, it is possible that "the Supreme Court follows the preferences of the dominant electoral coalition not because of deference (...) to its preferences, but because it is chosen by that coalition to have the same preferences" (Segal 1997, 33).

Strategic behavior

Finally, a third generic approach to judicial decision-making can be roughly included in what has been called the "strategic revolution" in study of judicial politics (Epstein and Knight forthcoming). This strategic approach to judicial-decision making does not force us to abandon the notion that justices wish to translate their values into legal policy. However, it suggests that justices also "realize that their ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act" (Epstein and Knight 1998, xiii).

This, in turn, raises the possibility that justices may be forced to depart from the sort of sincere behavior assumed by approaches focusing exclusively on personal attributes, and adopt instead forms of sophisticated behavior in order to achieve their goals. First, several studies have documented strategic interaction within courts, not only in terms of voting on the merits but also other aspects of judicial behavior, such as case selection or opinion assignment (Epstein and Knight 1995 and 1998, 112-135; Maltzman 266
and Wahlbeck 1996). Second, public opinion should also be taken into consideration in explaining judicial behavior, not only because it reflects itself on the elected branches — and thus on who is likely to get appointed to the courts — but also because the lack of electoral legitimacy that high courts typically exhibit forces justices to seriously consider public sentiment in order to maintain legitimacy, authority and compliance to their decisions.  

Finally, it has been shown that the preferences of other political institutions may also constitute external constraints placed upon high courts, forcing, again, justices to be strategic in order to achieve their goals. Even in the case of the U.S. Supreme Court, and despite the apparent invulnerability of its justices to threats on the part of the elected branches, the reactions of the latter to judicial decisions — which may include public attacks, non-compliance, institutional changes, legislative overrides, constitutional amendments, and appointments in lower courts, among others — can directly and indirectly affect the ability of the former to obtain their preferred policies, suggesting that strategic justices are likely to take those preferences into account.  

Higher courts outside the United States may also be affected by constraints related to the political and institutional environment in which they operate. Not surprisingly, such constraints — like the preferences of political parties, the degree of party discipline, or the number of veto-players in policy-making — have been easier to demonstrate in studies about statutory interpretation than about constitutional review decisions (Kate and Koppen, 1995; Cooter and Ginsburg 1996; Steunenberg 1997). But even courts exerting constitutional review powers proper may be less free to diverge from majority preferences and veto legislative policies than what it may seem.
Most studies pointing out such constraints have focused on cases of courts inserted in unconsolidated democracies or in their early years of activity, where the courts' special need to cultivate legitimacy and acceptance on the part of the public and political actors and the unstable institutional environment in which they operate has been conducive to strategic choices in terms of issue areas and political contexts where justices dare to engage in judicial activism (or judicial policy-making of any sort) (Knight and Epstein 1996; Smithey 1999; Vanberg 2000; Epstein, Knight, and Shvetsova 2001; Helmke 2002). However, there is evidence that even courts functioning in consolidated and stable democracies may remain constrained by their political environment when engaging in constitutional review. Volcansek, for example, argues that one of the reasons why the Italian Constitutional Court changed its previous attitude of non-interference in relation to the executive's (ab)use of decree powers in 1996 was an overall change in the political environment, namely, the dramatic transformation of the Italian party system that, for the justices, "translated into a type of enhanced independence, for their appointers and their potential patrons for future political careers were [now] largely irrelevant" (Volcansek 2000, 49). Vanberg shows that the likelihood of the German Constitutional Court finding constitutional violations in federal statutes has tended to decrease when highly complex policy areas are at stake, suggesting that lawmaking majorities can count on constitutional courts becoming more deferent to their preferences whenever it becomes more difficult for the public to monitor majorities' compliance to judicial decisions (Vanberg 2001). Finally, even students of the U.S. Supreme Court have suggested that the constraints placed upon justices when trying to translate the preferences into policy may be even greater in constitutional cases than in statutory
interpretation: since the stakes involved in the former are much higher both for the Court and the elected branches, the Court may incur in much higher costs in terms of its reputation and legitimacy even if attacks on the part of the elected branches are ultimately unsuccessful in terms of actually overriding judicial rulings (Martin 2001).

The hypothesis that courts and justices are potentially constrained by the preferences of the elected branches, if confirmed, bears important implications for the understanding of their role in parliamentary or presidential democracies. From the point of view of scholars focusing on the personal attributes of justices as explanations for their behavior, the ability of lawmaking majorities to prevent the emergence of powerful, activist and potentially countermajoritarian courts relies solely on how appointment rules and contingent vacancies combine to affect their capability of packing the courts with justices sharing the "right" personal attributes. However, under the strategic approach, the alignment of courts with the interests of ruling majorities might be a more permanent feature of political-judicial relations. Because the elected branches contribute regularly to change the Court’s composition and because justices are sophisticated actors deciding under constraints, "the Court’s decisions typically will never be far removed from what contemporary institutions desire" (Epstein and Walker 1995, 323).

Declarations of unconstitutionality in the Iberian constitutional courts: main hypotheses

These alternative approaches can be tested in the explanation of judicial behavior in the Spanish and Portuguese constitutional courts. In this chapter, we will focus on one particular aspect of that behavior: the likelihood of justices voting for declaring the
unconstitutionality of specific provisions within a bill, law or legislative decree, or even of the entire statute.

Such declarations of unconstitutionality are "certainly the most dramatic instances of a lack of judicial restraint — or conversely, the manifestation of judicial activism" (Segal and Spaeth 1993, 318). In Portugal, for example, if a majority of justices favors such declaration in *a priori* review, the Court immediately exerts a veto power in the legislative process. The President of the Republic is forced to return the bill or decree to the body that issued it (parliament or the executive), which is then left with only three constitutionally acceptable alternatives: abandon the legislative process altogether and accept the status quo; revise the process of approval or the content of legislation by withdrawing the elements found unconstitutional by the Court; or, in the case of bills, override the Court, but only through a qualified majority in parliament. In the case of *a posteriori* review in both the Spanish and Portuguese courts, the effects of such declarations are more delayed, but not necessarily less dramatic: provisions or entire pieces of legislation declared unconstitutional are immediately rendered null and void and must be considered as withdrawn from the legal order of the land.

This focus on whether justices vote for declaring the unconstitutionality of statutes or not does not mean to suggest that all other outcomes of judicial decision-making are necessarily irrelevant in terms of assessing judicial power and activism. In fact, several authors have argued that decisions that do not declare a legislative act or portion thereof unconstitutional but specifically attach to the ruling an interpretation of the challenged provision that renders it "not unconstitutional" can also be quite relevant in this sense. Such "interpretive rulings" may reduce the discretion of agencies and courts
by stating how statutes should be applied in ways that legislators might not have intended, thus showing constitutional courts to be "positive" legislators that autonomously expand on the literal precepts of statutes (rather than being "merely" negative veto-players) (Landrfied 1994, 114-115; Aja and González Beilfuss, 1999, 276-279; Sweet 2000, 71-73). However, it remains rather difficult to assess the real policy impact of such rulings. First, there is no reason to assume that the interpretation that ends up being favored by the Court in such cases is not the one intended by the lawmaking majority in the first place.\(^\text{11}\) Second, rulings that include interpretive guidelines are not necessarily different from those that simply declare statutes as not unconstitutional: justices \textit{always} expand on specific interpretations of statutes in their reasoning about whether they are unconstitutional or not. In fact, by explicitly committing to a particular interpretation that renders statutes not unconstitutional, justices may really be making an effort at judicial restraint (Almeida 1998, 227) — when not even downright deference towards majorities —, by signaling their unwillingness to enter in downright collision with lawmaking majorities (Wallach 1991, 171; Volcansek 1991, 122). In any case, "interpretive rulings" of this sort have been relative rare either in the Spanish or the Portuguese courts, at least following abstract review referrals by political litigants.\(^\text{12}\)

Instead, declarations of unconstitutionality are precisely what the policy-seeking approach suggests oppositions are seeking when referring legislation to constitutional courts: to "block [through total annulments] or dilute [through partial annulments] the government's legislative initiative as much as possible" (Sweet 2000, 54). And they are certainly the crucial manifestation of what students of comparative politics have defined as the core characteristic of judicial review as a feature of contemporary democracies: its
role as an "antimajoritarian device," whose effectiveness depends on being backed by a rigid constitution that prevents legislative majorities from responding to declarations of unconstitutionality with constitutional amendments (Lijphart 1999, 226-228).

Fortunately, institutional rules in both the Spanish and Portuguese courts — contrary to what occurs in countries such as Italy or France — permit us to make use of the approaches discussed in the previous section in the study of individual judicial behavior. One of the features shared by both courts is that they allow justices a choice about how their personal positions vis-à-vis the final ruling on the constitutionality of statutes is to be publicly presented. Justices can join the majority opinion, but they can also author (or join) a concurrence, through which they agree with the final disposition of the case but personally expand on the legal reasoning of the majority (or present an alternative legal reasoning altogether). Besides, they can also author or join a dissent, which expresses disagreement with both the legal reasoning and the disposition of the case. Therefore, we can advance a few testable hypotheses about the behavior of justices in both the Spanish and Portuguese Court on the basis of the three approaches sketched in the previous section.

Sincere and strategic consensus

The first relevant aspect about which we can test different approaches to judicial decision-making in Spain and Portugal is the level of consensus exhibited by justices in rulings about the constitutionality of statutes. According to the approach that sees courts as unconstrained actors applying normative reasoning to decisions, consensus in rulings about the constitutionality of statutes should basically occur all or most of the time. First,
because the goal of assuring the supremacy of the constitution, with what it requires in terms of "portraying their decision-making process as inherently 'judicial'," is scarcely compatible with justices exhibiting systematic internal conflicts about the interpretation of constitutional rules, particularly if political motivations can be attached to such nonconsensual behavior. Second, and most importantly, because conflict is likely to be naturally eradicated by the "power of the law itself," which either as written law or precedent should inevitably lead justices to reach similar results when testing the constitutionality of statutes. Sweet, for example, presents as supporting evidence of this approach the fact that, although the publication of dissents is prohibited in some cases, "in Germany and Spain, dissents are permitted but rare" (Sweet 2000, 48).

Conversely, if judicial behavior is explained by the personal attributes of justices, and in the likely event that justices do not all share the same personal attributes, consensual behavior becomes less likely: justices sharing different policy preferences or role orientations should behave differently in the face of the statutes that are presented before them. From this point of view, consensus is only likely to emerge as a result of two different factors. First, when policy-seeking justices enjoy discretionary control over case selection, their docket is more likely to be filled with salient issues, where political stakes are higher, strong cases can be built for both sides of the argument, and the larger room available for judicial discretion will then be used in accordance to the justices' ideological preferences (Brace and Hall 1990). However, if courts lack control over their dockets, "run-of-the-mill litigation" where "matters are open and shut" is more likely to appear (Spaeth 1995, 297-305), and the prevalence of policy goals over any other in judicial decision-making may diminish when "weight of the law lies heavily on one side"
(Segal and Spaeth 1993, 70). In this case, consensus is possible. Second, the substantive nature of the issues that compose the courts' docket may also engender consensual behavior among policy-seeking justices. As Baum notes, the relative importance of policy considerations in judicial behavior may diminish as "judges may find it difficult to ascertain how their preferences apply to some case, particularly when the issues do not relate directly to conventional ideological dimensions" (Baum 1997, 66). This raises the possibility that, in such cases, other goals more favorable to consensual behavior acquiring predominance over policy preferences.

We must then consider both these possibilities of consensual behavior on the part of policy-seeking justices in Spain and Portugal. On the one hand, both courts enjoy little control over their dockets and generally fail to exert the little control they enjoy. There are indeed circumstances in which justices (and the court as a whole) can vote for not ruling on the merits: when procedural rules for referrals have been violated,\(^{14}\) when the litigant lacks the right to refer a particular piece of legislation to the Court,\(^{15}\) or when the object of referral simply no longer exists to be ruled upon.\(^{16}\) However, ever since the initial periods of adaptation of potential litigants to the new institutions of abstract review in Spain and Portugal, blatant violations of procedural requirements for litigation have been extremely rare in both courts. Besides, in Spain, the limitation of litigation rights for the regional authorities to legislation that affects the comunidades' sphere of autonomy has been interpreted in a generally "lax" way by the Court, which has used it to dismiss very few referrals.\(^{17}\) On the other hand, both the Spanish and the Portuguese justices are indeed likely to be faced with issues that "do not relate directly to conventional ideological dimensions." One obvious example concerns disputes about central-
peripheral allocation of powers. In both countries, litigation rights against central/federal legislation are conferred upon regional governments and parliaments, which can use them to challenge the constitutionality of statutes for having invaded the regions' own legislative powers. As we saw in chapter five, the weight of such referrals is particularly high in Spain, where abstract review litigation has been much more frequently used by the comunidades than by the largest opposition party in the national parliament, suggesting that many of the Spanish Court's rulings concern an issue dimension of ideological and partisan conflict that is not subsumed under traditional left-right alignments. In fact, while both Spain and Portugal are among the industrialized democracies whose party systems and socio-ideological positions are more uni-dimensional in terms of issues such as socio-economic policy, religion, or the urban-rural cleavage (Laver and Hunt 1992, 53), Spain is a textbook example of the need to consider the positions of parties and political actors in general in a multidimensional policy space: while parties such as PNV and CiU and their supporters can be safely defined as centrist in the left-right ideological positioning, they are also — particularly in the case of the former — nationalist parties located close to one of the extremes of the cultural-ethnic issue dimension (Colomer 1996, 173). Thus, a high level of consensus in judicial decision-making in Spain might also result from the disproportionate weight in the Court's docket of federalism cases where justices share closer policy positions than in what concerns traditional issue dimensions.

Finally, consensus in the courts when ruling on the constitutionality of statutes is also compatible with a strategic approach to judicial decision-making. On the one hand, to the extent that assuming that justices are strategic does not force us to abandon the
notion that they seek legal policy, the previous considerations about how a personal attributes approach might be compatible with consensus in the court also apply. On the other hand, consensual behavior is also compatible with specifically strategic considerations. For individual justices, "the utility they receive from an opinion is in part a function of the actions of other justices" (Wahlbeck, Spriggs, and Maltzman 1999, 496). Therefore, justices that are policy-oriented and strategic may be willing to mute sincere dissent, particularly if such a dissent would bring them no utility in terms of their policy goals, i.e., if they are clearly in the minority and have no expectation that a dissent would make a difference for the better in the present or future disposition of the court's majority. In such cases, strategic consensus may emerge out of respect for norms of reciprocity aimed at fostering better interpersonal relationships with their colleagues (Atkins and Gree 1976; Baum 1997, 113-114; Wahlbeck, Spriggs, and Maltzman 1999, 496) or even as a behavior directed to actors outside the court, namely, out of a concern with displaying consensus in order preserve the court from negative reactions from the public or political actors that might endanger compliance and the institutional integrity and legitimacy of the court.\footnote{18}

*Party affiliation and judicial behavior*

A second and related aspect of interest concerns the extent to which justices are likely to follow the preferences of the parties that appointed them when deciding whether statutes are unconstitutional. We have seen that under approaches to judicial behavior that focus on the "power of law" and "normative reasoning," such "partisan behavior" should not emerge in any systematic way, and it has been argued that, in most cases, it
really does not. In Germany, for example, "in regard to civil liberties, the justices seem to
distribute themselves in a way that defies religious or party identification" (Kommers 1976, 187) and "all in all, [the justices'] party membership does not influence judicial review to any great extent" (Landfried 1994). In the Spanish case, the absence of "a clear correlation between the political party on which the appointment of a constitutional justice originates and her behavior in the Tribunal" has also been remarked (Bon 1988, 127; Cámara Villar 1993). Schwartz suggests this is also true in Eastern Europe (Schwartz 1993), and Brünneck argues that, for the generality of European constitutional courts, "judges - even those selected on the basis of party loyalty - frequently develop in a manner different from that which had been expected by their parties" (Brünneck 1989, 321).

However, if party affiliation is indeed found to affect judicial behavior, such finding would be consistent with both a personal attributes and a strategic approach to judicial decision making. Under the personal attributes approach, such patterns of "partisan" judicial behavior will almost inevitably emerge if decisions about the constitutionality of statutes are determined by the relationship between the preferences of policy-seeking justices and the state of the law. Party leaders who care about how constitutional law evolves can be assumed to be interested in placing in the court justices whose ideological preferences are congruent with theirs. Therefore, to the extent that legislative behavior and outcomes are expressions of the parties' ideological positions, justices applying their own preferences are more likely to support the constitutional conformity of statutes that were also supported in parliament by the parties that appointed them. In fact, Spanish and — particularly — Portuguese justices have not entirely
rejected the plausibility of this hypothesis and the role of ideological preferences in their decision-making. Discussing accusations about excessively "partisan" behavior in the Portuguese Constitutional Court, its former President Cardoso da Costa has described it precisely as an inevitable consequence of the role played by the ideological preferences of justices applying constitutional law:

"The Constitution of the Portuguese Republic is, in a certain sense and large measure, an 'open' text, and therefore its interpretation (...) can never be entirely neutral or 'chemically pure.' It is influenced by one's culture and worldview. (...) We shouldn’t hide this, but rather face that the difference in interpretive sensibilities about the Constitution also has to do with one's ideology."

Spanish justices seem somewhat less ready to assume the role of ideological preferences in decision-making. For example, as he took office as President of the Tribunal, Tomás y Valiente contested the notion that justices could be defined as "conservative" or "progressive" in the first place, and defined those labels as "unfortunate" and "more apparent than real." However, by 1990, Tomás y Valiente was already willing to concede to his interviewer that "I know that you place me in a line close to PSOE, and I agree that, ideologically, that position is correct, I have never rejected it."

However, a strong weight of the party affiliation of justices in the explanation of their behavior can also result from a rather different causal mechanism, i.e., institutions that foster the strategic adaptation of justices to the preferences of the parties that appointed them. Individual justices may be more prone to declare the constitutional conformity of statutes supported by the parties that appointed them not only because they share the same preferences, but also because they can be made accountable before those
parties. In the U.S. Supreme Court, one of the reasons why the proponents of the attitudinal model have assumed justices to be strictly motivated by policy goals is the fact that the "court situation" in which they are placed insulates them from career concerns (judicial or otherwise) (Rohde and Spaeth 1976, 72-74). However, the institutions of appointment and retention in constitutional courts are quite different: in most European constitutional courts, justices do not enjoy life tenure, nor do they serve terms whose only limit is a late compulsory retirement age. In fact, in some countries, justices' terms can even be renewed, as in Portugal until the constitutional revision of 1997 (that made terms non-renewable and extended their length until nine years), as well as in Croatia, the Czech Republic, Hungary, and Slovakia. Therefore, in comparison with the U.S. Supreme Court, justices in constitutional courts are typically placed in situations where career goals are not rendered irrelevant, either in terms of sustaining tenure (when terms are renewable) or of securing other positions after serving in the court. This raises the possibility that some of these justices, instead of acting sincerely according to their policy preferences, act strategically in order to avoid political reprisals in terms of career goals (Epstein, Knight, and Shvetsova, 2001b).

The comparison between the Spanish and Portuguese cases is illustrative of the potential consequences of appointment and retention institutions in judicial behavior. As we have seen in the previous chapter, appointments in Spain and Portugal function in a rather similar way, in the sense that most of them result from interparty negotiations about "quotas" of justices to be proposed by each party and, sometimes, even direct choices by the executive. However, there are also relevant differences between the two cases: as Table 7.2 shows, while in Portugal (until 1997), a requirement of legal
experience has been absent and justices enjoyed short and renewable terms, in Spain all justices must have at least 15 years of experience and service in the Court has been restricted, at most, to a single nine-year term.

<table>
<thead>
<tr>
<th></th>
<th>Spain</th>
<th>Portugal (until 1997)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appointing authorities</td>
<td>Congress (4 justices, 3/5 majority) Senate (4 justices, 3/5 majority)</td>
<td>Parliament (10 justices, 2/3 majority)</td>
</tr>
<tr>
<td></td>
<td>Executive (2 justices) CGPJ (2 justices, no voting rule specified)</td>
<td>Coopted by the first 10 justices (3 justices, 7/10 majority)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Constitution, Art. 159.1</td>
</tr>
<tr>
<td>Length of term</td>
<td>9 years</td>
<td>6 years</td>
</tr>
<tr>
<td></td>
<td>Constitution, Art. 159.3</td>
<td>Constitution, Art. 159.3</td>
</tr>
<tr>
<td>Term renewal</td>
<td>Prohibited (unless justice has served for less than three years)</td>
<td>Not prohibited</td>
</tr>
<tr>
<td></td>
<td>LOTC, Art. 16.2</td>
<td></td>
</tr>
<tr>
<td>Years of legal experience required</td>
<td>15 years</td>
<td>Not required</td>
</tr>
<tr>
<td></td>
<td>Constitution, Art. 159.2</td>
<td></td>
</tr>
<tr>
<td>Retirement age</td>
<td>Not specified</td>
<td>Justices cannot be reappointed if 70 or older</td>
</tr>
<tr>
<td></td>
<td></td>
<td>LTC, Art. 21.2</td>
</tr>
<tr>
<td>Other requirements</td>
<td>Lawyers &quot;of recognized competence&quot; (magistrates, prosecutors, professors, civil servants, attorneys)</td>
<td>At least six justices (and all coopted) must be ordinary judges. All must be lawyers.</td>
</tr>
<tr>
<td></td>
<td>Constitution, Art. 159.2</td>
<td>Constitution, Art. 224.2</td>
</tr>
</tbody>
</table>

Table 7.2 Institutional rules of appointment and retention in the Spanish and Portuguese constitutional courts

Table 7.3 reveals several directly observable consequences of these rules. First, the absence of a legal experience requirement has allowed Portuguese political parties to appoint generally younger justices, particularly those recruited outside the career judiciary. On average, Portuguese justices have entered the Court being almost a full decade younger than in Spain, and 12 out of the 28 justices appointed between 1983 and
1998 were 45 years old or younger (against only six out of 38 justices appointed in Spain between 1980 and 1999).

