Judicial Activism in Post-Communist Politics

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Introduction

This article documents and provides possible explanations for the degree of judicial activism in eight post-communist countries. We examined constitutional court cases for the three years following the initial adoption of a constitution in the Czech Republic, Estonia, Georgia, Latvia, Lithuania, Moldova, Russia, and Slovakia. We found that contextual political factors, such as the extent to which the party system is fragmented and the extent to which the court enjoys popular trust and confidence (rather than the formal powers entrusted to the court by the constitution or the structure of the political system), contribute most to the degree of activism by constitutional courts.

Until recently, judicial politics scholars paid little attention to courts outside the United States. Comparativists have been even less likely to focus on courts for their own sake. Recently, there has been a significant increase in the comparative study of courts by members of both fields. One reason for this increase, especially among comparativists, has been the revival of interest in institutional effects on political developments, particularly in those newly democratizing countries that are busy designing and implementing new constitutional structures.

Scholars examining the effects of laws relating to executive institutions and elections have provided a wealth of data on the emerging democracies of post-communist Eastern Europe and the former Soviet Union (Hellman 1997; Frye 1997; Ishiyama & Velten 1998