<table>
<thead>
<tr>
<th></th>
<th>Average age at time of appointment</th>
<th>Average age at time of departure</th>
<th>Average number of years served in the Court</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>All justices</td>
<td>Career judges</td>
<td>All justices</td>
</tr>
<tr>
<td>Spain</td>
<td>56.6</td>
<td>58.9</td>
<td>64.5</td>
</tr>
<tr>
<td>Portugal</td>
<td>47.9</td>
<td>52.3</td>
<td>57.5</td>
</tr>
</tbody>
</table>

* For justices still serving (by August 2002), age of departure is counted as their age by expected end of term

Table 7.3 Average ages of appointment, departure, and years served in the Spanish and Portuguese constitutional courts

Second, shorter terms have also favored earlier departures in Portugal: while, on average, Spanish justices have remained in the Court well until their sixties, Portuguese justices have left the Court, on average, still in their fifties. Finally, at the same time, renewable terms in Portugal have allowed a relevant number of justices to remain in service well beyond a single six-year term. Portuguese justices have served an average of 9.6 years in the Court and, by 2007 (when the term of the justices appointed in 1998 terminates), nine of the 28 justices appointed since 1983 will have presumably served for at least 12 years in the Court. Conversely, and with the exception of five justices that were appointed in the 1980-86 transitional period (where terms could be renewed) or entered by mid-term to replace exiting colleagues, all Spanish justices have only served nine years or less in the Court.

Therefore, the absence of life-tenure in both Spain and Portugal opens for parties the possibility of applying sanctions and rewards to justices who are interested in
furthering their careers after serving in both courts. The role of political parties in judicial (re)appointments and in managing political and bureaucratic careers turns them into principals of the justices they appoint, making them able to ignite *ex post* accountability mechanisms based on career benefits or costs. Besides, parties can use those accountability mechanisms on the basis of publicly observable behavior: justices joining, concurring with, or dissenting from majority opinions. In fact, the right to cast votes in constitutional courts becomes, at least for justices who give their career goals some consideration, an institutional rule that induces them to reveal the information necessary for parties being able to monitor and sanction the justices’ behavior. However, the comparison between the institutions of appointment and retention in the two courts also suggests that, if justices behave strategically, institutional rules in Portugal should foster stronger individual accountability of justices before parties. Portuguese justices either leave the Court at an earlier point in their careers or require partisan support in order to obtain a term renewal. Therefore, although we should expect justices in both courts to exhibit "partisan" patterns of behavior in declarations of unconstitutionality, the role of party affiliation in explaining judicial behavior should be stronger in Portugal, given costs involved for justices voting sincerely *regardless* of party preferences. Partisan behavior in votes about declarations of unconstitutionality becomes therefore more likely not only as an expression of justices voting on the basis of preferences congruent with those of the parties that appointed them, but rather as an expression of strategic responsiveness in relation to those preferences.
Constrained courts?

A third aspect of interest about the behavior of Spanish and Portuguese justices concerns the extent to which potential threats to the institutional integrity of the courts as a whole or to their ability to have the last word in setting legal policy ends up affecting judicial behavior. As we have seen in the previous section, the main argument supporting the notion that constitutional courts and their justices are unconstrained actors is related to the difficulties felt by political actors in passing amendments to constitutional laws. Given the shape of the party systems in contemporary European democracies, no party is able to single-handedly muster enough support to pass such amendments. And if courts need not fear threats upon their institutional integrity or the binding nature of the legal policy they set, then they do not need to take whatever majorities want into consideration in their decisions. Moreover, methodological reasons have been advanced to dismiss the whole notion that constitutional courts behave strategically in relation to the preferences of majorities and the elected branches as a whole. As Sweet puts it, "evaluating the extent to which constitutional courts constrain themselves due to fears of being overridden constitutionally is extremely difficult, if not impossible, to do empirically", and "the analyst can only infer such behavior from outcomes, and only by choosing to interpret data in one way rather than the other" (Sweet 2000, 90).

However, some doubts can be cast upon this reasoning, at least when applied to the Spanish and Portuguese constitutional courts. First, we must not forget that the functioning of both courts is regulated not only by constitutional rules but also by organic laws, which require only absolute majorities in parliament to be approved and amended. This plainly means that anything about both courts' institutional make-up that is not
fixated in the Constitution — whose amendment indeed require qualified majorities — is potentially amenable to unilateral change on the part of a party enjoying the support of a disciplined absolute majority in parliament, as both PSOE and PSD enjoyed in Portugal and Spain for a considerable period of time. Whether terms are renewable or not, the internal organization of the Court in sections and plenary and what kind of referrals and appeals are heard by them, the rules for election of each courts' President and Vice-President, quorum requirements and voting rules for any kind of decisions, the very possibility of casting dissenting or concurring opinions, the regulation of vacancies and impeachment of justices, the existence of an age for compulsory retirement, the calculation of justices' pensions and additional allowances, the restriction of abstract review referrals by the autonomous communities in Spain to norms "that may affect their own range of autonomy," or the deadlines for referral of legislation in a priori or a posteriori review are a just few examples of relevant issues about the functioning of the Court which are regulated by statute rather than by constitutional rules in either country.

Besides, the ability of majorities and the governments they support to tinker with the either court's institutional make-up varies according to the detail of constitutional rules and whatever additional obstacles may be placed on the path of such lawmaking process. In this respect, the differences between the Spanish and Portuguese cases are susceptible of producing observable effects. In the latter, not only is the Constitution more detailed about the effects of rulings of constitutionality or unconstitutionality, but also organic laws such as those regulating the Constitutional Court may end up requiring a 2/3 majority after all, namely, if they get vetoed by the President. Thus, in Portugal, a majority's ability to unilaterally amend the Court's organic law depends on the presence
of a President sympathetic to that measure. However, in Spain, relevant changes in the Tribunal's organic law are easier for legislative majorities. Past experience has already shown that lawmaking majorities in Spain may add and withdraw competencies not mentioned in the Constitution to the Tribunal's jurisdiction. For example, Organic Law 7/1999 expanded that jurisdiction beyond what is specified in the Spanish Constitution, creating a new type of conflicts of competencies that gives local governments the right — under certain conditions — of challenging the constitutionality of central government or the autonomous communities' legislation that violates local autonomy. Conversely, in 1985, the PSOE majority passed Organic Law 4/1985, amending LOTC and making a priori review of legislation simply disappear from among the Court's powers. In other words, in comparison with Portugal, institutional rules in Spain foster a stronger collective accountability of courts before majorities, since the latter enjoy the ability to affect the institutional integrity of the court by legislative means.

Second, attacks against constitutional courts do not have to be limited to formal constitutional or legislative changes aimed at reversing decisions or change judicial institutions. Political actors and elected officials in general can attempt to constrain judicial decisions by simply threatening non-compliance and mobilizing public opinion against the courts. The cases in which such attempts have been made in both Spain and Portugal throughout the last two decades are just too numerous to discuss exhaustively, but a few examples are enough to suggest that, at the very least, attacks against the courts on the part of majorities are not limited to contexts of unconsolidated democratic regimes. For example, in 1985, following leaks about a possible unconstitutionality ruling on the law decriminalizing abortion, PSOE charged the cabinet's number two Alfonso
Guerra with launching a full-fledged attack against the Tribunal. Referring to the contrast between the composition of the Court and the Congress, Guerra asked "how is it possible that twelve gentlemen can never be wrong and 350 can?," and stated how "incredible it is that the most important laws of a Government are stopped by twelve people who have not been popularly elected." Besides, Guerra warned that while the government would "obviously" abide to a unfavorable ruling — "only proper of the 18th century and that would place the Court in an incredible position vis-à-vis Spanish society" —, such a ruling would inevitably force the government to "start an indulting machine."

It was not necessary for Guerra to explain that such an "indult-making machine" would, in practice, render the status quo (the full criminalization of abortion) and the judicial ruling that supported it totally inoperative. It has also occurred that Spanish parties have even made their loyalty to the Constitution itself conditional upon favorable ruling, as in the case of CiU as a decision on the constitutionality of legislation regulating requirements for knowledge of Catalán. In this case, a high level party official simply stated that the possibility of an unconstitutionality decision "was so negative that we prefer not to consider it," while others suggested that "the consequences [of a negative ruling] would be unimaginable" and that "perhaps we have made a mistake" in voting for the Constitution back in 1978.

Lawmaking majorities in Portugal have been no less adept at mobilizing public opinion against the Court, reacting to rulings that seriously threaten their ability to obtain their preferred policies with significant rhetorical violence and ill-disguised hints at radical institutional changes. For example, in 1988, following a ruling that prevented the PSD majority from passing legislation that fully deregulated the labor market, Prime
Minister Cavaco Silva made a prime-time televised address to the country expressing his "serious concern about the Court's ruling," describing it as "an obstacle to the development of the country," and hinting at the fact that "something is seriously wrong with our political-constitutional system," only to argue a few days later that the Court was composed by "politicians rather than judges."  

A few months later, commenting another declaration of unconstitutionality of legislation regulating elections to the European Parliament, a high level government official described the ruling as "absurd and unjustified" and "with a political content." And like in Spain, the accusation of lack of democratic legitimacy is also, inevitably, the last weapon to which majorities resort short of actually moving from rhetorical to concrete action against the courts. 

We should expect all this to make a difference in the likelihood of courts actually challenging ruling majorities and declaring their policies unconstitutional. Constitutional justices are not unaware that, although majorities may find it difficult and costly to reverse their rulings, the last word in setting legal policy falls upon those who are supposed to implement it: legislators, executives, and agencies. Of course, there are costs for non-compliance, but those costs depend on whatever support voters give the Court and their ability to monitor non-compliance (Vanberg 2001, 342). And public support results, at least partially, from the perception that they satisfy more than a single constituency and that their decisions result from procedural requirements ("the law") rather policy preferences ("politics") (Gibson, Caldeira, and Baird, 1998, 354-356). By accusing courts of being biased against elected majorities and of making "political" decisions without having the democratic mandate to do so— as Spanish and Portuguese lawmakers have routinely done when faced with actual or potential adverse rulings —,
majorities strike at the heart of judicial legitimacy, reducing the costs for non-compliance and, thus, affecting the justices' ability to reach their goals. Finally, given that, as we have seen, the amendment of organic laws does not necessarily require supermajorities, Spanish and Portuguese justices are not even immune from full-fledged attacks on the part of absolute majorities upon their courts' extant jurisdiction, status, and institutional integrity. It is at least plausible that courts and the justices that compose them may be interested in avoiding such reactions and attacks. In both countries, and keeping other things equal, courts can do so by refraining from declaring the unconstitutionality of laws passed by contemporary absolute majorities, precisely those who would be interested in and able to resort to the weapons of non-compliance, public censure, and institutional reprisals. If justices do behave strategically, we can expect this to be particularly visible in the Spanish case, where majorities' ability to tinker with the Court's institutional framework — at least that which is fixated in the Court's Organic Law — is, as we have seen, unencumbered by the role of other veto players (unlike what occurs with the presidential veto in Portugal).

*Role orientations*

Finally, under the framework of the different approaches to judicial behavior sketched earlier, it is relevant to determine whether the likelihood of Spanish and Portuguese justices declaring the unconstitutionality of statutes is affected not only by their party affiliation or their concern with avoiding attacks by lawmaking majorities, but also by their personal conception of the role constitutional justices should assume. More specifically, "regardless of their personal policy values, or how those values relate to the
values to the values dominant in majoritarian institutions," "activism" or "restraint" on
the part of justices should also vary according to their perception of the extent to which
they "should participate in policy-making (...) [and] substitute policy solutions they
derive from those derived by other institutions" (Tate 1995, 33-34).

It is, nevertheless, very difficult to access such role orientations and measure them
in any valid and reliable way. Constitutional court justices in Europe seldom leave behind
them a "track record" that might contribute to obtain measures of their inherent judicial
"activism" or "restraint." For former career judges, data about judicial decision-making in
lower courts is often non-existent. From former party officials that end up being
appointed to constitutional courts, statements about the level of judicial "activism" or
"restraint" exhibited by constitutional justices are abundant, but are also obviously
contingent upon how exactly the courts' decisions affect policy outcomes and how those
politicians wish to portray them. In fact, the same problem occurs with law professors,
whose written doctrinal reflection and comments about the propriety of judicial
"activism" or "restraint" is not independent from similar considerations.32 Newspaper
articles occasionally classify appointees as "progressive" and "leftist" or, conversely, as
"conservative" or "rightist,"33 but the most systematically available information about the
attitudes of any particular justice in Spain or Portugal is her party affiliation, measured
either in terms of the party that proposed her name in the interparty negotiations for
parliamentary appointments, the party controlling the executive (in the case of executive
appointments in Spain), or even the party to which the justice is seen to be "close" (in the
case of coopted justices in Portugal). This can be seen, at most, as a proxy of her
preferences, and not of her role orientation. Finally, and regardless of the validity issues
involved in the use of questionnaires designed to measure the justices' self-described role orientations (Baum 1997, 84-85), such questionnaires have not been applied to Spanish or Portuguese constitutional court justices.

However, we can test the impact of what can be conceived as a proxy measure of role orientations, that can be determined by one potentially relevant aspect of the justices' background: whether they were recruited among the career judiciary or among the remaining legal professions. One common theme in the socio-legal literature about civil law systems concerns the extent to which the professional ethos of the career judiciary in these countries is typically tied to traditional notions of the judge as a bureaucratic civil servant, the supremacy of the law emanated from parliament, and the acute separation between law and politics. It has even been argued that the very emergence of special courts in charge of judicial review and separated from the regular judiciary is a direct result of the incapability of the traditional civil law judge to perform such tasks. As Cappelletti and Golay put it,

"traditional appellate courts in Civil Law countries (...) often lack the temperament and inclination to make the hard, controversial choices often demanded by constitutional adjudication. In Civil Law countries, a career in the judiciary is often a career like that of any public servant. The judge-aspirant trains in the technical application of statutes, graduates to a judgeship, advances by seniority and retires to his pension. Such a career neither attracts people with penumbral vision, nor trains them in clairvoyance" (Cappelletti and Golay 1981). 34

The question is not only one of legal knowledge or creativity. As Guarnieri and Pederzoli note, referring explicitly to the literature on "role orientations," civil law systems have been heavily influenced by a "negative" definition of the judicial role,
namely, one of "judges that do not oppose the legitimate political institutions, (...), making it difficult [for them] to oppose a Parliament seen as the true incarnation of the political community and presented as the true 'interpreter' of popular will" (Guarnieri and Pederzoli 1996, 69; see also Pederzoli 1990). Although career judges appointed to constitutional courts are placed under a different structure of incentives than that which prevails in the bureaucratic judiciaries, and in spite of the recent diffusion in continental Europe of more activist role conceptions for ordinary judges — in which the most progressive professional associations have made a crucial contribution (Guarnieri and Pederzoli 1996, 72-73) — a legal culture of positivism and passivity may be carried into constitutional courts by career judges, in contrast with appointees recruited among other legal professions (attorneys or law professors) or even among party cadres. Thus, and regardless of their party affiliations and strategic considerations, we should expect constitutional court justices recruited among the career judiciary in both Spain and Portugal to be less inclined to declare the unconstitutionality of laws emanating from sovereign parliaments.

In sum, Table 7.4 shows an overview of the main hypotheses concerning levels of consensus, the impact of the party affiliation of justices on judicial behavior, and the extent to which justices display deference towards the preferences of contemporary majorities. If courts and justices are treated as unconstrained actors, two almost perfectly contrasting sets of assumptions emerge, depending on which we hypothesize judicial behavior to be determined by “normative reasoning” or by the “personal attributes” of justices (ideology or role orientations). In the former case, levels of consensus in the court are likely to be high and the party affiliation of justices is unlikely to make any
significant difference in individual judicial behavior. In the latter (provided that litigation is not predominantly trivial or “unconventional” in what concerns the ideological dimensions raised), consensus is likely to be low and the impact of the party affiliation of justices substantial. However, the common assumption about the unconstrained nature of judicial decision-making determines one common expectation: that justices will not exhibit any deferential behavior towards extant majorities.

<table>
<thead>
<tr>
<th></th>
<th>Unconstrained justices</th>
<th>Strategic justices</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Predomiance of normative reasoning in decision-making</td>
<td>Predomiance of personal attributes in decision making</td>
</tr>
<tr>
<td>Consensus</td>
<td>High</td>
<td>Low</td>
</tr>
<tr>
<td>Impact of party affiliation</td>
<td>Low</td>
<td>High</td>
</tr>
<tr>
<td></td>
<td>Unless “trivial” or “unconventional” litigation</td>
<td>Unless “trivial” or “unconventional” litigation</td>
</tr>
<tr>
<td>Deference towards contemporary majorities</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

Table 7.4 Main hypotheses about judicial behavior in constitutional courts

The notion that justices are strategic, however, generates a more complex set of expectations. Whenever the institutions of appointment and retention are such that justices have strong incentives to remain accountable before the parties that appoint them, the impact of party affiliation on judicial decision-making is likely to be also strong, eliminating the possibility of high levels of consensus. This would correspond, as we have seen, to the case of Portugal. Conversely, if it is the insulation of the court as a whole vis-à-vis majority retaliation that is lower, then judicial behavior might seem
similar to that we could expect from a theoretical approach treating justices as unconstrained actors behaving according to a “legal model”, with high levels of consensus and a low impact of individual party affiliation on individual judicial behavior. However, in that case, such behavior would be strategic, engendered in order to preserve the court from negative reactions from the public or political actors. This would correspond, as we have seen, to the case of Spain. Finally, the assumption of strategic justices is likely to result in judicial deference towards contemporary majorities, unlike what is suggested by the “unconstrained courts” or the “personal attributes” approach. For the reasons described above, this should be particularly visible in Spain, where the institutional integrity of the Court is more vulnerable to majority rule than in Portugal.

**Judicial behavior in the Iberian constitutional courts**

In this section, I examine data about individual judicial behavior in the Portuguese and Spanish constitutional courts. Data for Portugal was obtained about all abstract review rulings on the merits made between 1983 and December 1999 on the constitutionality of bills, laws, and decrees passed in the same period (meaning, since the inception of the Court until the end of the 7th legislature), upon referral by opposition MP’s, regional authorities, and the President of the Republic. This corresponds to 77 cases and 821 justice observations. Data for Spain was obtained about all abstract review rulings on the merits made between 1980 and July 2001 on the constitutionality of bills, laws, and decrees passed during the first six legislative terms (since the creation of the Court until PP’s minority government), following referrals by opposition MP’s or senators and regional authorities. This corresponds to 108 cases and 1,217 justice observations. 

35
Justices' observations were measured as a dichotomous variable with value 1 if the justice found unconstitutional provisions in the scrutinized piece of legislation and value 0 if she did not. This is obviously a simplification of each justice's opinion in each ruling. The votes of two different justices in a single ruling will both be coded with value 1 if the justices found unconstitutional provisions in a specific piece of legislation, even if those provisions are not the same or if they present different legal reasonings as to why they should be declared unconstitutional. Similarly, different legal reasonings as to why certain provisions are not unconstitutional are not taken into account with this measurement, and those votes are similarly coded with value 0.

Nonetheless, this overt simplification is not devoid of advantages. By focusing on a single dependent variable of interest — whether justices voted to declare statutes or parts thereof null and void —, it allows justices' votes to be comparable across a multitude of different rulings. Besides, by potentially overestimating consensus within the Court — counting as unanimous those rulings in which justices may have presented concurring opinions or even dissents but did not disagree in the basic issue of whether statutes contained any unconstitutional provision or not —, this measurement provides a more stringent test to approaches suggesting that consensual behavior should not prevail systematically in the Court, namely, approaches arguing that justices to be solely or partially motivated by policy preferences.

Portugal

We can get a first glimpse of one of the main differences between judicial behavior in the Spanish and Portuguese courts by focusing on the levels of consensus
within each court in abstract review cases. Figure 7.1 displays the proportion of unanimous rulings in each court since their inception. We count as unanimous any ruling in which no justice found unconstitutional provisions or all justices found unconstitutional provisions in the scrutinized piece of legislation.

![Figure 7.1: Proportion of unanimous abstract review rulings on the merits in the Spanish and Portuguese constitutional courts](image)

This is a stark contrast between the two courts in this respect: in Portugal, consensus in abstract review rulings is much less pervasive than in Spain. At least until 1996, less than one out of every four rulings about whether to declare statutes unconstitutional in the Portuguese Court were unanimous. In the first three years of the Court's life (1983-85), there was not a single abstract review ruling that did not generate
dissents on the issue of whether statutes contained unconstitutional provisions. Conversely, in Spain, for any of the four periods considered, in only about one out of every five rulings about the constitutionality of statutes was there disagreement among the justices about whether those statutes contained unconstitutional provisions or not. Note that this contrast between the two countries is not a function of the way unanimity was measured here. In Spain, for the entire period, the percentage of unanimous rulings on the merits according to our measurement was 81 percent. But when we make the criteria for unanimity much more stringent, namely, counting as unanimous only the cases in which all justices agree on the entire content of case disposition and legal reasoning expressed by the Court's opinion (i.e., when there are no concurring or dissenting opinions), the percentage of entirely unanimous rulings is still 61 percent, well above the 30 percent in Portugal between 1983 and 1999.

The sort of nonconsensual behavior in the Portuguese Court immediately casts doubts upon the kind of substantive contribution that notions such as the "power of the law" or the concern of justices with assuring "the supremacy of the constitution" offer to explain judicial behavior. Although Portuguese justices may be interested in "achieving the supremacy of the constitution," and whatever role the "power of the law" and "normative reasoning" has on their behavior, that role does not seem to constrain them too much to consistently find similar solutions about how that can be achieved. However, what does explain their predominantly nonconsensual behavior? Do disagreements about the constitutionality of statutes arise in a more or less random fashion, or are they structured on the base of individual attributes of the justices, either of a political-ideological or different nature?
Bloc analysis provides important clues about the potential explanations of conflict within the Portuguese Court. Tables 7.5 and 7.6 display, for two different periods (1983-89 and 1989-99), the interagreement scores for the Portuguese justices in abstract review cases following political referrals. Justices are placed along a left-right continuum according to the parties that appointed them, with the so-called "third coopted" justices ("neutral") placed in the middle. Interagreement scores for each pair of justices are calculated as the proportion of cases in which they both participated and in which they agreed either on finding unconstitutional provisions in the scrutinized legislation or on not finding any unconstitutionality. Scores for justices appointed by the same party are placed within boxes, while those above the average interagreement value are marked in bold.
Table 7.5: Interagreement scores in the Portuguese Court, abstract review rulings on the merits between 1983 and 1989 (pairs of justices that participated in less than ten rulings not considered)

<table>
<thead>
<tr>
<th>CDS app.</th>
<th>PSD appointees</th>
<th>Nt.</th>
<th>PS appointees</th>
<th>PCP appointees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cardoso da Costa</td>
<td>- .86 (.14)</td>
<td>.84 (.25)</td>
<td>.97 (.30)</td>
<td>.83 (.29)</td>
</tr>
<tr>
<td>Mário Afonso</td>
<td>- .84 (.13)</td>
<td>.77 (.12)</td>
<td>.87 (.14)</td>
<td>.79 (.12)</td>
</tr>
<tr>
<td>Raul Mateus</td>
<td>- .88 (.25)</td>
<td>.90 (.24)</td>
<td>.78 (.23)</td>
<td>.81 (.23)</td>
</tr>
<tr>
<td>Messias Bento</td>
<td>- .86 (.25)</td>
<td>.68 (.29)</td>
<td>.65 (.29)</td>
<td>.64 (.29)</td>
</tr>
<tr>
<td>Marques Guedes</td>
<td>- .79 (.24)</td>
<td>.79 (.28)</td>
<td>.72 (.26)</td>
<td>.77 (.26)</td>
</tr>
<tr>
<td>Martins da Fonseca</td>
<td>- .89 (.26)</td>
<td>.92 (.26)</td>
<td>1.00 (.26)</td>
<td>.87 (.26)</td>
</tr>
<tr>
<td>Monteiro Diniz</td>
<td>- .88 (.26)</td>
<td>.89 (.26)</td>
<td>.93 (.26)</td>
<td>.89 (.26)</td>
</tr>
<tr>
<td>Magalhães Godinho</td>
<td>- 1.00 (.27)</td>
<td>.87 (.27)</td>
<td>.79 (.27)</td>
<td></td>
</tr>
<tr>
<td>L. Nunes de Almeida</td>
<td>- .86 (.22)</td>
<td>.79 (.22)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Vital Moreira</td>
<td>- .87 (.23)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mário Brito</td>
<td>- .52 (.27)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

In parenthesis, number of rulings in which both justices participated. Pairs of justices that participated in less than ten rulings not considered.
Average interagreement: all pairs (.79); PSD appointees (.85); PS appointees (.92); PCP appointees (.87)
Sources: see Appendix.
Recall that our measure of judicial behavior tends to overestimate interagreement, by considering that two justices agree whenever they find unconstitutional provisions in the scrutinized piece of legislation, regardless of what those provisions are and the legal reasoning espoused by the justices. Besides, we place the hypotheses relating personal attributes to judicial behavior under a more stringent test that usual, since interagreement scores were calculated for all rulings, both unanimous and non-unanimous. However, even under these coding rules, it is easy to see that conflict within the Court is not

Table 7.6: Interagreement scores in the Portuguese Court, abstract review rulings on the merits between 1990 and 1999 (pairs of justices that participated in less than ten rulings not considered)
random. Instead, it seems to be politically structured. In both periods, and with a single exception (Mário Afonso and Messias Bento between 1983 and 1989), all justices that were appointed by the same party exhibited above-average interagreement scores. Besides, most of the remaining cases of above-average interagreement scores take place among justices appointed by parties belonging to the same ideological bloc. Thus, between 1983 and 1989, the CDS-appointed Cardoso da Costa frequently joined the bloc of PSD-appointed justices, in the same way that PCP-appointed Vital Moreira (and, to a lesser extent, Mário de Brito) joined the bloc of Socialist appointees. From the 80s to the 90s, increasing polarization is visible: while average interagreement decreases, it increases within both party and ideological blocs, with Cardoso da Costa integrated again in an overall right-wing bloc and Communist-appointees forming again the left-wing bloc with justices appointed by the PS.

One of the working hypotheses about judicial behavior in the Iberian courts concerned precisely the role of the justices' party affiliation in favoring the formation of such blocs. The general hypothesis was that, both because political parties are able to select all or most of the justices on the basis of their policy preferences and justices experience costs in terms of career goals for deviating from party preferences, justices appointed by parties that supported the approval of a specific statute were less likely to vote for declaring it totally or partially unconstitutional. Additionally, it was suggested that the weight of party affiliation in the explanation of judicial behavior should be particularly pronounced in Portugal, given institutions of appointment and retention that increase the costs justices willing to disregard party preferences might experience in terms of career goals.
In order to measure the impact of the justices' party affiliation in votes on declarations of unconstitutionality, a variable measuring *Appointing party support* was created, relating legislative partisan behavior with judicial appointments. In Portugal, that variable takes the value 1 when, for every justice and every piece of legislation scrutinized, the party that appointed the justice voted *in favor* of that legislation's approval in the final vote in parliament, and 0 otherwise.36

<table>
<thead>
<tr>
<th></th>
<th>Vote against unconstitutionality</th>
<th>Vote for unconstitutionality</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>All rulings</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Justice appointed by party</td>
<td>63.9</td>
<td>36.1</td>
</tr>
<tr>
<td>supporting legislation</td>
<td>(239)</td>
<td>(135)</td>
</tr>
<tr>
<td>Justice not appointed by party</td>
<td>31.8</td>
<td>68.2</td>
</tr>
<tr>
<td>supporting legislation</td>
<td>(142)</td>
<td>(305)</td>
</tr>
<tr>
<td></td>
<td><em>Cramer's v = .29</em></td>
<td></td>
</tr>
<tr>
<td><strong>Non-unanimous rulings</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Justice appointed by party</td>
<td>63.7</td>
<td>36.3</td>
</tr>
<tr>
<td>supporting legislation</td>
<td>(177)</td>
<td>(101)</td>
</tr>
<tr>
<td>Justice not appointed by party</td>
<td>19.9</td>
<td>80.1</td>
</tr>
<tr>
<td>supporting legislation</td>
<td>(65)</td>
<td>(261)</td>
</tr>
<tr>
<td></td>
<td><em>Cramer's v = .45</em>**</td>
<td></td>
</tr>
</tbody>
</table>

*35p<.05; **p<.01; ***p<.001
Sources: see Appendix.

Table 7.7: Portugal: the relationship between justices' party affiliation and votes on declarations of unconstitutionality (row percentages)

As Table 7.7 reveals, the party affiliation of Portuguese justices and their behavior in abstract review rulings are significantly associated: when we consider all rulings — unanimous and non-unanimous — *Appointing party support* for the legislation scrutinized is clearly related to the way justices vote in abstract review cases. Of all votes issued by justices who had been appointed by parties that supported the scrutinized piece of legislation, only 36 per cent were for the unconstitutionality of the entire statute or part
of it. However, of all votes issued by justices that were not appointed by parties supporting the legislation, that percentage rose to 68 per cent. The relationship between the two variables almost doubles in strength if we deal exclusively with non-unanimous votes, showing that, whenever there was conflict within the Portuguese Court about the constitutionality of statutes, that conflict seems to have been strongly structured by the party affiliation of justices.

This finding is validated when, by means of multivariate analysis, we test all hypotheses that result from both the personal attributes and strategic approaches. Our dependent variable is whether justices voted for the unconstitutionality of scrutinized statutes. Besides Appointing party support, we also test the impact of three additional independent variables. First, Career justice is a proxy variable for role orientations, coded 1 when the justice was recruited from among the career judiciary and 0 otherwise, and we should expect its impact to be negative: regardless of other factors, including whether the party that appointed the justice supported the scrutinized legislation or not, a justice recruited among the career judiciary should be less likely to declare statutes of parts thereof unconstitutional.

Second, the hypothesis that justices are strategic in their relationship with lawmaking majorities, refraining from making declarations of unconstitutionality in contexts where such behavior is more likely to result in effective political reprisals, is also tested. We should expect justices to be less likely to veto statutes or parts thereof when that statute was supported by a government that enjoyed an absolute majority at the time of the ruling (Contemporary absolute majority is coded 1 in such cases). Conversely, when directly facing any minority government or one supported by a party
different from that which prevailed at the time of the statute's approval (when the value of Contemporary absolute majority is 0), justices should, keeping other things equal, be more likely to declare the unconstitutionality of statutes.

Finally, a control variable for case mix is introduced. We should expect justices to behave differently when deciding upon referrals made by regional MP's and authorities, since such cases potentially raise issues unrelated to traditional ideological cleavages and to the alignment of parties along the left-right continuum. We can even form clear expectations about what the outcomes in such cases should be: to the extent that judicial appointments allow political actors to place in the Court justices aligned with their policy preferences, the lack of intervention of regional authorities in the process of selection and screening of justices and the control of that process by the parties' national leaderships suggests that justices should generally be less prone to support the arguments presented by regional authorities about the invasion of their competencies. In other words, when facing Regional referrals, and keeping other things equal, justices should be less likely to declare the unconstitutionality of national legislation.
<table>
<thead>
<tr>
<th>Independent variables</th>
<th>Coefficient</th>
<th>Standard Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appointing party support</td>
<td>-1.44***</td>
<td>.16</td>
</tr>
<tr>
<td>Career judge</td>
<td>.01</td>
<td>.16</td>
</tr>
<tr>
<td>Contemporary absolute majority</td>
<td>-0.50**</td>
<td>.18</td>
</tr>
<tr>
<td>Regional referral</td>
<td>-2.77***</td>
<td>.39</td>
</tr>
<tr>
<td>Constant</td>
<td>1.35</td>
<td></td>
</tr>
</tbody>
</table>

N=821
\( \chi^2 = 160.11^{***} \)
Nagelkerke R\(^2 = .24 \)
Corr. predict=71%

**p<.01; ***p<.001
Sources: see Appendix.

Table 7.8: Portugal: logistic regression analysis of justices' votes for the unconstitutionality of statutes in abstract review

Table 7.8 presents the results of a logistic regression explaining justices’ votes for the unconstitutionality of scrutinized statutes. Those results yield strong evidence for some of the theoretical expectations about the determinants of individual judicial behavior on declarations of unconstitutionality. The negative and significant coefficient of *Appointing party support* shows that the behavior of Portuguese justices is strongly affected by their party affiliation: they are less likely to vote for the unconstitutionality of legislation when such legislation was supported by the parties that appointed them, and to do the opposite when that support was absent. On the other hand, and regardless of their party affiliation, justices are less likely to declare statutes unconstitutional when they are facing contemporary absolute majorities. However, party affiliation seems to have a much stronger weight in the explanation of judicial behavior than strategic considerations about the reactions of majority governments. In our sample, the original probability of a justice voting for the unconstitutionality of a statute is 54 percent, *but it increases to about 83 percent* when the statute was *not* supported by the party that appointed her.
Conversely, the probability of an unconstitutionality vote only raises to 66 percent when the justice is not facing a contemporary absolute majority. Furthermore, as expected, regional referrals tend to result in non-unconstitutionality rulings, regardless of party affiliation and contemporary majoritarian support for legislation. Only the fact of whether justices were recruited among the career judiciary or not seems to make no difference for their behavior, suggesting that either the career background of justices is a poor proxy for role orientations or that such orientations are entirely subsumed by the weight of more important political considerations (ideological and strategic) in judicial behavior.

Therefore, in Portugal, justices' party affiliation — and therefore the process of judicial appointments by political parties — plays a decisive role in their decision whether to declare statutes unconstitutional or not. High levels of dissent within the Portuguese Court are a direct consequence of such role: combined with the continuous presence of appointees from different parties in the Court's composition, the impact of justices' party affiliation on their behavior tends cause the frequent formation of stable and conflicting blocs within the Court whenever it rules upon referrals by political actors. Those blocs are largely constituted by justices appointed by either of the two largest parties and are often extended by appointees of smaller parties within each ideological bloc in the party system. Strategic considerations about the institutional integrity and legitimacy of the court do seem to have mitigated dissent to some extent, as all justices, regardless of party affiliation, display a systematic avoidance of full-fledged confrontation with contemporary absolute majorities. However, individual partisan links — either because of policy congruence with or political responsiveness to party preferences (and presumably
both) —, have been the overwhelming force behind judicial behavior and dissent with the Portuguese Court.

Spain

We saw that, in contrast with the Portuguese case, the presence in the Spanish Court of justices appointed by different parties has not resulted in systematic dissent. Quite the contrary: in about 80 percent of cases, Spanish justices have not disagreed about the presence or absence of unconstitutional provisions in the statutes they scrutinize. At first sight, this suggests that, unlike what occurs in Portugal, the party affiliation of justices plays a minor or even irrelevant direct role in their decisions about the constitutionality of statutes. We can obtain a first glimpse of that phenomenon by determining the extent to which Appointing party support and judicial behavior are associated in Spain. Unlike what occurs with the Portuguese Diário da Assembleia da República, the congressional Diario de Sessiones does not register final votes by parliamentary party, but only the aggregate number of MP's voting in favor, against or abstaining in the final vote of bills in parliament. Thus, lacking a measure of legislative behavior in the final vote in parliament for every justice and every piece of legislation scrutinized, Appointing party support in Spain was simply coded 1 if the justice was appointed by the party that supported the executive at the time legislation was passed, and 0 otherwise. As in Portugal, we expect the relationship between this variable and judicial behavior to be negative: justices appointed by the executive's party should be less likely to declare statutes passed under it totally or partially unconstitutional.

As it happens, that direct relationship between party affiliation and vote for declarations of unconstitutionality appears to be weak or non-existent. As Table 7.9
shows, *Appointing party support* has a statistically significant but weak relationship with judicial behavior in the few cases of non-unanimous decisions, but that association totally disappears when we consider the entire universe of abstract review rulings by the *Tribunal*.

<table>
<thead>
<tr>
<th>All rulings</th>
<th>Vote against unconstitutionality</th>
<th>Vote for unconstitutionality</th>
</tr>
</thead>
<tbody>
<tr>
<td>Justice appointed by government's party</td>
<td>45.4 (265)</td>
<td>54.6 (319)</td>
</tr>
<tr>
<td>Justice not appointed by government's party</td>
<td>41.9 (265)</td>
<td>58.1 (368)</td>
</tr>
</tbody>
</table>

Cramer's $\nu = .04$

<table>
<thead>
<tr>
<th>Non-unanimous rulings</th>
<th>Vote against unconstitutionality</th>
<th>Vote for unconstitutionality</th>
</tr>
</thead>
<tbody>
<tr>
<td>Justice appointed by party supporting legislation</td>
<td>67.9 (72)</td>
<td>32.1 (34)</td>
</tr>
<tr>
<td>Justice not appointed by party supporting legislation</td>
<td>51.1 (68)</td>
<td>48.9 (65)</td>
</tr>
</tbody>
</table>

Cramer's $\nu = .17^{**}$

*p<.05; **p<.01; ***p<.001
Sources: see Appendix.

Table 7.9: Spain: the relationship between justices' party affiliation and votes on declarations of unconstitutionality (row percentages)

One might still be led to salvage the hypothesis about a direct impact of party affiliation in the behavior of Spanish justices. First, it could be argued that lack of data renders our measurement of *Appointing party support* for Spain less precise than in Portugal. This measurement assumes that all bills passed under a particular cabinet in Spain count *exclusively* with the support of the party supporting that cabinet, something we know to be partially inaccurate (Capo Giol 1994, 97). Second, the weight of the regional referrals in the Spanish Court's docket, unrelated to traditional dimensions of party and ideological left-right conflict, might explain why substantive agreement in the
Spanish Tribunal might prevail in most cases and why party affiliation fails to account for judicial behavior. This is particularly so considering that, as we have seen in chapter six, the frequent demands on the part of some regional governments and nationalist parties — particularly Basque and Catalonian — for allowing the comunidades a role in judicial appointments have been to no avail, suggesting that, in terms of judicial policy preferences, the allocation of competencies between the central government and the comunidades has not become a relevant cleavage within the Court. Finally, given the existing institutions of appointment and retention under which both courts functioned for almost the entire period under analysis, we had already hypothesized that party affiliation should have less weight in the explanation of judicial behavior in Spain, considering the longer (and non-renewable) terms served by justices. But even with all these caveats, multivariate analysis seems to condemn the hypothesis as it stands. In spite of the imperfect measurement of Appointing party support and the theoretical expectations about a weaker role of party affiliation in the explanation of judicial behavior in Spain, it is striking that, when we control for regional referrals and the constraints placed upon justices by confronting contemporary absolute majorities, whether justices were appointed by the party in government party at the time the scrutinized statute was approved seems to make no different whatsoever in their decision to declare that statute unconstitutional: although the variable has the correct sign, it is far from being statistically significant at conventional levels.
Table 7.10: Spain: logistic regression analyses of justices' votes for the unconstitutionality of statutes in abstract review

<table>
<thead>
<tr>
<th>Independent variables</th>
<th>Coefficient</th>
<th>Standard Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appointing party support</td>
<td>-0.20</td>
<td>0.14</td>
</tr>
<tr>
<td>Career judge</td>
<td>0.02</td>
<td>0.17</td>
</tr>
<tr>
<td>Contemporary absolute majority</td>
<td>-0.86***</td>
<td>0.12</td>
</tr>
<tr>
<td>Regional referral</td>
<td>0.95***</td>
<td>0.13</td>
</tr>
<tr>
<td>Constant</td>
<td>0.123</td>
<td></td>
</tr>
</tbody>
</table>

N=1207
χ²=101.150***
Nagelkerke R²=0.11
Corr. predict=62%

***p<.001
Sources: see Appendix.

However, recall that in the previous section it was suggested that, both in order to avoid displaying divisions within the Court, sophisticated policy-seeking justices might be willing to mute their sincere dissent in relation to majority opinions whenever such dissent would bring them no utility in terms of the Court's final disposition. This would not mean that the composition of the Tribunal and the justices’ party affiliation make no difference in judicial outputs. Instead, it would mean that whenever the correlation of forces within the Court seems to dictate a particular outcome, justices in the minority might be willing to concede to majority opinion for strategic purposes. In order to test that hypothesis, we add another variable to the previous model: Majority justices. For each ruling, Majority justices was coded as the number of justices in the Court appointed by the party that controlled the executive at the time the statute was approved. If judicial
behavior is affected by the partisan-ideological makeup of the Court in any way, we should expect this variable to have a negative impact on declarations of unconstitutionality: justices, regardless of the party that appointed them, should be less likely to vote for declaring statutes unconstitutional when the correlation of forces within the Court as a whole makes it to potentially disposed in a more favorable way towards the policies they are scrutinizing.

<table>
<thead>
<tr>
<th>Independent variables</th>
<th>Coefficient</th>
<th>Standard Error</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appointing party support</td>
<td>-.15</td>
<td>.15</td>
</tr>
<tr>
<td>Career judge</td>
<td>.03</td>
<td>.17</td>
</tr>
<tr>
<td>Contemporary absolute majority</td>
<td>-.83***</td>
<td>.12</td>
</tr>
<tr>
<td>Regional referral</td>
<td>1.06***</td>
<td>.13</td>
</tr>
<tr>
<td>Majority justices</td>
<td>-.14*</td>
<td>.06</td>
</tr>
<tr>
<td>Constant</td>
<td>.79</td>
<td></td>
</tr>
</tbody>
</table>

N=1207  
χ²=105.86***  
Nagelkerke R²=.11  
Corr. predict=59%

*p<.05; **p<.01; ***p<.001  
Sources: see Appendix.

Table 7.11: Spain: logistic regression analyses of justices' votes about the unconstitutionality of statutes in abstract review

Results in Table 7.11 support this hypothesis. Individual party affiliation still produces no impact on individual judicial behavior. However, the weight of majority appointees within the Court as a whole in each ruling does: the coefficient for Majority justices is negative and significant, suggesting that individual justices become less likely to declare statutes unconstitutional as the number of justices that were appointed by the government's party increases. In other words, party affiliation does have an impact on
judicial behavior in Spain after all: regardless of their individual affiliation with the executive's party, justices are moved towards voting for the constitutionality of statutes whenever potential support for those statutes increases within the Court, and towards voting for unconstitutionality when that support decreases.

The notion that Spanish justices act strategically is strongly reinforced when we shift our attention to the way the external (rather than the internal) environment of the Court affects individual behavior. In the previous section, we had hypothesized that although justices in the Spanish and Portuguese should both refrain from vetoing legislation passed by contemporary absolute majorities, that constraint should be stronger in Spain, considering that the ability of Spanish majorities to affect the Court's institutional integrity by changes in its organic law is less encumbered by additional legislative veto points than in Portugal. This comparative hypothesis is confirmed by the data: in our sample, the original probability of a Spanish justice voting for the unconstitutionality of a statute is 57 percent; however, that probability decreases by 18 percent points whenever the Court is facing a contemporary absolute majority at the time of the ruling, a stronger effect than produced by the same variable in Portugal. Finally, although whether the justices were recruited from among the career judiciary seems to have no impact on their behavior, regional referrals do seem to have a systematic impact on judicial behavior. However, contrary to expectations, justices are more likely to rule federal legislation unconstitutional when referrals originate from the comunidades. In other words, and unlike we assumed in the beginning, the absence of a role for regional authorities in judicial appointments has not necessarily rendered the
Court deferent to the national legislator in issues specifically concerning center-periphery allocation of powers.

It seems therefore that who appoints constitutional courts’ justices does make a whole lot of difference for explaining their behavior when scrutinizing the constitutionality of legislation. In Portugal, the likelihood of justices detecting unconstitutional provisions on any specific piece of legislation is strongly (negatively) affected by whether the party that appointed them lent its support to the scrutinized statute. In Spain, that impact is not direct, but rather mediated by the overall political outlook of the Court: as the aggregate composition of the Court tilts more favorably towards potential support to majority policies, all justices, regardless of who appointed them, are more likely to find statutes to be according to the Constitution.

We had suggested two alternative causal mechanisms accounting for this phenomenon. This might be evidence of the role of justices' personal attributes (in this case, ideological preferences) in explaining judicial decisions or, instead, of sophisticated judicial behavior in adaptation to party preferences. On their own, in each country, the results for each country are consistent with both approaches to judicial decision-making: the direct or indirect role of justices' party affiliation in explaining judicial decisions may result from the congruence between justices and parties' ideological preferences (allowed by the appointment rules and practices in Iberian constitutional courts), but also from justices' strategic adaptation to changing party preferences (fostered by the lack of life tenure and the possibility of term renewal). However, comparative results do contribute to mitigate this apparent indeterminacy about what explains judicial behavior in the two countries. In fact, regardless of which explanation ultimately prevails, the comparison
between the Portuguese and Spanish cases yields results that are not compatible with an approach that focuses exclusively on the personal attributes of justices. Such an approach does not explain why the behavior of Portuguese justices is directly determined by their party affiliation while in Spain it is not, and also fails to account for the indirect impact of the partisan composition of the Court on how Spanish justices decide.

Instead, a strategic approach to judicial decision-making is compatible with both outcomes. As we argued earlier, the institutions of appointment and retention in the Portuguese Court entail more important risks for career-minded justices for voting sincerely regardless of party preferences, suggesting that party affiliation should play a larger role in individual behavior than in Spain. This is, in fact, what occurs. To a great extent, mitigating this level of individual accountability of justices before the parties that appoint them was precisely the goal of the 1997 constitutional amendments that took place in Portugal, that put an end to the renewability of terms and increased their length. They have been almost unanimously described by Portuguese politicians and justices alike as favoring the independence of the latter vis-à-vis parties, suggesting that both were quite aware that individual autonomy in relation to party preferences might have been much less than perfect while short terms and the possibility of reelection prevailed.37 It is still too soon, however, to assess the effects of those institutional reforms.

Similarly, the high level of consensus in the Spanish Court could only arise if party affiliation made no difference for decision outcomes, if consensus resulted from a docket that systematically raises issues unrelated to traditional ideological conflicts, or if justices were, in fact, exhibiting strategic consensus. As it happens, when we control for the impact of federalism cases, aggregate party affiliation in the Court does make a
difference on individual judicial decisions in Spain, suggesting a practice of strategic conformity on the part of justices to the dominant forces within the Court. In fact, the prevalence of the sort of strategic consensus is consistent with the almost obsessive concern of Spanish justices with the potential negative consequences of displaying "partisan" behavior. As the Court’s then Vice-President, Rubio Llorente, put it in answer to a journalist’s question about why do the Spanish justices exhibit such an "irregular" and "fluid" (i.e., non-partisan) behavior in what concerns dissenting opinions, "it would be extremely bad for the Court if permanent blocs were formed, because that might lead people to think that one does not act for juridical reasons, but rather ideological or other reasons."

If the composition of the Court made no difference whatsoever for judicial outcomes, we could still mistake this prevailing norm of consensus with a purported effect of legal norms, systematically constraining justices to find similar solutions for similar constitutional problems. However, as it happens, that norm of consensus seems clearly aimed at preserving the Court from political attacks, and does not prevent individual judicial behavior and overall decisions from being influenced by the partisan correlation of forces within the Tribunal.

Finally, majorities' ability to "punish" courts does not seem to be limited to seemingly impossible constitutional amendments that might reverse their decisions or affect their institutional integrity. Governments can threaten non-compliance, mobilize public support against the courts, undermine judicial legitimacy, and, if supported by an absolute majority, resort to legislative reforms aimed at disrupting the courts' institutional environment. We had hypothesized that constitutional court justices in both countries should be wary of confronting contemporary absolute majorities, but also that such
wariness should be higher in Spain, considering the almost unencumbered — and already experimented — ability of majorities to operate legislative changes with substantial impact on the institutions of constitutional review. The results confirm our expectations.

**Some implications**

The implications of these findings go beyond testing the approaches to judicial behavior sketched earlier in the chapter. They also tell us something about the likelihood of either court actually becoming a countermajoritarian actor in policy-making in each respective political system.

<table>
<thead>
<tr>
<th>Legislature in which statutes were passed</th>
<th>All rulings</th>
<th>Rulings when facing a contemporary absolute majority</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total statutes scrutinized until July 2001</td>
<td>Statutes containing norms ruled unconstitutional</td>
</tr>
<tr>
<td>1st Legislature (1980-82) UCD minority</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>2nd Legislature (1982-86) PSOE majority</td>
<td>22</td>
<td>7</td>
</tr>
<tr>
<td>3rd Legislature (1986-89) PSOE majority</td>
<td>8</td>
<td>6</td>
</tr>
<tr>
<td>4th Legislature (1989-93) PSOE majority</td>
<td>11</td>
<td>5</td>
</tr>
<tr>
<td>5th Legislature (1993-96) PSOE minority</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>6th Legislature (1996-00) PP minority</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>49</td>
<td>23</td>
</tr>
</tbody>
</table>

Sources: see Appendix.

*Ruling 164/2001, against a law passed during the 6th legislature but declared unconstitutional already after PP had obtained an absolute majority in the 2000 elections.

Table 7.12: Spain: constitutional court rulings following opposition referrals (1980-2001)
As we can see in Table 7.12, in the more than two decades of the Spanish Court's existence, from 1980 to July 2001, referrals by opposition MP's or senators of bills, decrees, and laws passed during the first six legislatures in Spain resulted in a total of 49 abstract review rulings on the merits. The Court detected unconstitutional provisions in the scrutinized statutes in 23 out of those 49 rulings. However, *it only confronted a contemporary absolute majority in ten of such cases*. All the remaining unconstitutionality rulings took place *after* elections had produced changes in the political context under which statutes had been approved, either by withdrawing majority support from governments (from PSOE majority to PSOE minority after 1993) or by replacing the party in government altogether (from UCD to PSOE after 1982, and from PSOE to PP cabinets since 1996).

Furthermore, closer observation of those ten cases of judicial vetoes of legislation mitigates even more the perception that opposition litigation is likely to be successful in terms of blocking majority policies. In half of those cases, unconstitutionality rulings resulted from litigation by *both* parliamentary oppositions *and* regional governments or parliaments, and the provisions rendered unconstitutional were more often those which were claimed to be so by the autonomous communities rather than by the main parliamentary opposition parties. The remaining five unconstitutionality rulings did originate in referrals made exclusively by opposition parties. However, *in all but one of those cases*, the fact that the Court found unconstitutional provisions ended up making little difference for the majority's ability to pass their preferred policies. First, in Ruling 72/1984, the Court declared the unconstitutionality of a bill revising the system of incompatibilities with other public or private activities to which MP's and senators would
be subjected, following a PP referral for *a priori* review. However, unlike what the *populares* had requested, the Court refrained from examining the substantive question about whether MP's or senators could lose their seat by mid-term under new legislation, and merely vetoed the bill for constituting an *ad hoc* revision of general electoral law.

In the following year, the Socialist majority was faced with two unconstitutionality rulings, namely against the bill decriminalizing abortion and the one regulating the "right to education" (LODE). However, in the first of these apparent victories for the opposition — the abortion ruling (53/1985) — the Court declared that the fetus did not enjoy a "right to life," that therapeutic abortion was constitutionally acceptable on account of preserving both the physical *and* "psychical" health of the mother. In fact, it declared the bill unconstitutional merely on account of not providing sufficient guarantees of verification that the grounds for legal abortion were being met, something that the Socialists were immediately able to solve without endangering the fundamental tenets of the bill. As for the LODE case, PP's litigation efforts were even less successful, since the Court basically confirmed the constitutionality of the entire bill with the exception of a provision of minor importance.40 The forth case took place in 1986, when the Tribunal ruled a government decree as being partially unconstitutional for legislating on issues reserved for organic law, something that the PSOE majority was again able to correct rather quickly by resorting to its parliamentary majority.41 Finally, the only significant defeat imposed by the Court on a contemporary majority cabinet concerned PSOE’s legislation on the civil service which, under the guise of fighting corporatist practices, was also designed to allow the Socialists to appoint a substantial number of party faithfuls to jobs previously occupied by career civil servants. However,
although the Court did nullify substantial parts of the statute, most of the desired effects of the legislation had already been obtained between 1984 (when the law was approved) and 1987 (when it was finally ruled unconstitutional by the Court).  

Portuguese opposition parties were even less successful in getting the Court to directly confront majority governments. Between 1983 and 1999, the Court declared the unconstitutionality of only ten statutes following referrals by opposition parties. However, as we can see in Table 7.13, the fingers of one hand are more than enough to count the number of cases (four) in which the Court directly challenged an absolute majority following opposition referrals.

<table>
<thead>
<tr>
<th>Legislature in which statute was passed</th>
<th>Total number of statutes scrutinized until December 1999</th>
<th>Statutes containing norms ruled unconstitutional</th>
<th>Proportion of statutes ruled unconstitutional</th>
<th>Rulings when facing a contemporary absolute majority</th>
<th>Proportion of statutes ruled unconstitutional</th>
</tr>
</thead>
<tbody>
<tr>
<td>3rd Legislature (1983-85) PS-PSD majority</td>
<td>4</td>
<td>3</td>
<td>.75</td>
<td>1</td>
<td>.25</td>
</tr>
<tr>
<td>4th Legislature (1985-87) PSD minority 5th Legislature (1987-91) PSD majority</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>22</td>
<td>10</td>
<td>.45</td>
<td>4</td>
<td>.18</td>
</tr>
</tbody>
</table>

Sources: see Appendix.

Table 7.13: Portugal: constitutional court rulings following opposition referrals (1983-1999)

In July 1985, after parliament had already been dissolved, Ruling 144/85 declared part of the 1985 Budget Law unconstitutional for allowing excessive autonomy to the
executive to engage in budgetary transfers. In 1988, the Court declared again the unconstitutionality of several provisions of the 1988 Budget Law (Ruling 267/88), nullifying them for having surpassed the limits of delegation of powers from parliament to the executive. In 1990, the Court vetoed a law suspending an increase in teachers' wages that had been approved just a few months earlier, for violating the constitutional principle of trust in the legislator (Ruling 303/90). Finally, in 1995, the Court dismissed almost the entire referral made by the Communist MP's against the agrarian reform law passed under the first PSD majority government in 1988, and only ruled as unconstitutional a single article that restricted access to the administrative courts for appeals against the devolution of land to former owners (Ruling 225/95). All in all, as in Spain, only about one out of every five rulings following opposition referrals resulted in the Court vetoing laws passed by contemporary majorities, and with the relatively modest impact that we have just described.

These results confirm what we had already suggested about little oppositions have had to gain from countermajoritarian litigation in Spain and Portugal. Given the existing rules for the parliamentary (political and partisan) appointment of justices and staggered, short or renewable terms, extant majorities have been consistently able to prevent oppositions from populating the courts with the justices of their choice, something that we now know to make a distinct difference for judicial outcomes (and, therefore, for the likelihood of strategic oppositions ever engaging in litigation in the first place). And given majorities' ability to punish courts for excessive activism, either by mobilizing public opinion against them or downright affecting their institutional integrity, courts have displayed a systematic tendency to avoid open confrontations with those majorities.
As observers have already remarked for courts other than the Spanish and the Portuguese, *a posteriori* review — the kind of litigation to which opposition parties had had access in either Spain or Portugal — allows justices to "make an ally of time," postponing annulments of legislation until the stakes involved have substantially diminished, cases are settled by non-judicial means, or majorities themselves have been electorally displaced (Kommers 1994, 476 and 1997, 55). In fact, courts seem to be so effective in neutralizing whatever policy gains countermajoritarian litigation might have for oppositions that, in several cases, the legislation whose constitutionality is challenged by oppositions ends up being revoked even before courts have gotten around to decide whether it is unconstitutional or not. In Portugal, that occurred in no less than nine occasions in response to referrals made by political actors of laws or decrees, and the only reason why is the phenomenon is less frequent in Spain is because litigants have, in almost all such situations, desisted from litigation before the Court.

**Conclusion of Part Two**

A large part of the scholarship produced by comparative political scientists about constitutional review in Europe, built upon evidence collected in cases such as France, Germany, Spain, or Italy, has conveyed a main message: European constitutional courts have become "third legislative chambers" and legislative politics in parliamentary systems has been intensely judicialized. That scholarship has also provided theoretical explanations for this phenomenon. First, oppositions have not only free access to abstract review litigation, but also a lot to gain and little to lose from systematically bringing
constitutional courts into the policy-making process. Second, those courts themselves are unconstrained actors, able to set legal policy and take the development of constitutional law wherever they see fit without fear of political reprisals. In those cases where courts seem to be somewhat less involved in the legislative process, we should see that only as a result of policy-making processes where opposition interests are taken consistently into account and litigation is rendered less useful.

In the four chapters that constitute Part Two of this work, these arguments were submitted to empirical testing in Spain and Portugal, two countries where constitutional courts have been in place for about two decades. We found that although both countries have often been characterized by contexts comparable to those found by extant scholarship to be favorable to an intense judicialization of politics, the level and nature of abstract review litigation in both countries failed to meet those theoretical expectations. Litigation has been comparatively low and conflicts between majority and oppositions about policy outcomes were only part — and sometimes a very small part — of what the use of abstract review referrals was all about. In fact, we saw that, in Spain and Portugal, oppositions have not been unconstrained or voracious litigants, and that litigation is not cost-free. Instead, oppositions have been forced to behave strategically as litigants, litigation has forced them to face contradictions between the search for both policy and electoral goals, and the consequences of those contradictions have occasionally been suffered. And for those litigants less likely to be encumbered by such contradictions and with little to lose from litigation — smaller and more extremist parties not disputing the centrist vote — their use of abstract review as a countermajoritarian weapon has been mostly prevented by rules that exclude them from access to courts.
The implausibility of the “judicialization hypothesis” becomes greater if we examine it in the broader light of extant theories of party behavior. Parties have been commonly conceived as "vote" or "office-seeking" rather than "policy-seeking" in their objectives (Downs 1957; Riker 1962). Besides, the treatment of party strategies has evolved in comparative politics precisely in the direction of depicting party competition as a highly complex undertaking, in which political parties pursue multiple goals in several arenas and more often than not forced to make difficult trade-offs and hard choices in that pursuit. The fact that we are dealing with behaviors that take place in the context of legislative processes reinforces these expectations: in European "arena legislatures," vote-maximization is likely to become a more important goal than policy (Dahl 1966, 339; Beer 1990, orig. ed. 1966, 72), and even in so-called "transformative parliaments," legislators have been depicted as being partially influenced by the search for the adequate kind of publicity and its rewards (Mayhew 1977; Fiorina 1977). Moreover, unlike what the “judicialization hypothesis” suggests, not all political systems are characterized by parties whose electoral worries are mainly "about the consequences of too much, not too little, compromise." In fact, many political systems are precisely characterized by the opposite features, i.e., commonly accepted "policy-making styles" of consensus and accommodation, fostered by formal rules of decision-making, cultural norms and traditions, and even purely self-interested motivations, and where "voracious" litigation in order to seek systematic vetoes of majority policies can easily be seen as a punishable breach of the collusive features of party behavior (Bartolini 2000, 41-50). Thus, assuming political actors with access to courts to be naïve and
unconstrained policy-seekers, as the judicialization hypothesis does, is an obviously unrealistic depiction of the incentives of parties in parliamentary democracies.

Furthermore, the analysis of judicial behavior in the Spanish and Portuguese courts also puts into question the second cornerstone of the "judicialization hypothesis": the notion that courts are unconstrained actors. Instead, we saw quite the opposite taking place: justices have resisted being used as part of an "anti-majoritarian device" at the service of oppositions, and have done so precisely when the external political environment suggests the possibility of political reprisals by majorities, a type of environment that has been anything but exceptional in our two countries. Besides, the impact of the party affiliation of justices on judicial behavior shows that when political parties struggle for determining the composition of constitutional courts, and refrain from litigating whenever that composition seems unfavorable to their interests, they are definitely not working under a formidable deception. Instead, they are making entirely accurate predictions: the partisan composition of courts and the party affiliation of justices does make a difference for judicial outcomes. And as it happens, one of the main consequences of the appointment and retention rules inherited from the processes of institutional design that were described in Part One has been precisely to assure that parliamentary oppositions seldom become or remain judicial majorities. Thus, parliamentary majorities are not even forced to systematically resort to political threats and attacks in order to get courts to behave according to their preferences. Instead, as Tsebelis suggests, although constitutional courts are formal veto-players, they are also typically “absorbed” by the political veto players (2002, 227).
Careful consideration of the extant literature on judicial behavior in high courts should have suggested this might be the case. In the gargantuan body of scholarship produced about the determinants of judicial decision-making in the U.S. Supreme Court which we surveyed in chapter seven, the notion that justices are interested in policy and that their behavior is at least partially determined by their ideology suffers no contestation among empirical social scientists. And a growing body of knowledge has been amassed to support the notion that not even in one of the most independent courts in contemporary democracies — the U.S. Supreme Court — can we be certain that justices and the court as a whole are unconstrained actors. Instead, they may be forced to take public sentiment and the preferences of the other branches into consideration. There are no reasons to assume — quite the contrary — that judicial behavior in constitutional courts, whose justices are less institutionally insulated, whose composition is more sensitive to electoral realignments, and whose entire institutional framework less invulnerable to majority will should be any different.⁴⁸
CHAPTER 8

CONCLUSION

The Kelsenian model of judicial review entails the institutionalization of special constitutional courts, able to veto bills and declare statutes generally null and void on grounds of their unconstitutionality, following referrals by public authorities in general and political oppositions in particular. Earlier on, I sketched two broad alternative views about the political consequences of that model of judicial review. The first of those views is the one that has prevailed among the comparative judicial politics literature. It treats the emergence of constitutional courts in parliamentary democracies as a response to the need to find institutional bodies able to arbitrate disputes about what the constitutional text means, resolving ambiguities and filling gaps in that incomplete contract. However, this view also suggests that, as soon as those institutional bodies are in place, a dynamic of ever-increasing judicialization of politics typically unfolds. Parliamentary minorities have strong incentives to use their access to courts as an instrument with which to place veto points in the path of previously overpowering majorities, especially when they are prevented from influencing the content of policy in any other way. As the jurisdiction of constitutional courts thus expands, judges resolve such disputes using normative reasoning and in such a way as to preserve the normative superiority of constitutional law.
in the future. They do so under an environment that typically allows them complete
independence, preventing majorities from overturning their decisions and affecting the
courts' institutional integrity. As a result, legislative policy-making is placed under the
constant shadow of constitutional law and politics becomes judicialized.

As it happens, what we saw taking place in the Spanish and Portuguese cases
was a far more complex and nuanced process. Part One of this study focused on the issue
of how such judicial institutions came about in both countries. Constitutional review
certainly emerged under a broad agreement about the need to find institutional bodies that
would be able to perform certain "functions," such as assuring the supremacy of
constitutional law and arbitrate disputes about its meaning. However, this functionalist
explanation leaves too much to be accounted for. On the one hand, the concrete way in
which such functions were going to be performed generated broad disagreements
between political actors. Behind those disagreements was often the attempt by such
political actors to shape institutional rules to their advantage, i.e., to curtail access of their
opponents to abstract review litigation and foster the congruence of courts with their
preferences and their responsiveness to their interests. On the other hand, we also saw
how cultural-historical factors intertwined with that narrower search for strategic
advantages. The way in which these two post-authoritarian civil law countries converged
around the need to establish *some* form of judicial review of legislation in two post-
authoritarian civil law states is one case in point, as is the fact that, at several crucial
moments in the design of both countries’ judicial institutions, political actors abdicated
from imposing solutions would that would simply maximize their short-term interests, in
view of preventing the overall breakdown of negotiations, the delegitimization of the new
constitutional courts, and the repetition of previous failures. It is true that this concern faded as the “extraordinary” politics of democratic transition gave way to normal “post-transitional” politics in both countries, but it certainly played a crucial role in allowing the emergence of constitutional courts in the first place.

This study of the origin of these judicial institutions was important also for reasons other than demonstrating the complementarity of different approaches to institutional design. First, because it allowed us to see how such design was an eminently political process, where issues such as different modalities of judicial review, access to courts, and appointment and retention of justices were debated by political actors who displayed a remarkable level of awareness and sophistication about the distributional consequences of different choices for majority-opposition relations and policy outcomes. Second, because it allowed us to sketch hypotheses about which institutional design contexts are more likely to engender higher levels of judicialization of politics in the future. When incumbents are powerful enough to shape judicial review as a form of insurance against a future and predictable lack of control over legislative bodies (Ginsburg 2001,5) — as occurred with the French Constitutional Council or, for that matter, with the Portuguese Council of the Revolution — more intense judicialization is likely to ensue, as yesterday’s incumbents become today’s oppositions. However, if the context of institutional design is, in contrast, characterized by greater equilibrium between the bargaining power of present incumbents and oppositions and by uncertainty about the future distribution of power, as it was the case in 1978-79 Spain or 1982-83 Portugal, judicial institutions are unlikely to be tailored to serve the interests of present or future dominant political actors. This does not mean that there will not be “losers” in the
process of institutional design, such as it occurred with the President of the Republic in Portugal or the smaller non-regionalist parties in Spain. However, it does suggest that the largest political parties — present and potentially future governing majorities — will be able to obtain mutual assurances against the conversion of constitutional courts into full-fledged countermajoritarian actors.

In Part Two we saw how those institutions interacted with the shifting contexts in Spain and Portugal post-transitional politics. And here, again, the “judicialization hypothesis” was shown to be based upon an excessively simplistic view about the incentives of majorities, oppositions, and justices, as well as of the constraints to which they are subjected. For considerable and clearly identifiable periods of time, Spanish and Portuguese political systems have been characterized by what the "judicialization hypothesis" claims to be the most favorable conditions for an intense and systematic use of litigation for countermajoritarian purposes on the part of opposition parties or political actors. However, only seldom have such expectations been fulfilled. The periods between 1982 and 1985 in Spain and during the second term of President Mário Soares in Portugal were those exceptions. For the rest of the time, the sort of intense abstract review litigation the "judicialization hypothesis" would lead us to expect only emerged either for reasons unrelated to majority-opposition conflicts (by the Spanish "historical" comunidades autónomas until the late 1980s) or not at all (Portugal).

The predictions derived from the “judicialization hypothesis” fail to materialize because they are based on a misspecification of both the process through which political actors decide about referring statutes for abstract review and the way institutional rules affect the entire process. Oppositions may have opportunities and incentives to litigate in
order to obtain policy or even electoral benefits, but they are also forced to ponder the political costs involved in such actions. First, whenever the opposition’s access to courts is limited to *a posteriori* review litigation (rather than *a priori* litigation), the lure of a countermajoritarian use of referrals seems to be clearly diminished. Courts can place enormous temporal distance between the enactment of policies and their rulings about them, avoiding a direct involvement in everyday legislative processes and — most crucially — rendering litigation useless as a means of pure legislative obstructionism. Second, rules about judicial appointments that prevent the congruence between overall ideological outlook of the Court and the preferences of opposition parties inevitably force sophisticated litigants to think twice about the utility of bringing a court unsympathetic to their interests into the legislative process. When those rules end up providing strategic advantages for majorities — as in the case of Spain —, whatever lure countermajoritarian litigation might have seems to evaporate. Here, staggered appointments and selection rights for the executive have ensured that the composition of courts remains sensitive to electoral realignments, and therefore that oppositions need to remain strategic litigants. In Portugal, the combination of the two-thirds rule for judicial appointments by parliament and the shape of the Portuguese party system has permitted the original "gentlemen's agreement" to hold firm, rendering the composition of the Constitutional Court mostly *insensitive* to electoral realignments. But since that original agreement was precisely one that prevented any political party from controlling a majority within the Court, those rules also prevented it from becoming a potential countermajoritarian ally of any opposition party. It is true that, for some types of political actors, the "temptation" of countermajoritarian litigation has remained irresistible, but that occurs only because they
do not face such common contradictions between policy and electoral goals in resorting
to the courts. However, as Kelsen had also suggested could happen, rules awarding
litigation rights only to "qualified minorities" have contributed to withdraw those rights
precisely to those parties more likely to engage in such "reckless litigation."

The "judicialization hypothesis" would also lead us to expect courts to be
unconstrained by the preferences of lawmaking majorities. However, we also saw plenty
of evidence of how this is an inaccurate depiction of the relationship between parties,
majorities, and courts. Several of the same institutional rules that impose constraints to
litigation also impose constraints to the actual freedom of courts and justices.
Appointment rules and practices allow parties to select justices whose preferences are
congruent with theirs, something that, as we saw, makes a clear difference for judicial
behavior in both countries. In the case of Portugal, short terms and the possibility of
renewal even seem to have fostered direct responsiveness of individual justices to the
interests of the parties that appoint them. Considering what we already know about the
improbability of oppositions being able to appoint a majority of those justices, the
likelihood of majorities being encumbered by judicial vetoes of legislation has remained
small. And although there were short periods when oppositions were indeed able to
preserve a stronghold in the court — i.e., before electoral changes have failed to have
been reflected in the courts' composition — justices have continuously displayed a
systematic tendency to avoid imposing policy costs on new incumbents, delaying
declarations of unconstitutionality until the stakes involved and the likelihood of political
reprisals have greatly diminished, or even until electoral and political changes render
litigation simply useless. Therefore, in conclusion, the cornerstones of the "judicialization

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hypotheses" — unconstrained litigants and unconstrained courts — have failed to materialize in any of our cases.

**Generalizing the findings**

There are probably two main objections that could be made against what has been argued in this study, and I would like to address them now. The first objection might be that, in an effort to demonstrate the limits to judicialization, I have thrown out the baby with the bath water, to the point of denying that constitutional courts in Spain and Portugal — and, by extension, similar institutions elsewhere — have any political relevance whatsoever. I should therefore restate what I am not arguing. I am not arguing that constitutional courts are politically irrelevant, or that their existence has had no impact whatsoever on legislative politics in Spain and Portugal. It is difficult to imagine, for example, how the Spanish "state of autonomies" might have looked like without the Tribunal Constitucional. It is true that qualified observers have disagreed about exactly in what direction — more or less centralist — the Court has led Spanish federalism in the 1980s, and that the increasing influence of the nationalist parties in policy-making has contributed to replace the Court as an arbitral mechanism in conflicts between the communities and the central government by direct political negotiation. But landmark decisions such as that declaring the unconstitutionality of LOAPA no doubt had a momentous importance, not only for shape of Spanish federalism but also, perhaps, for the very viability of Spanish democracy (Gunther 1991, 251-252).

Similarly, by mere observation of the policies that both courts have ultimately vetoed and transformed in the last two decades, it is easy to see how the development of
several areas of policy-making, the internal organization of the Spanish and Portuguese political systems, and even substantive political outcomes were affected by the existence of constitutional review of legislation. For example, without the Spanish Court, the "law and order" impulses of the last PSOE majority government could have increased police powers in ways probably incompatible with the conception of civil rights shared by most of Spain’s European neighbors. Similarly, in the late 1980s, the Court’s jurisprudence on tax law had an enormous impact on the Spanish economy and society, in fact undermining the previously demonstrated ability of the Socialist cabinets to combine budgetary orthodoxy with increased social expenses (Boix 1996, 181-185). In Portugal, without the Court, and especially without the use of *a priori* litigation by the President, the PSD majority cabinets could conceivably have been able to transform by legislative means several features of the countries’ judicial and political institutions, affecting the independence of the judiciary and reshaping electoral law with consequences that now we can only guess at. The constitutional litigation against and judicial annulments of such policies can even be argued to have played a major role in fostering an image of PSD majority’s incomplete allegiance to the constitutional principles of the separation of powers and undermining its public support, thus contributing to the party's electoral defeat in 1995 and of Cavaco Silva's presidential bid in 1996. Finally, constitutional courts in Spain and Portugal perform many other activities besides abstract review of legislation. They have authority on electoral proceedings and party financing, and they can rule — in different ways — on appeals from parties in a trial against lower court decisions. In the case of Spain, the Court can even decide on conflicts of competencies between branches of government and the central government and the regions, or even
declare laws unconstitutional after lower court judges have referred them to the Court. Several cases of great political importance have been decided under these different jurisdictions. Although, unlike abstract review, those activities are neither shared by all European constitutional courts nor have they been theorized by the proponents of the "judicialization hypothesis" in the same way as abstract review has been, I believe they are well worth future theoretical discussion and empirical exploration.

However, the basic arguments presented here do not exclude the possibility that constitutional courts can become very powerful and autonomous political actors in their own right, and much less that their presence can sometimes make a difference in a variety of political outcomes in democratic regimes, such as levels of policy stability or opposition influence in policy-making. Instead, they allow us to prevent undue generalizations made on the basis either of “high judicialization” contexts such as France or “low judicialization” contexts such as Spain or Portugal, by generating testable hypothesis about what institutional and political conditions favor or disfavor the expansion of judicial power. There seems to be a combination of conditions under which constitutional courts are more likely to systematically acquire the last word in policy-making processes and to prevent majorities from obtaining their preferred outcomes. As the “judicialization hypothesis” suggested, this is more likely to occur under majority governments unencumbered by a veto-laden legislative processes and committed to major policy changes in highly adversarial political systems. However, this condition is not sufficient. Other necessary conditions include giving access to courts to oppositional parties and other political actors that are unlikely to experience contradictions between policy and electoral goals in their litigation strategies; the ability to effectively use
abstract review litigation as a mechanism of legislative obstructionism; and judicial appointment and retention rules that favor the congruence of the court's preferences with those of oppositions and restrict the responsiveness of justices to the preferences of majorities. In contrast, in the absence of such conditions — as it happened in most of the time in Spain and Portugal — the opportunities and incentives for judicializing politics are likely to diminish significantly, to the point of rendering the "judicialization hypothesis" into a gross overestimation of the expansion of judicial power in those democracies. This occurs because, as Kelsen had suggested, while some institutional rules may enable the judicialization of politics — delegating power to courts to make binding decisions on the constitutionality of laws —, other rules may effectively posed limits to judicialization. In the Iberian democracies, those rules have prevented courts from being consistently populated with oppositional justices, fostered individual and/or collective responsiveness to majority preferences, restricted standing before the Court to "qualified majorities," limited opportunities for legislative obstructionism, and increased the costs of litigation. Whenever such rules are found in other contexts, similar outcomes should ensue.

The second possible objection is that I have failed to refute entirely the panoply of assumptions, arguments, and empirical findings that support the "judicialization hypothesis." More specifically, at no point in this study do I empirically address the issue of "autolimitation," i.e., the extent to which lawmaking majorities in Spain and Portugal have actually abdicated from their preferred policies in order to prevent opposition referrals and declarations of unconstitutionality. That objection might seem all the more relevant considering that several observers have argued that "autolimitation" is actually
the most important and profound political consequence of constitutional review. Vanberg, for example, writes that "the importance of abstract review lies in its indirect, anticipatory effects" (Vanberg 1998, 300), while Stone suggests that low levels of litigation by oppositions can actually result from that autolimitation taking place, since committee and parliamentary debates are already loaded with constitutional constraints in the first place (Stone 1992b, 49).

I do not wish to dismiss out of hand the potential importance of “autolimitation”. In fact, other authors that have previously stressed the limits to the expansion of judicial power have also been among the first to suggest the existence of the phenomenon. In France, Favoreu noted that "the very existence of the Constitutional Council has certainly led the government to renounce more profound reforms. (…) Given the existence of the Council and the threats of opposition referral, we witness a autolimitation on the part of the governmental and parliamentary majority" (Favoreu 1984, 56).

The notion that that the power of courts may be felt through the side street of "anticipated reactions" rather than the avenue of direct annulments is not even exclusive to the study of European constitutional courts. As Murphy and Pritchett remarked, there are difficulties with measuring the power exerted by the U.S. Supreme Court, resulting from the possibility that Congress, anticipating a negative ruling, may produce legislation already adapted to the Court's previous doctrine (Murphy and Pritchett 1974, 666). Much of the comparative judicial politics literature cited throughout this study has provided abundant qualitative evidence about how the discourse of lawmakers has become permeated by constitutional concepts and how politicians claim to have abandoned preferred courses of action while taking potential judicial vetoes into consideration. And
there are even observable instances of governments seeming to tailor policies contained
in their platforms under the expectation of abstract review referrals and judicial vetoes.
One of such instances has been observed in one of countries under scrutiny in this study:
in her work about the partial decriminalization of abortion in Spain in 1983, Barreiro
specifically suggests that the Spanish Socialists' bill was strategically drafted taking into
consideration the possibility of referral by the *populares* in the opposition and
constitutional court censure (Barreiro 1998, 151-152).

However, the study of "autolimitation" raises theoretical and methodological
problems that I believe to remain unsolved. Referring again to "autolimitation" in France,
Keeler points out that it is "certain that such a process has taken place," but also that it is
"impossible to determine exactly the extent to which the government has anticipated the
negative decisions of the Council and attenuated its own projects of reform" (Keeler
1985, 245). Difficulties seem to stem from two different sources. On the one hand, the
fact that political discourse has been transformed in some countries by a frequent use of
"legalese" (or "constitutionalese") on the part of lawmakers and government officials,
although an interesting phenomenon on its own, is certainly insufficient evidence about
the extent to which the presence of constitutional courts actually forces them to abdicate
from their policy preferences. On the other hand, observed instances of apparent
"autolimitation" are consistent with very different — when not totally contradictory —
accounts of the role and importance of constitutional review. Vanberg, for example,
suggests that the apparent "irrelevance" of the Austrian Constitutional Court in terms of
litigation levels and judicial activism is nothing but the manifestation of a court that is so
enormously powerful that it does not need to formally intervene in policy-making,
forcing instead politicians to systematic autolimitation (Vanberg 1998, 315). However, Shapiro and Stone warn that such "dearth of major judicial-political confrontations (…) is susceptible to one of several characterizations", including both a powerful judiciary in relation to which "the legislature has (…) perfected its anticipatory reaction" and courts with "little influence over the broad outlines of policy" (Shapiro and Stone 1994, 407). Returning to Spain, Barreiro also provides an alternative explanation as to why the Socialists abdicated from presenting a previously considered and more ambitious version of the abortion bill, one that is not related to constitutional litigation or judicial review at all, but rather to an overall strategic shift in the party's ideological appeal in the direction of the centrist electorate (including the abandonment of a previous anticlerical position) and to a reaction to current public mood, which was unfavorable to radical changes in the abortion legislation (Barreiro 1998, 152). Finally, even if we do observe majorities explicitly and unequivocally abdicating from their preferred policies in order to abide by constitutional constraints, we need to ask whether such behavior bears any relation to constitutional review. A legislative majority could conceivably prefer introducing the death penalty, abolishing elections, or passing retroactive legislation. However, if the constitution plainly states that such actions are forbidden, abdicating from a preferred outcome may simply mean that, under the current distribution of forces in the political system, majorities prefer to comply with the limits imposed by constitutional rules instead of violating them, a distinct possibility in the absence of judicial review of legislation altogether.

Nevertheless, the findings of this study do have direct and significant implications for the likelihood of majorities engaging in such behavior. If, as Sweet suggests,
"autolimitation" is likely to take place "to the extent that the majority perceives the threat of constitutional annulment as credible" (Sweet 2000, 76), one of the findings about the Spanish and Portuguese courts is precisely that, in some contexts, such a threat is much less credible than it might first seem. To the extent that majorities are aware that oppositions with access to the Court experience costs from litigation and that courts' preferences can be kept incongruent with the opposition’s and responsive to those of majorities, systematic "autolimitation" for fear of referral and/or annulment would be irrational behavior. Under such conditions, majorities can refuse to compromise not only because they can claim before their constituencies to have stood by their policy promises, but also because such refusal is unlikely to result in their policies being referred for abstract review and vetoed by the Court in the first place. We now know those conditions to be in place much more frequently that what the "judicialization hypothesis" would lead us to believe. But on the other hand, although there are unsolved problems in terms of the validity and reliability of the existing empirical evidence, future cross-national studies focusing on the relationship between qualitative data denouncing the presence of “autolimitation” and institutional rules and political contexts that make the “threat of constitutional annulment” more or less credible may might give us a much better grasp about the pervasiveness and importance of the phenomenon.

**Judicial review and democracy**

The study of judicial review is relevant for addressing some fundamental questions that have long concerned political scientists. Empirical democratic theorists have compared democratic regimes in terms of different types of institutional
arrangements that affect policy stability and the influence of oppositions in policy-making, and thus also affect several basic outcomes related to governmental efficacy, political representation, and government accountability (Lijphart 1999, Powell 2000, Tsebelis 2002). The findings about the limits to judicialization in the Iberian countries suggest the future understanding of the “consensual” role of judicial review in modern democracies would benefit from paying attention to rules other than those allowing courts to veto legislation on constitutional grounds. Other secondary but seemingly decisive institutional rules — particularly those concerning how standing before the courts and judicial appointments are regulated — are likely to determine in what circumstances such potential to reduce policy instability and increase oppositional influence in policy-making processes is likely to be fulfilled.

The fundamental understanding of parliamentary democracies as systems of delegation of power would probably also benefit from integrating the study of institutional bodies in charge of judicial review. It has been observed that one of the recent developments found in contemporary democracies is the increasing amount of delegation of power to non-majoritarian institutions that has been taking place, potentially withdrawing important domains of policy-making from electoral accountability (Strøm 2000). However, the findings of this study suggest that political principals in general and lawmaking majorities in particular are not powerless to respond to the agency costs created by delegating power to non-majoritarian institutions in general, and courts with abstract review powers in particular. As Elster puts it, one way of dealing with the problems that result from creating checks on majority will is simply to create "checks on the checks" (Elster 1994, 70), or in other words, to devise appropriate
institutional mechanisms that change the incentives of agents and the ability of principals to reward and punish them. This study identified some of those institutional mechanisms in the case of Spain and Portugal, mechanisms that seem to be present in many other parliamentary regimes with constitutional review of legislation.

This means, finally, that we may have now additional elements with which to think about the legitimacy, accountability, and even the democratic nature of judicial review in parliamentary democracies. If the existence of constitutional courts always placed democratically elected rulers under a web of insurmountable constitutional constraints, recurrently preventing them from passing their preferred policies in a large array of crucial issue areas, it would also be likely that, in the public realm, we would be permanently faced with a very important question about the legitimacy of judicial review: what is the source of authority that unelected and unaccountable judges enjoy in order to thwart majority will? Legal and political theorists have in fact struggled with such "eternal question" (Shapiro 1983, 375) and they will probably continue to do so. However, in that case, other empirical and political questions would also have to be asked and answered. Why would political rulers be willing to relinquish such amount of power in favor of institutions without direct democratic legitimacy? How could the institutions of constitutional review, having those purported implications, have taken hold in so many new democracies in Europe without being seriously disputed, disrupted, or even eliminated? How was it possible that the experiments with judicial review in many “third wave” democracies have become such a “surprising success”? (Schwartz 1999) In fact, one of the reasons why political rulers seem to abdicate from power in favor of constitutional courts and justices is because, in many cases, they really do not. Whatever
the normative implications of that phenomenon, the dilemmas about the legitimacy of judicial review in real world democracies may be far more intractable in theory than they are in practice.
NOTES

INTRODUCTION

2 See, among others, Cappelletti and Golay 1981; Brünneck 1989; Beyme 1989; Shapiro and Stone 1994; Tate and 1995; Tate 1995; and Wright 1999.
3 See also Stone 1992b; and Tate 1992.
4 See also Tsebelis 2000; Powell 2000; Stepan 1999 and 2000.
5 See also Bendor, Glazer, and Hammond 2001; and Lupia forthcoming.
6 See also, for example, Ely 1980; Freeman 1990; and Habermas 1996.
7 See also Tsebelis 1995a and 1995b.
9 See, among many, Maravall and Santamaría 1986; Mainwaring and Share 1986; and Gunther 1992.

PART ONE. THE INSTITUTIONAL DESIGN OF CONSTITUTIONAL REVIEW

1 See, for example, Cappelletti 1971; Cappelletti and Golay 1981, 16-24; Dworkin 1990; and Shapiro and Stone 1994, 401-402.
3 See Favoreu 1986b, 9-10; Cappelletti 1989, 132; Schwartz 2000, 22.
5 For overviews, see, for example, Caporaso and Levine 1992; Eggertsson 1996; and Peters 1999.
7 See Garrett and Weingast 1993, Majone 1996; Shapiro, 1997; and Sweet 1999.
9 See Shepsle 1995; Reich 1997; Frye 1997; Magalhães 1999; Shvetsova 1999 Benoit and Schiemman 2001; and Schiemman 2001.
10 See also Ramseyer and Ronsebluth 1993, 179-181; Magalhães 1999, 47-49; and Hirschl 2001, 316-320.
11 Constitution of Pennsylvania, 1776, section 47.
CHAPTER 1. A SHARED LEGACY

1 See, for example, Malefakis 1995; Linz and Stepan 1996, 137-147; Diamandouros 1997; and Whitehead 1999.
2 For overviews, see for example, Merryman 1969; Gilissen 1979; Shapiro 1981; and David and Spinosi 1992.
3 See, for example, the essays in Frankowski and Stephan 1995; Heydebrand 1995; and Reitz 1997.
4 See, for example, Bassols Coma, 1981; Cruz Villalón 1987; Roura Goméz 1998; and Acosta Sánchez 1998, 161-175.

CHAPTER 2. FROM CONSENSUS TO DUOPOLY: THE INSTITUTIONAL DESIGN OF JUDICIAL REVIEW IN SPAIN

1 In Italy, it had taken no less than eight years from the approval of the approval of the 1947 Constitution to the full establishment of the Constitutional Court. For Portugal, see the following chapter.

2 The consequences were immediately visible on the issue of the entire procedure that the constitution-making process should follow. Initially, Suárez wanted Congress to debate a constitutional draft prepared solely by the government or, at least, by a "consensual" technical committee, but all opposition parties followed PSOE's lead in the adamant refusal to have that task withdrawn from parliament. The decision was then that the Constitution's preparatory draft would be produced by a subcommittee (Ponencia) of the Congressional Constitutional Committee, composed by seven members: UCD would have three representatives, and PSOE, PCE, AP, and CDC one each. The work of the Ponencia took place first from August 1977 to April 1978. Although several changes were introduced throughout the following stages of the constituent process, the final draft produced by the Ponencia remained the basic template — in most cases unaltered — of what came finally to be the Spanish Constitution. See, for example, Esteban 1989, 299; and Gallego-Díaz and de la Cuadra 1995, 199.

3 In a poll conducted by the Centro de Investigaciones Sociológicas (CIS) in December 1977, as the Ponencia was finishing its preliminary constitutional draft, PSOE got 20 percent of voting intentions, UCD 19 percent, and 26 percent of voters were undecided. By December 1978, according to a CIS poll (study 1178) and another published in newspaper Ya (22 December 1978) PSOE's lead had risen slightly but the number of undecided voters remained high.

4 For a description of this process, see, for example, Mateos 1996, 227-231.

5 See, for example, the study made by CIS in April 1978, where Suárez appears as the most valued party leader, published in the Revista Española de Investigaciones Sociológicas 3: 271. For the importance of Suárez personal popularity for UCD's electoral performance see, for example, Hopkin 2000, 123-124.

6 As Aja reminds us, the expression originates "in the 'Catalanist' political literature during Restauration (fet diferencial) as a summary of what distinguished Catalonia from the rest of Spain, consisting basically in the language and culture." See Aja Fernández 1995, 91-92.


8 Including the support of 3/4 of municipalities and an absolute majority of electors in each province.

9 For detailed analyses of the different modalities of devolution and power-sharing implicit in the Spanish Constitution, see, for example, Esteban and López Guerra 1982, 381-390; Aja 1999, 99-110. An adequate summary in English can be found in Cuchillo 1993, 214-216.

10 While PSOE and PCE reluctantly accepted the state's financial support to private schools and AP and UCD the constitutionalization of teachers' and parents' rights to participate in schools' management, the right of private schools to organize teaching according to moral and religious principles was only recognized indirectly, through an allusion to international treaties already ratified by Spain.

11 Other examples of vague formulations of constitutional rules designed to facilitate agreement are those related to the right to strike (art. 28), and the role of public initiative in economy (art. 128). See Herrero de Miñon 1988, 72.

12 The first Spanish author to remark the applicability of the concept to the Spanish Constitution was Miguel Herrero de Miñon, one of the UCD ponentes. See Herrero de Miñón, 1979.
13 Interviewed in ABC, 10 January 1978, 10.
15 Attempts at interposing recursos de contrafuero were indeed made by members of the moderate opposition to Franco’s regime, who presented petitions for that purpose both before parliament and the Consejo Nacional. However, those petitions were always rejected. See Pérez 2000.
16 See “Proyecto de Reforma de las Leyes Fundamentales del Primer Gobierno de la Monarquía,” Title II, Arts. 23. to 29.
17 The draft was published in Esteban 1977.
18 The draft is published in Peces-Barba Martínez 1988.
19 In the preamble of the preliminary draft of the Law for Political Reform approved in the cabinet in September 1976, Suárez and Torcuato Fernández Miranda (the speaker of the Cortes) had indicated that an inevitable future task for a Spanish democracy would be the creation of a “jurisdictional body in charge of constitutional and electoral issues.” See “Proyecto de Ley para la Reforma Política aprobado por el Gobierno,” 10th September 1976.
21 Personal interview with a high-ranking official of UCD, July 2000.
22 “El Tribunal de Garantías decidirá los conflictos entre el poder central e las nacionalidades,” El País, 12 October 1977, 18.
23 See Hernández-Gil 1982.,
24 Amendment to the anteproyecto proposed by the Basque parliamentary party, in Constitución Española. Trabajos Parlamentarios (Madrid: Cortes Generales, 1981), 682.
26 Constitución Española. Trabajos Parlamentarios, 3449.
27 See, for example, Manuel Aragon, "El control de constitucionalidad," El País, 21 January 1978, 12; and the interventions by Nicolás Pérez Serrano and Pedro de Vega in last session of the debate entitled La Constitución, a debate, reported in El País, 18 February 1978, 13.
30 Tomás y Valiente, Escritos sobre y desde el Tribunal Constitucional, 35.
31 El País, 16 May 1979, 12.
32 They concerned the impossibility of immediate reappointment of judges once they completed a nine-year term and the creation of a Court's Vice-President.
33 Esperabé de Arteaga, in Diario de sesiones del Congreso de los Diputados 23, 23 July 1979, 1210.
34 Oscar Alzaga, in Diario de sesiones del Congreso de los Diputados 23, 23 July 1979, 1220.
36 Quoted in ABC, 13 July 1979, 8.
37 In the Basque case, negotiations had been unblocked by a meeting between Suárez and the president of the Basque government in July 17th. In the Catalan case, the most intense stage of negotiations between the government, the Generalitat, and the Catalan MP's took place in August 1979.
38 Miquel Roca Junyent, in Diario de sesiones del Congreso de los Diputados 24, 24 July 1979, 1281.
39 Jordi Solé Tura, in Diario de sesiones del Congreso de los Diputados 24, 24 July 1979, 1277.
40 ABC, 24 July 1979, 5.
41 Santiago Carrillo, in Diario de sesiones del Congreso de los Diputados 23, 23 July 1979, 1251. See also El País, 24 July 1979, 9; and ABC, 24 July 1979, 1; 5-6.
Quoted in *El País*, 24 July 1979, 1.

The Senate also clarified other aspects of the bill, specifying that the conflicts of competence between bodies of the state could only arise around "decisions" (and not the previous and generic "actions", whose formulation could easily allow the government to paralyze the activity of parliament) and that *a priori* review of *estatutos* could only be made about finalized versions ready to be submitted to referendum.

*ABC*, 4 September 1979, 7.


*El País*, 5 October 1979, 12.

For this period see, for example, Huneeus 1985; Caciagli 1989, 412-417; and Soto 1998, 88-91.


In spite of the deal between UCD and PSOE, not all justices obtained the same amount votes in Congress. Rubio Llorente, Diez de Velasco and Tomás y Valiente all obtained more than 250 votes, while Aurelio Menéndez, who both parties agreed upon as Chief Justice, obtained only 248. See *El País*, 31 January 1980, 11.

While this can be seen as a remarkable display of judicial independence in the face of a highly partisan and politicized appointment process, other described it as the result of last minute pressures placed by high-ranking PSOE officials over some of the justices. For the latter interpretation, see Emílio Attard, "La elección del primer presidente del Tribunal Constitucional," *Noticias al día*, 17 January 1984, in Attard 1995.


## CHAPTER 3. FROM MONOPOLY TO CONSENSUS: THE INSTITUTIONAL DESIGN OF JUDICIAL REVIEW IN PORTUGAL

1 For accounts of coup and its antecedents see, for example, Rodrigues, Borga and Cardoso 1974; Schmitter 1975; Porch 1977; Maxwell 1982 and 1995.


3 See, for example, the chapters by John R. Logan, Charles Downs and Nancy Bermeo in Graham and Wheeler 1983; and Bermeo 1986.

4 By February 1975, about 12,000 people were estimated to have been legally or illegally purged or suspended from their posts in the private and public sectors. See Pinto 2001, 73.

5 For a study of land reform in Portugal in this period, see Barreto 1987.

6 In March, the Communist wing of the MFA had been interested in postponing elections indefinitely, considering that the few opinion polls that had been made gave the Communist party a rather small share of the vote. However, and crucially, General Costa Gomes, which had replaced Spinola as President, insisted on elections taking place within the 12 months established by the MFA program.

7 Preamble of CDS's constitutional draft. All drafts are published in Miranda 1978, 231-502.

8 Articles 36 and 39 of CDS's constitutional project.

9 The PPD's draft stated that "the State and other public entities, in the stage of transition to socialism, must gradually acquire control of financial institutions, land and other natural resources, the industries crucial to national defense, all monopolistic activities and the basic sectors of national economy, through nationalization or public appropriation of productive units," and added that all nationalizations made after 1974 were to be considered "irreversible" (Article 67 of PPD's constitutional project). The Socialists draft was similar, while the Communist Party only recognized private
property as composed by "small independent producers and small or medium enterprises," placing the economy under "control of the democratic revolutionary state" (PCP's constitutional project, Article 6).

10 Articles 48 to 51 and 54, CDS constitutional draft.

11 Such as those to jobs, equal opportunity employment and wages, "physical culture and sports," and "rest and leisure."

12 Articles 51 to 60, Portuguese Constitution (1976).

13 On December 10, with the opposition of the Communists, the assembly deliberated to postpone all debates on the Articles concerning political institutions (which had barely started) and to start negotiations for a Second Pact with a Council of the Revolution that, by now, had been totally revamped through the expulsion of its radical leftist members. The CR appointed a special committee to conduct those negotiations, and solicited from the parties' proposals for the Pact's revision. Those proposals have been published as an appendix to Teles 1998.

14 Personal interview with one of the negotiators of the II MFA-Parties Pact, January 2000.

15 The number of references about semipresidentialism and, particularly, the Portuguese case, is huge. See, among many, Duverger 1992; Shugart and Carey 1992; Bahro, Bayerlein and Veser 1998; as well as Miranda 1984; Pires 1989; Sousa 1987; and Cruz 1994.

16 Statement by Vítor Sá Machado, Diário da Assembleia Constituinte 132, 3-4-76, 4438.

17 See Miranda 1980, 4-6; and Araújo 1995, 890-897.

18 See A Opção do Voto 1975, 50.

19 Published in Miranda 1975.

20 Articles 136 to 140, CDS constitutional draft.

21 Personal interview with a high-ranking official of the CDS, March 2000.

22 Final and transitional dispositions, Article 1., PPD constitutional draft.

23 See, for example, the intervention by PPD's Jorge Miranda, in Diário da Assembleia Constituinte 36, 23 August 1975, 984-985.

24 Articles 69. and 70., PS constitutional draft.


26 Diário da Assembleia Constituinte 96, 17 December 1975.

27 Personal interview with one of the negotiators of the Second Pact, March 2000.


29 Considering, for example, that the French Conseil Constitutionnel regularly scrutinizes about 30 percent of all laws passed.

30 Without questioning the "irreversibility of nationalizations", the government still allowed for the private management of some state enterprises. In the face of the manifest failure of agricultural "collective production units" — and especially of their control by the Communist Party — the highly controversial law for agrarian reform opened the way for the return of land to previous owners. And in October 1977, a regime for compensation of former shareholders of nationalized companies was approved For the Socialist government's economic policies in this period, see Franco 1996, 211-226; Lopes 1996, 347-360; and Viegas 1996, 130-141.

31 "In some decisive moments, there was a personal intervention of the President near some members of the Committee. (...) It was made clear to some Committee members that opinions that detected unconstitutionality in some laws might be 'inconvenient' and cause serious disturbances. This did not occur in 95 percent of the cases, but only in two or three decisive moments. The most evident concerned the 1977 Law for Agrarian Reform. In these moments, the Committee took a stand that, in my opinion, was not totally unrelated to the persuasion that a different ruling might cause serious political disturbances. This was clearly made felt to the Committee, or at least to some of its members, by the President himself." — personal interview with a former member of the Constitutional Committee, January 2000. Inside the Council, Eanes also played a prominent role. As one his chief political advisors put it, "since August 1976, [Eanes] had created a 'division' within the Council that allowed him to 'decide the rulings' through the movements of two 'mobile' members" —Aguiar 1996, 1261.
Several other instances of what became known as "institutional guerilla warfare" between the government and the Council of the Revolution took place until 1982, including the frequent use of presidential veto powers and even the use of *a posteriori* review litigation by the government against military legislation issued by the Council itself. See Campinos 1986 and Barroso 1986.


Sousa 1995, 223; and personal interview with one of the top PS negotiators in the 1982 constitutional revision, January 2000.

For these drafts and proposals, see Carneiro 1979, 172-177; Lopes and Barroso 1980, 173-224; Melo, Costa, and Andrade 1981. For their detailed analysis in what concerned constitutional justice, see Araújo 1985, 918-926.


Miranda 1980, 17.

Personal interview with a high-ranking member of AD, March 2000.

See *Diário da Assembleia da República* 6, 26 June 1981, 56.

In what concerned the "economic constitution", the amendments allowed by the Socialists ended up staying very short of the right's ambitions to full economic liberalization, particularly in what concerned labor rights and the "irreversibility of nationalizations". However, most references to a "transition to Socialism" were suppressed and the principle of "nationalization without compensation" was eliminated. These amendments were negotiated directly between the CDS and the PS, unbeknownst to the PSD. According to a PS MP, "all the amendments concerning the economic part of the Constitution negotiated in 1982 was concertated in the very beginning with (...) [a CDS MP]. During the debates, the proposals kept being presented, but what the PSD was doing was joining proposals that were sometimes ours, sometimes from the CDS, and they never realized that the entire thing had been negotiated with the CDS months ago. They thought we were actually bargaining and reaching agreements. (...) We reached an agreement easily with the CDS because they understood our limitations, and we also understood the minimum demands they had to place upon us (personal interview with a PS MP, December 1999).

FRS's draft, art. 198. In this and other respects, AD's draft was understandably more radical, simply eliminating the ability of the President to dismiss the cabinet or to appoint any members of a newly formed Council of State, and extinguishing the office of "Supreme Commander of the Armed Forces, for example. For an analysis of the different parties's drafts in what concerns presidential powers and executive-legislative relations, see Sousa 1992, 39-48.

FRS's draft liberetned the parliamentary dissolution powers of the President from any consultation with the parties or the "Council of the Republic" and increased the range of policies where the override of presidential vetoes required a qualified 2/3 majority (arts. 136. and 139.).

The Socialists' preference for having *Conselho Superior da Magistratura* (Supreme Council of the Judiciary) appointing the "judicial quota" in the Court stemmed from the very critical assessment made by the PS and the left in general of the system of judicial self-government since 1976. Claiming that the control of the Council by the judicial higher-ranks had been a failure and the judicial autonomy had gone too far, the Socialists's proposed a change in the Council's composition, putting political appointees in majority and judges elected among their peers in minority. In this way, the appointment of constitutional justices by this revamped CSM would also weaken the influence of the judicial higher-ranks.

Although apparently rhetorical, this change was not irrelevant. In the past, the CR had declared entire bills and decrees unconstitutional because of what members of Constitutional Committee itself stated were minor aspects (and, conversely, failed to declare bills or decrees as unconstitutional in order to avoid the veto of a bill or decree for "minor" reasons). With the new system, through which the Constitutional Court could make partial constitutional vetoes affecting only specific norms, all it was required from parliament to overcome that veto was a majority rule decision that expunged those norms from the bills or decrees.

Other parties besides the AD and the FRS coalitions presented projects of constitutional revision, particularly the PCP. However, the draft presented by the Communist Party played no other role than symbolizing the party's resistance to the completion of a full transition to procedural democracy, by failing to propose the extinction of the Council of the Revolution. In the somewhat cryptic words of the foremost legal scholars in the PCP's bench, Vital Moreira, "it has not been established that the problem that the Council of the Revolution was supposed to solve has indeed been solved. (...) We have found no evidence that it is possible to find alternative solutions to the performance of the Council's tasks that do not endanger the equilibrium and stability of the democratic system, (...) and the question remains whether that
extinction will not endanger the existence of an independent and efficacious system of constitutional review. — *Diário da Assembleia da República* 19 (suplement), 25 November 1981.


49 Santana Lopes, Ibid.

50 In the earlier stages of the negotiation, the furthest that the PS was willing to go was to allow the President to appoint only four justices (instead of five), cutting also on the number of justices to be appointed by the Supreme Council of the Judiciary (four), and reducing the quota for lower court judges, leaving seven for the parliament to elect by a 2/3 majority: Almeida Santos, "O Tribunal Constitucional," *Diário de Notícias*, 17 August 1982.

51 In the heat of the debates, the issue of "which justices would belong to whom" was discussed with remarkable candor. As PSD's Costa Andrade put it, "if we go to that solution [parliamentary appointment by qualified majority], there will have to be a partition of the judges among the political parties represented in parliament. I really cannot imagine any party indicating certain person just because he or she is a good constitutional lawyer. Generosity will not go that far. (…) If there are five parliamentary appointees, the PSD, which is at the moment the majoritarian party, claims two justices." — *Diário da Assembleia da República* 77 (suplement), 14 April 1982.


53 The Socialist delegation was composed by Mário Soares (PS’s leader), Almeida Santos (Soares's deputy), and Luis Nunes de Almeida, (constitutional law scholar, former member of the Constitutional Committee and one of the negotiators of the Second Pact MFA/Parties on the side of the MFA). AD's delegation was larger, led by Pinto Balsemão (PPD's leader and Prime-Minister), Freitas do Amaral (CDS's leader and deputy Prime-Minister), and Marcelo Rebelo de Sousa (a constitutional law scholar and Minister of Parliamentary Affairs).

54 Personal interview with a member of AD's delegation, March 2000.

55 Personal interview with a member of PS's delegation, January 2000. "Rose" is the color of the Socialist Party.

56 Personal interview with a member of the AD delegation, March 2000. As another AD negotiator argued, "it was evident the primacy of a political objective (…): to make the appointment of justices by the President of the Republic impossible": Sousa 1995, 223-224. Although less openly acknowledged, the same motivation seems to have been shared by the Socialist delegation (although not by the Socialist Party as a whole). As one of the members of the PS delegation confided in a personal interview (January 2000), "the complicated problem in the summit was the composition of the Constitutional Court. And that problem was caused by the pact that Soares had signed with Eanes. Dr. Mário Soares had made a commitment not to reduce presidential powers in the constitutional revision. And General Eanes understood that appointing judges to the Court — as he appointed them to the Constitutional Committee— was an essential power, such as that of dismissing the cabinet. So, the tripartite composition that came in FRS's draft — *a solution that I personally detested* — had been elaborated in that context in the relation with ASDI" (our italics).

57 Personal interview with a high-ranking member of AD, March 2000.

58 Personal interview with a member of PS's delegation, January 2000. This reference to the "13th justice" as "Cato" is particularly enlightening about the intention of the political designers of the 1982 constitutional revision. Marcus Porcius Cato "the Younger" (95-46 BC) was a Roman statesman known for his honesty, incorruptibility and unwillingness to compromise. In other words (and, presumably, contrary to the remaining twelve justices), "Cato" was to be "apolitical" and have no clear partisan affiliation.


60 Jorge Miranda, Ibid.


63 Amândio de Azevedo, Ibid.. For other reactions, and an analysis of the Socialists' attempts to put the blame of this institutional choice on AD, see Araújo 1995, 932-935.

64 See, for example, Jorge Sampaio, *Diário da Assembleia da República* 128, 27 July 1982.

The first draft was commissioned by the AD government to two renowned legal experts, Barbosa de Melo (a former PSD MP) and Cardoso da Costa (a member of the Constitutional Committee appointed by the CDS). They had also been two of the authors of an early draft of the constitutional revision law commissioned by Francisco Lucas Pires, AD's political coordinator. That first draft was exhaustively discussed discussed with Freitas do Amaral (CDS's deputy Prime-Minister), Marcelo Rebelo de Sousa (PSD's Minister of Parliamentary Affairs), and Menéres Pimentel (PSD's Minister of Justice): personal interviews with a high-ranking member of the CDS (March 2000) and with one of the drafters of LOFPTC (February 2000); and Costa 1986, 85-95; and Araújo 1995, 935-941.

Proposta de Lei No. 130/II, in Organização, Funcionamento e Processo do Tribunal Constitucional (Lisbon: Assembleia da República, 1984), 58 and 61.

Other provisions in this direction included a "period of reflection" in all important decision between the production of Court's draft decision by the rapporteur and the actual ruling and the payment of judicial costs by litigants. For a detailed analysis of the draft bill, see Araújo 1985, 936-940.

Personal interview with one of the drafters of the LOFPTC bill, February 2000.

José Manuel Mendes, in Organização, Funcionamento e Processo do Tribunal Constitucional, 121.

Jorge Miranda, from ASDI, criticized AD's "mistrust and aversion" in relation to constitutional justice, in which he was followed by PS's Almeida Santos. Organização, Funcionamento e Processo do Tribunal Constitucional, 123 and 125. See also "Em defesa do Tribunal Constitucional," in Santos 1983, 103-113.

António Vitorino, in Organização, Funcionamento e Processo do Tribunal Constitucional, 120. In a newspaper interview, PCP's Carlos Brito made a similar warning -Diário de Noticias, 2 November 1982.

"Tribunal Constitutional presidido por juiz conselheiro," Expresso, 2 October 1982. The other constraints concerned age (21 years minimum), a law degree, and that 6 of the 13 justices should be judges in ordinary courts. For LOPFTC, AD had proposed a minimum age of 35 and that 10 years had passed after obtaining a law degree, but ultimately settled on imposing no other constraints but those in the Constitution itself.


"Continua o impasse na Comissão Constitucional" [sic], Expresso, 4 December 1982.

CHAPTER 4. ABSTRACT REVIEW LITIGATION: INSTITUTIONAL OPPORTUNITIES AND POLICY INCENTIVES

1 See also Sweet 1995 and 1998.

2 In Poland, from 1989 to 1994, the Constitutional Court has reviewed 60 statutes, a yearly average of ten. Schwartz provides no quantitative data concerning Hungary, but suggests that "abstract norm control" (...) gives an excessively political cast to the court's decisions, making it appear less like a court and more like a legislative chamber" — Schwartz 1999, 200-204. See also Schwartz 2000, 55-56, 71-74, 80, 106-108.

3 In the 1989 constitutional revision, the creation of a new type of "organic laws" — requiring the approval of an absolute majority in parliament and concerning issues such as elections and the armed forces — was accompanied by an expansion of access to the Constitutional Court. Since 1989, replacing the system in which only the President of the Republic had the right to refer national legislation for a priori review by the Court, both the Prime Minister and a group of at least 1/5 of MP's have been entitled to refer organic bills for a priori review.

4 LOTC 2/79, art. 32.2.

5 Portuguese Constitution, art. 281.


7 Sources: Kommers 1997, 52; and Saalfeld 1998, 47.

8 For analyses of this process see, among many, Bacalhau 1989; Magone 1999; Lobo 2001; Freire 2001; and Gunther 2002.

9 José António Lima, "As transferências de voto em milhares," Expresso-Revista, 12 October 1991, 9-R.

10 For detailed analyses of these elections, see, among many, Santamaria 1984; Caciaghi 1986; and Montero 1992.

11 For a discussion of the similar French example, see Tsebelis 2000, 441-474.

12 See Martínez Sospedra, 1989; Paniagua Soto 1989; Bon 1993; Murillo 1994.

13 In Portugal, executive control over the parliamentary agenda has been reinforced by the curtailment in 1988 of the special agenda-setting rights granted to opposition MP’s regardless of the size of their parliamentary party. For the Spanish and Portuguese cases, see Döring 1995a, 223-234; Leston-Bandeira 1998, 142-146; Leston-Bandeira 2002, 93-100; and Guerrero 2000, 154-155.

14 Even in the case of the Fifth Legislature, where Private Members' bills displayed the highest rate of success since 1982, this seems to be a reflection not so much of minority government, but rather of the shorter duration of that legislature. See Guerrero Salom 2000, 158.


16 "Where abstract review constitutes the only veto opportunity available, one would expect oppositions to make the most use of petitions to the constitutional court (France and Spain)" —Sweet 2000, 54. For the reasons developed in this chapter, the same should apply to the Portuguese case.

CHAPTER 5. LOOKING FOR THE POLICY-SEEKING LITIGANT

1 The basis upon which these percentages have been calculated already excludes all bills concerning the rearrangement of geographical administrative boundaries (municipal bills). These so-called "small laws" or leggine are usually excluded from analysis of law production in Portugal, given their large numbers but diminute importance and purely routine debate. See Bandeira 1998, 149.
2 Only 0.2 percent of all decrees issued were sent for a priori review between 1983 and 1998, and 1.7 percent for a posteriori review. The percentage of decrees referred for abstract a posteriori review is calculated upon all decrees approved in the Council of Ministers minus those that were submitted to presidential or judicial vetoes and those returned without veto by the President to the government.

3 Sweet's assessment about levels of abstract review litigation in Spain — that, "since 1986, the rhythm of such referrals has quickened, surpassing French levels"— is based on the total number of referrals made to the Court. However, this neglects two important details. First, as he ultimately admits, almost one-third of those referrals were made "by the federal government, usually against legislation passed by the autonomous regions," and not by parliamentary oppositions or the autonomous communities against legislation passed by the Cortes - Sweet 2000, 64-65 [our italics]. Second, many referrals are made by different authors contesting the constitutionality of the same piece of legislation, something that defeats the comparison with the French case.

4 The Ombudsman plays a modest role in litigation, having only 13 statutes (1.3 percent of all laws passed).

5 Sources: Ministerio para las Administraciones Públicas, Conflictividad entre el Estado y las Comunidades Autónomas (bulletin published every three months); and Kommers 1997, 11.

6 See also Bon, Cruz, and Moderne 1990; and Blanco Valdés 1999, 26-27.


8 As CiU's leader Jordi Pujol impressively put it, once the estatutos had been approved, litigation became the main instrument with which the comunidades attempted to redefine the limits of regional powers in their favor: "The ceiling [of autonomy] that would result from the fact that the Generalitat wins all appeals to the Constitutional Court it has presented, or that the central government has presented: this is the ceiling of autonomy to which we aspire." Quoted in Calvo-Sotelo 1990, 110.

9 Another example was the signing of the Acuerdo Nacional para el Empleo in the same year, the first successful social pact between the government, both major unions — Comisiones Obreras and UGT —, and the business associations since the Pactos de Moncloa in 1977.

10 Following the September 1979 Extraordinary Congress, where González secured the ideological shift of the Socialist Party away from Marxism and in the direction of a moderate catch-all appeal, PSOE became an extremely hierarchical and centralized party, closely controlled by a tandem composed by Felipe González (as Prime Minister) and Alfonso Guerra (as Deputy PM and PSOE's Vice president in charge of executive-party coordination) For analyses of PSOE's ideological reconfiguration and centralization, see, for example, Share 1989, 53-66; and Puhle 2001, 298-300.


12 One of the few laws referred by PSOE in a posteriori litigation was the Ley Orgánica del Estatuto de Centros Docentes, which touched one of the most the delicate (and unresolved) issues debated during the Constituent process: church-state relations. Drafted by members of the Christian democratic faction of UCD, the Estatuto preserved extensive privileges for Catholic schools, a solution contested not only by the leftist parties but also by the socialdemocratic sectors of UCD The remaining referrals by PSOE concerned the 1981 Budget (questioning the executive's ability to create new taxes with a budgetary law), the provision of religious services to the armed forces, the supression of an agency in charge of managing public-owned media (which PSOE argued should be an organic law, given its connection to fundamental rights and freedoms).

13 By early 1982, RUMASA was on the verge on bankruptcy. After failed negotiations with its CEO, José María Ruiz Mateos, the PSOE executive decided on expropriation, fearing that the company's collapse would bring about a general crisis of the Spanish financial sector. The populares referred the decree to the Court claiming it failed to meet the requirement of "extraordinary and urgent necessity" for the issuing of decretos-leyes and violated a large number of fundamental rights, including those to private property and free enterprise. See referral 116/1983 and TC ruling 111/1983.


15 See, for example, referrals 1430/1988 (against norms in Law 10/88, on private television broadcasting) and 1632/1988 (against norms in Law 19/1988, on account auditing).
Following a November 1988 Constitutional Court *amparo* ruling that reversed a judicial decision prohibiting a married couple from presenting separate income tax statements in order to be taxed at a lower rate on grounds of discrimination (ruling 208/1988), PP seized the opportunity to submit the government's successive attempts to adapt to this jurisprudence to the Court for abstract review: see referrals 1791/90 and 1857/1991, both against norms in the legislation on income tax (Laws 20/1989 and 19/1991).


Another possibility was a referral by the Ombudsman, Álvaro Gil-Robles. However, even before the bill was passed in parliament, Gil-Robles had several meetings with José Luis Corcuera and the Socialist parliamentary group in order to "improve" several aspects of the bill. In January 1991, a newspaper editorial argued about the Ombudsman that "to the extent that [these meetings] commit the institution he represents to abdicate from performing one of its most relevant functions — placing a *recurso de inconstitucionalidad* —, they are inadmissible" ("Ley bajo sospecha," *El País*, 21 January 1992). As it happened, against the judgment of his team of clerks, the Ombudsman ended up not referring the *Ley Corcuera* for *a posteriori* review ("Tres impugnaciones parlamentarias y dos judiciales," *El País*, 17 October 1993).


Published as *Informe de la Comisión de Expertos sobre Autonomías* (Madrid: Centro de Estudios Constitucionales, 1981).

Ruling 76/1983.

See, for example, Valles and Cuchillo Foix 1988, 396-397; Cuchillo 1993, 220-222; Agranoff 1999, 70-71.

For example, the *Estatuto de Castilla y León* (Organic Law 4/1983), legislation addressing funding of and financial redistribution among the *comunidades* (Laws 30/1983 and 7/1984), the powers and financing of local governments (Laws 24/1983 and 7/1985) and, inevitably, the new Law of Autonomic Process that replaced the vetoed LOAPA (Organic Law 12/1983).


On the abortion case, see Barreiro 1998.

See also "Demasiados retrasos en el Tribunal Constitucional," *El País*, 17 March 1985, 12.


Full text of agreement in "PP y CiU prometen 'solidaridad'," *El Mundo*, 29 April 1986.


*Programa do IX Governo* (Lisbon: Presidência do Conselho de Ministros, Direcção Geral da Comunicação Social, 1983), 100. See also "Cláusulas de desenvolvimento do acordo político parlamentar e de governo entre o PS e o PSD," in Magalhães 1989, 168-174.

Rulings 212/86 and 273/86. However, ruling 102/87 did declare the unconstitutionality of a decree that reprivatized two companies which had been nationalized in 1975, explicitly arguing that privatization was constitutionality prohibited.
CHAPTER 6. STRATEGIC LITIGANTS, CONFLICTING GOALS, AND THE POLITICS OF CONSTITUTIONAL LITIGATION

1 For research supporting this general hypothesis, see, for example, Marshall 1989; Mondak 1992 and 1994; Mishler and Sheehan 1993; Hoekstra 1995; Hoesktra and Segal 1996; and Hoekstra 2000. But see also research showing that, at least in some policy areas, landmark judicial decisions tend to crystallize individuals' opinions about the issues involved, instead of increasing support: Franklin and Kosaki 1989; and Johnson and Martin 1998.


4 "El Grupo Popular llevará al Tribunal Constitucional la ley del aborto," El País, 27 February 1983. As Herrero de Miñón would later put it, "we were interested in preventing the candidates of the Socialist majority from erupting in the Court, where several important referrals were pending, such as that against LOAPA and, later, RUMASA" (1994, 291). Difficulties in reaching an agreement were further increased by the fact that negotiations about the justices' appointments were included in an overall package that also contained the appointment of the administration of RTVE, the public television network. See "La renovación del Tribunal Constitucional, afectada por la ruptura entre PSOE y AP sobre el Consejo de RTVE," El País, 14 May 1983.


9 "Tomás y Valiente, considerado candidato del Gobierno, presidente del Tribunal Constitucional," ABC, 4 March 1986. In the meantime, the executive's appointees were Miguel Rodríguez Piñero and Luis López Guerra, the former a close friend of Felipe González, and both unanimously seen as close to the Socialist Party. The CGPJ elected Carlos de la Vega Benayas and Eugenio Díaz Eimil, both unrelated to the most conservative sectors of the judiciary or, according to Socialist sources, "more synthonized with the social majority expressed by the Spanish people in the last elections" - see "García-Mon e Jesús Leguina serán elegidos por el Parlamento magistrados del Tribunal Constitucional," El País, 11 February 1986.

10 Of the four justices elected by the Senate in 1989, AP proposed only one (the senator José Luis de los Mozos). The Socialists got the remaining three names: García-Mon (elected three years earlier to replace García-Pelayo and now confirmed), Vicente Gimeno Sendra, and Álvaro Rodríguez Bereijo. See "El Senado elegirá hoy a Rodríguez Bereijo, Gimeno Sendra y De los Mozos magistrados del Constitucional," El País, 8 February 1989; "Tomás y Valiente y Francisco Rubio serán elegidos hoy para dirigir el Constitucional," El País, 6 March 1989.


12 Interview with Jorge Campinos, Diário de Notícias, 18 November 1982.


"PS e PSD dividem a meio o Tribunal Constitucional," Expresso, 8 July 1989. The curtailment of PCP's representation was also caused by the internal crisis then faced by the party: all major Communist candidates that were presumably acceptable to the remaining parties had become increasingly critical of the party's leadership and would later, in most cases, abandon the party. See "Vital Moreira abandona o Tribunal Constitucional," Europeu, 10 March 1989; "Quem será o novo Presidente do Tribunal Constitucional," Europeu, 8 June 1989.


"Gallardón:Las tesis de Tomás y Valiente no coinciden con AP," ABC, 4 March 1986.

"La llegada del rodillo al Tribunal Constitucional consuma una larga operación de desprestigio," ABC, 8 January 1986.

"Tomás y Valiente, considerado candidato del Gobierno, Presidente del Tribunal Constitucional," ABC, 4 March 1986 (our italics).

"Fraga culpa el Gobierno de 'las dudas sobre el Constitucional'," El País, 23 September 1988.

See "Manuel Fraga dice que Tomás y Valiente se ha comportando como un 'militante socialista'," El País, 7 October 1988;

During 1990, while PP's new leader José María Aznar was restructuring the party and renovating its leadership cadres, it was still possible to preserve some last elements of consensus in majority-opposition relations, visible in the pacts signed throughout that year to elect the new CGPJ, the Board of the Spanish public network RTVE, and to replace of the resigning justice Truyol Serra (appointed in his day by UCD) by PP-proposed José Gabaldon Lopez. However, by the end of the Fourth Legislature, the relationship between PSOE and PP had become purely confrontational, fueled by a steady increase in the number of media and judicial investigations of corruption and abuses of power — see Jiménez 1998. An anecdotal illustration of this highly confrontational environment was the fact, by late 1991, Prime Minister González had simply cut all personal communication with the leader of the opposition, refusing to receive him personally "until he changed his attitude" - "González y Aznar ni se ven ni se hablan hace meses," El País, 5 February 1992.


PSOE they proposed and elected Pedro Cruz Villalón, but it was IU who proposed Julio González Campos (linked to the Communist Party during Franquism), while the Catalans advanced the name of Carles Viver (a professor of Barcelona’s Pompeu Fabra University). See "Igualdad entre progresistas y conservadores en el nuevo Tribunal Constitucional," El País, 26 June 1992; “El Congreso renueva el Constitucional con un retraso de cuatro meses al apoyar la lista del PSOE,” El País, 26 June 1992.


El PSOE se ha asegurado el control de la Justicia hasta el siglo XXI," ABC, 27 June 1992; "El PP afirma que hay 'un Tribunal Constitucional a la carta',' El País, 16 July 1992. Things would not change until PP’s victory and the 1998 recomposition of the Court: in 1995, for example, the appointment by the PSOE executive of Jiménez de Parga and Tomás Vives, were immediately attacked by the populares as "ideological" and "hostile to PP," especially because the former had publicly supported taking away from judge Baltazar Garzón the responsibility for investigating the GAL case. See "El Gobierno nombra a Jiménez de Parga y Vives como jueces de Constitucional," El País, 1 April 1995; "Jiménez de Parga ha apoyado reiteradamente la tesis del PSOE contra Garzón," El Mundo, 1 April 1995; "El defensor del PSOE, al Constitucional," El Mundo, 1 April 1995; "Jiménez de Parga y Vives se defienden de las críticas del PP," El Mundo, 2 April 1995.

PNV’s electoral platform for the 2000 legislative elections criticized the present mode of election of the Court’s members for having "deprived the Court from its theoretical role as judicially independent" and "verified a deficit of neutrality that starts in its own composition," arguing that a Court "whose primary function consists in deciding on the distribution of political power between the State and the autonomics should, at least, be balanced in its composition, articulating systems of institutional participation by the autonomies" (EAJ-PNV 2000 program in http://www.eaj-pnv.com/arcelectoral/generales00/material.html). See also, for example, José António Ardanza, "El autogobierno vasco," conference at the Real Academia de Historia, 3 April 2001; and Emilio Olabarria Muñoz, "¿Es constitucional el Tribunal Constitucional?," in http://www.eaj-pnv.com/documentos/articulos/011119iritconstitucional.doc.

See, for example, "Almunia acusa a Pujol de deteriorar la credibilidad del Tribunal Constitucional," El País, 28 July 1989.

The first of those experiments was the 1923 Triple Alianza, followed by the 1933 "Pact of Compostela". For a brief history of the alliances between the Galician, Basque, and Catalan nationalism movements, see Granja, Beramendi, and Anguera 2001, 235-264.

42 "Editorial: o primeiro teste," Diário de Noticias, 7 July 1983;
43 "A importância dos fundamentos," Diário de Noticias, 10 July 1983.
48 Personal interview with a senior political adviser to President Eanes, April 2000.

49 Eanes referral of the abortion bill was partially determined by personal disagreements: "I am against abortion for profoundly cultural reasons. For cultural reasons and because I am a Christian, and therefore, against abortion." Interview to Rádio Renascença, 9 December 1984. However, it was also determined by the will to shed any personal responsibility in either passing or explicitly vetoing the law. As Eanes himself put it, "it is true that the President has the power to promulgate or veto the bill. However, the substantive legitimacy of any decision by the President — veto
or promulgation — would not be uncontroversial, it would always be a personal decision, taken without a transparent dialogue with the electorate." Speech, 23 April 1984.


51 Personal interview with member of President Soares's Staff, May 2000.

52 Personal interview with a senior political adviser to President Eanes, April 2000.

53 Personal interview with member of President Soares's Staff, May 2000.

54 "Dr. Soares listened to constitutional scholars [constitucionalistas] a lot. It was not a question of asking for formal briefs, but simply of discussing things with them." - personal interview with member of President Soares's staff, May 2000.

55 Personal interview with a justice of the Constitutional Court, January 2000.

56 In the case of Portugal, the variable takes the value one if the bill was object of "contemporary litigation," i.e., if it was referred to the Court during the same legislature in which it was passed. See chapter four for explanation of this criterion.

57 The original probability of observing litigation against bills in Spain is 14.1 percent (14.1 percent of the passed bills in the sample have been referred to the Court). This corresponds to an odds of .164 (14.1/85.9). Since the logistic coefficient for "Majority government" is 1.18, which corresponds to an odds ratio of $e^{1.18}$ (3.254), the new odds of the dependent variable is .534 (.164 multiplied by 3.254). If $x$ is the new probability and $x/(1-x) = .534$, then $x = .35$. In other words, a logistic coefficient of 1.15 means that a one unit increase in the variable "Majority government" raises the probability of abstract review referral from about 14 percent to about 35 percent.

58 The exact opposite hypothesis has been advanced in the literature. According to Vanberg (1998), when courts are more favorably disposed to majority policies, and therefore more deferent towards bills and statutes that change the status quo, the end result will be more frequent appeals against the constitutionality of laws. However, this counterintuitive hypothesis — that oppositions are more likely to activate courts when those courts are more sympathetic to majorities — is based not on a theory about how judicial preferences affect litigation, but rather on how they affect legislation. Namely, that low levels of litigation are the result of political compromises between majorities and oppositions in the presence of powerful judiciaries that restrict changes to the legislative status quo. In any case, it is clear that the hypothesis does not hold in either the Portuguese or Spanish cases.

59 For seminal references see, for example, Tufte 1978; Alt and Crystal 1983; Clarke et al. 1992; and Anderson 1995.

60 On the rightist electorate relatively moderate position vis-à-vis the decriminalization of abortion, see Barreiro 1998, 229-230; on AP's radicalism on the education issue in contrast with the Catholic church's position, see Powell 2001, 405-407.

61 See, for example, "El recurso previo," El País, 4 May 1984, 10; "Otra vez el recurso previo," El País, 2 July 1984, 8; "La oposición y el recurso previo," El País, 23 September 1984, 12.


63 Centro de Investigaciones Sociologicas, Study 1416 (May 1984 Barometer).

64 As Linz and Stepan note, the attempt to systematically trump elected and majoritarian institutions by increasing the political role of unelected powers is precisely one of the marks of such "semi-loyalty" —Linz and Stepan 1978, 37.

65 Luís Nunes de Almeida, Diário da Assembleia da República, supplement to n. 69, 20 March 1982 (our italics).

66 Costa Andrade, Diário da Assembleia da República, supplement to n. 69, 20 March 1982.

67 This is, of course, for "contemporary referrals". In case of all laws referred, the average time between the date of the final vote and the date of corresponding ruling in a posteriori review jumps to 52 months. The data concerning governmental decrees is not very different: 40 months on average between publication and ruling for contemporary referrals of decrees.

68 Personal interview with high ranking PS official, March 2000.

69 Law on health care (Law 48/90).

70 The expansion of private initiative to the banking and insurance sectors in 1983 (Law 11/83) and, later, of additional economic sectors (Law 100/88); the privatizations law of 1990 (Law 11/90), passed following the 1989 constitutional
revision that allowed for the privatization of the entire capital of public enterprises; and two agrarian reform laws (Laws 109/88 and 46/90).

71 A law delegating decree authority to the PSD government for labor legislation reform (Law 107/88) and legislation deregulating the housing rental market (Law 42/90).

72 As Vital Moreira, future justice of the Court put it in 1982, "what's the use of not touching on the guarantee of the economic Constitution, in the irreversibility of nationalizations, in the principle of irreversibility of the nationalization of land, if tomorrow a Constitutional Court, purposely constituted in order to become a 'scapegoat,' allows such laws — instead of being declared unconstitutional, as they should — to be politically whitewashed by that body that calls itself a Constitutional Court?" - Diário da Assembleia da República 128 (1982), 5389. Ten years later, already after having left the Court, Moreira would accuse it of having "methodically demolished the economic Constitution even before it had been changed in the constitutional text itself." - Vital Moreira, "O Tribunal Constitucional e os trabalhadores," Expresso, 17 October 1992.

73 This happened with laws 107/88, 100/88, 109/88, 11/90. Indirectly, the law on agrarian reform of 1990 also falls into this category, since its potential unconstitutionalities had already been addressed by Decision 187/88 made on the a priori review of the bill that led to Law 109/88.

74 See Diário da Assembleia da República 73, 1988, 2854; Ibid. 74, 1988, 2895; Idid. 100, 1988, 4093; Ibid. 113, 1988, 4583; and Ibid. 47, 1990, 1645.

75 The exception was the Law on Strikes, which had already been scrutinized in a priori review and where PS MP's were joined by Communist MP's in the referral. However, even in this case, the brief explicitly requested the Court to appreciate the law from a point of view of its formal/procedural constitutionality, which the first ruling (Decision 289/92) had not examined.

76 He openly described the apparent "social peace" with which the partial privatization program was being received in the late 1980s not only as a "demonstration of the country's political maturity" - interview with Mário Soares, Tal e Qual, 24 June 1988. In the aftermath of the 1989 constitutional revision, Soares argued that its "broadly consensual nature withdrew the last alibis from the adversaries of the regime," and praised the adoption of "the structural reforms that long ago were claimed by a significant part of Portuguese public opinion" — Mário Soares, "Prefácio," in Intervenções 4 (Lisboa: INCM, 1990), 39.

77 Personal interview with a senior political adviser of President Soares, March 2000.

78 See also "Privatizações: Cavaco pede a Soares envio de leis para o TC," Expresso, 1 April 1988; "Turno de férias salva Lei dos Sectores," Expresso, 13 August 1988.

79 These were linked to Soares's 1988 veto of the new electoral law for the European Parliament (for attributing the right to vote to Portuguese citizens residing outside the European Union, among which the PSD had always enjoyed a disproportionate electoral support), the 1990 veto of the law of the High Authority for Social Communication (on the grounds that the composition of this quasi-judicial agency favored governmentalization) and the 1990 a priori referral to the Constitutional Court of new legislation about incompatibilities between political offices, on grounds that it excessively restricted political rights and was directed specifically against Fernando Gomes, the Socialist Mayor of Oporto who had been elected as MEP. In the former two cases, the PSD majority simply overrode the vetoes with little or no substantive changes. In the latter case, the Court confirmed that the law was not unconstitutional. However, even in these situations, the reactions of the PSD to Soares's actions was very moderate, suggesting even the vetoes were "decisions deriving from the President's normal use of his constitutional powers. (Duarte Lima, "O veto presidencial: as razões dos outros e as nossas," Povo Livre, 25 April 1990).

80 Carlos Encarnação, in Povo Livre, 19 July 1989. See also, for example, Duarte Lima, "PSD e as presidenciais," Povo Livre, 7 February 1990.


82 Crucial was the use of the so-called "open presidencies," — week-long visits to different regions of the country which quickly became huge media events — in order to monopolize the public agenda and allow local government officials, social interests representatives, and the public in general to voice their demands and discontent. For a study of the open presidencies as "pseudo-events" and the Presidency's manipulation of the public agenda in this period, see Serrano 2002.

83 Interview to Público, 9 March 1990.

In any case, it is telling that one of Soares’s concerns in his second term was precisely mitigating the consequences of the inevitable perception that his referrals were moved by political considerations. In a televised address following the decision not to refer a bill for a priori review, the President made a point of noting that, since his reelection, he had used his litigation powers with “rigor and moderation: from 811 statutes from parliament and the government that were submitted to me, in the sixteen months of my second term, I have vetoed only one, and send ten to the Constitutional Court, having won the appeal seven times.”

CHAPTER 7. JUDICIAL DECISION-MAKING IN THE IBERIAN COURTS: POLICY PREFERENCES AND INSTITUTIONAL CONSTRAINTS

1 This hypothesis — the policy-seeking approach to litigation — has been presented in more extensive detail in chapter four and tested in the two previous chapters.

2 Tsebelis’s and Volcansek’s arguments are somewhat more nuanced than Sweet’s in this respect. While Tsebelis suggests that courts can also enjoy great discretion in statutory interpretation if the political system is heavily veto-laden, Volcansek notes that, although courts engaging in constitutional review are not agents, they are not totally autonomous either since they depend on other institutions for the enforcement of their rulings. See Tsebelis 2000, 465; and Volcansek 2001, 350.

3 In a more recent work, Spaeth and Segal have also shown that justices that disagree with an established precedent seldom turn to displaying adherence to that precedent in later votes: see Spaeth and Segal 1999.

4 See, for example, Nagel 1961; Ulmer 1973; Tate 1981; Ulmer 1986; Tate and Handberg 1991.

5 See, for example, Segal and Cover 1989; Segal and Spaeth 1993, 221-231; Segal et al. 1995.

6 See, for example, Gibson 1978; and Scheb, Unger, and Hayes 1989.

7 See the various essays in Schubert and Danelski 1969. For the Spanish Constitutional Court, see Castillo Vera 1987.

8 According to Dahl, the Supreme Court was only prone to strike down legislation passed by majorities different from those it confronted at the time. Conversely, when facing “current” lawmaking majorities, the Court was much less activist, and its few successes in preventing or delaying the implementation of congressional policy were obtained mostly against the interests of social minorities and individual rights — Dahl 1957. For criticism of Dahl’s hypothesis, see among others, Adamany 1973; and Casper 1976.

9 For studies showing at least some independent impact of public opinion on the U. S. Supreme Court decision-making see, for example, Mishler and Sheehan 1993; Link 1995; Stimson, MacKuen, and Erikson 1995; Mishler and Sheehan 1996; and Flemming and Wood 1997. But see also Norpoth and Segal 1994 for the argument that the Court’s apparent responsiveness to public opinion is actually mediated by the judicial appointment process.

10 For both theoretical arguments and empirical evidence of responsiveness of judicial decisions to preferences of other political actors, see, among many, Murphy 1964; Eskridge 1991; Rosenberg 1992; Gely and Spiller 1992; George and Epstein 1992; Epstein and Walker 1995; Epstein and Knight 1998, 138-175; Hansford and Damore 2000. But see also Segal 1997, suggesting that realistic models of strategic interaction leave justices basically unconstrained to vote their ideal preferences.

11 For example, in 1986, the Spanish parliament passed a new law on the organization of the judicial system that allowed for the parliamentary appointment of all members of the General Council of the Judiciary in charge of managing judicial personnel, reduced the age limit for compulsory retirement of judges, and delegated on the government the ability to issue the necessary regulations in order to implement the law. In one of the first rulings by the Spanish Tribunal that attached interpretative guidelines to “non-unconstitutionality” declarations, the Court disregarded the referral made by the opposition and did not declare any of the law’s provisions unconstitutional. However, it noted that the executive’s ability to implement the law by use of its own regulatory powers was to be regarded as “constitutional” only to the extent that such use did not bring any innovations in relation to the substantive content of the challenged law and respected the Council’s own regulatory powers in judicial matters. Obviously, this admonition about how the executive should use its regulatory powers in the future did not affect in the least what PSOE intended with this legislation: the Socialists needed was for the Court to declare the constitutional conformity of the basic provisions of the law, allowing them to undercut the power of conservative career judges in the judiciary and populate
the CGPJ with Socialist appointees. Besides, this example suggests another general problem with interpretive rulings: it was clear that the Court wished the Socialists to refrain from transfiguring the law or invading the CGPJ regulatory powers in the future by the use of non-legislative measures; it remained quite unclear how we should expect the Court to monitor and punish non-compliance with that interpretation.

12 In Spain, of the 108 rulings on the merits issued until July 2001 following abstract review referrals by opposition parties or the autonomous communities, only 11 (about 10 percent) contained this type of interpretive guidelines attached to provisions ruled to be according to the Constitution (Rulings 106/1986, 26/1987, 74/1987, 99/1987, 15/1989, 76/1990, 185/1995, 195/1996, 212/1996, 116/1999, and 105/2000). In the Portuguese Court, they have been even less frequent: of the 77 rulings on the merits resulting from abstract referrals by parliamentary oppositions, the President of the Republic, or regional authorities from 1983 to the end of 1999, only three contained this sort of interpretive guidelines (Rulings 458/93 (legislation on state secrets), 224/94 (fight against corruption and organized crime), and 59/95 (scrutiny of public officials incomes).

13 In Spain, Article 90.2 of the Organic Law of the Constitutional Court specifically states that "the President and the Judges of the Court can reflect their dissenting opinion in the deliberation in a private vote, both in what concerns the final resolution and its justification." In Portugal, although the Law of the Constitutional Court is mute about concurrences, Article 42.4 states that "the judges of the Constitutional Court have the right to table their reasons for a dissenting vote," and justices have, in practice presented both concurrences and dissents.

14 For example, in Ruling 94/84, the Portuguese Court declined pronouncing itself on a priori review of a decree, since the President had violated the five days deadline imposed him for this sort of referrals.

15 In Spain, that was the case with a series of early abstract review referrals made by individual citizens (see Autos 26/1980, 41/1980, 48/1980, 76/1980, 81/1980, 6/1981). In Portugal, also in the earlier years of the Court's life, several referrals resulted from petitions made to the Speaker of Parliament, which the latter directly sent to the Court. The Court dismissed them for not constituting a true challenge of the constitutionality of laws subscribed by the Speaker, but rather a case of actio popularis (see, for example, Rulings 5/83 and 16/83). A different sort of non-decision is Ruling 25/1981 of the Spanish Tribunal, where it argued that the Basque Parliament, which had challenged the constitutionality of an organic law on terrorism (Law 11/80), could not claim that such legislation directly affected its own "sphere of autonomy" and therefore lacked litigation rights. Similarly, in Portugal, see Ruling 54/99, where the Court refused to rule on the constitutionality of a law that had been challenged by a group of MPs of Madeira's Regional Legislative Assembly, on grounds that the appeal was not specifically grounded on a violation of the rights of the autonomous regions.

16 In Portugal, although the jurisprudence in such issues has been originally introduced by the Constitutional Committee, the first of such rulings by the Constitutional Court was 175/89, the result of a 1987 referral of legislation regulating radio broadcasting that, in the meantime, had been revoked in 1988. In Spain see, for example, Ruling 65/1998 on the constitutionality of several precepts of Law 25/1988, where the Court declined to rule on the merits of the control exerted by the central government over certain highways in Catalonia, since, in the meantime, that control had already been transferred to the Catalan authorities.

17 See Blanco Valdés 1999, 27. Similarly, until 1999, the Portuguese Court had in only two occasions denied the autonomous regions of Azores or Madeira the legitimacy to refer legislation for abstract review on similar grounds: see Rulings 54/99 and 673/99.

18 See Epstein and Knight 1998, 98-107, for examples of such behavior in the U.S. Supreme Court on the basis of documental evidence.


20 Interview with Francisco Tomás y Valiente, El País, 9 March 1986.

21 Interview with Francisco Tomás y Valiente, El País, January 1990.

22 For a discussion about why this may not be the case even with Supreme Court justices, see Baum 1997, 35-36 and 42-44.

23 Among the seventeen European countries classified as "free electoral democracies" by Freedom House in 2001 and with constitutional courts, only in Austria and Estonia do justices serve terms whose only limit is a compulsory retirement age of 70. In the remaining fifteen cases, the length of terms of office ranges from six years in Portugal (until 1997) and seven years in Slovakia to the twelve years served by German justices: See European Commission for Democracy Through Law 1997.

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A former justice of the Constitutional Court has even suggested a concrete case in which one of his colleagues (Raul Mateus), proposed by the PSD in 1983, allegedly failed to have his term renewed in 1989 on account having sided with the left on a concrete ruling: see Vital Moreira, "Nos 10 anos do TC," Expresso, 19 June 1993.

In Spain, 3/5 of both Congress and Senate and a referendum. In Portugal, 2/3 of parliament or, if any constitutional revision has taken place within the last five years, a 4/5 majority.

"Guerra afirma que el Gobierno recurrirá a 'la máquina de hacer indultos' si la norma es declarada inconstitucional," El País, March 1985.

"CiU amenza com retirar su apoyo a la Constitución en caso de fallo negativo sobre la 'ley del catalán'," El Mundo, 18 February 1994.


For example, in 1992, PSD's Durão Barroso, then Minister of Foreign Affairs, criticized the Court for making "judgements that clearly surpass technical-legal considerations and enter into political areas," as well as the tendency to "launch a suspicion over the bodies of democratic political power, contrasting them to judgments made by people that lack any kind of democratic mandate and support themselves in an alleged legal knowledge and an imaginary personal independence": see interview with Durão Barroso, Expresso, 25 July 1992.

As Shapiro notes in relation to the U.S. Supreme Court, doctrines of self-restraint were first developed as the Court threatened welfare legislation in the late 19th century, then prolonged by New Deal commentators in the 1930s, and then adopted by conservatives since the liberal thrust of the Warren Court. See Shapiro 1994, 103.

As a mere illustration, take the profiles published about two justices appointed to the Spanish Constitutional Court in December 1998. About Vicente Conde Martin de Hijas, El Mundo (5 December 1998) wrote that "he is considered as one of the best judges of the Supreme Court, in whose Third Section of Administrative Litigation he has worked for nine years. He has excellent reputation and is very respected by his colleagues. (…) Of a conservative character, Vicente Conde belongs to the Asociación Profesional de la Magistratura, majoritarian among Spanish judges and magistrates". About Maria Emilia Casas Baamonde, El Mundo wrote: "Born in Lugo 48 years ago, she is a Professor of Labor Law in the Complutense University of Madrid. She as part of the managing committee of University Carlos III, where she was vice-rector. Maria Emilia Casas is progressive, such as her husband, Jesus Leguina, who was also justice in the Constitutional Court a few years ago under proposal of PSOE."

See also Cappelletti and Cohen 1979, 81.

See Appendix for sources.

In case of executive decrees, the variable takes the value 1 when the party that appointed the justice belongs to the coalition supporting the executive, and 0 otherwise. Appointing Party Support by justices deemed as "neutral" (see chapter six) is always coded 0.

As Court's President Cardoso da Costa has himself argued commenting the 1997 amendments to the Constitution, "the commonly accepted idea is that the impossibility of reelection is an element that aids the independence of justices, because they have nothing to win or lose with their behavior within the Court, since, whatever their orientation in rulings may be, they have their seat guaranteed until the end of the term and also know that they cannot be Reelected. One cannot deny this prefigures itself, in fact, as a reinforcement of judicial independence. (…) The circumstance of not having the possibility of reelection perhaps makes people more free and independent." — interview with José Manuel Cardoso da Costa, Forum Iustitiae, December 1999. And already back in 1993, Luis Nunes de Almeida (the Court's Vice-President) had argued that "six years is indeed very little time to be a constitutional justice, because the exercise of such functions cannot become a mere moment — albeit a privileged one — in a political-professional career, but rather an objective in itself. The justice's independence is, at least on appearance, clearly diminished and affected when he exercises his functions as a mere parenthesis of a political or a professional career." - Almeida 1995, 253. For very similar arguments presented by the Socialist Party during the 1997 constitutional revision, see statements by Vital Moreira and Alberto Martins in meeting n. 53 (12 November 1996) of the Committee for Constitutional Revision. In 1997, in spite of an earlier hesitation, PSD also ended up embracing this proposal and using similar arguments, which, in fact, had been espoused by PSD's leader at the time — Marcelo Rebelo de Sousa — at least since the early 1990s. See Guedes 1997, 196; and Sousa 1995, 227.
CHAPTER 8. CONCLUSION

1 In the early 1990s, Pedro Cruz Villalón described the first decade of the Court's jurisprudence as "moderately centralist" (Cruz Villalón, 1991). However, other were less persuaded of that moderation, stressing the Court's "obsession" with "the essential unity of the Spanish legal order" or even the way the Court had curtailed regional prerogatives (Solozábal Echavarria 1991; Cuchillo 1993; Valles and Cuchillo Foix 1988). Finally, others preferred to stress the unclear, casuistic and fragmentary nature of the Court's jurisprudence (Pérez Royo 1986; Moderne 1993).

2 See, for example, McCubbins, Noll, and Weingast 1987; Kiewiet and McCubbins 1991; and Lupia and McCubbins 2000.
APPENDIX

The data used in this study were mainly collected from press coverage of judicial cases, official judicial and parliamentary documents, and interviews with Spanish politicians and judicial officials and experts (justices, lawyers, and clerks). The following newspapers were used: *El País* (Madrid), *ABC* (Madrid), *Ya* (Madrid), *El Mundo* (Madrid), *Expresso* (Lisbon), *Diário de Notícias* (Lisbon), *O Jornal* (Lisbon), *Portugal Hoje* (Lisbon), *Povo Livre* (Lisbon), *Diário de Lisboa* (Lisbon), and *Público* (Lisbon). Articles’ titles and dates are listed in the endnotes.

Extensive open-ended interviews were conducted with political and judicial officials in Spain and Portugal, covering issues such as the design of judicial institutions in both countries and prevailing norms and practices of judicial appointments, litigatory behavior, and judicial decision-making. I am grateful to Joaquim Aguiar, Luís Nunes de Almeida, Diogo Freitas do Amaral, Eduardo Barroso, Pedro Cruz Villalón, José Manuel Cardoso da Costa, Ana Martinha, Jorge Miranda, Armindo Ribeiro Mendes, Pablo Pérez Tremps, Marcelo Rebelo de Sousa, Francisco Rubio Llorente and one Spanish interviewee who wishes to remain anonymous for graciously conceding me interviews.

The main official sources for parliamentary debates were the *Diario de Sessiones del Congreso* and the *Diário da Assembleia da República*, while the main sources about judicial rulings were the Portuguese *Acórdãos do Tribunal Constitucional*, 40 volumes

The quantitative data used in this study were organized in four databases, two for each country. The Spanish database on legislative production and abstract review litigation in Spain was built with information collected in the Anuarios El País, the legislative database of the Ministerio de la Presidencia: Secretaria de Estado de Relaciones con las Cortes (www.mpr.es/accesoSI.asp), and the Argo database of the Spanish Cortes. The equivalent database in Portugal was built with information collected in the yearly reports on the activity of the Portuguese Assembleia da República published in Diário da Assembleia da República, Série C, the official record of the Portuguese Constitutional Court’s abstract review docket, and data from the Center for Documentation and Information of the Presidency of the Republic. The two databases on judicial behavior in Portugal and Spain were built with information collected in the main sources about constitutional courts’ mentioned above.
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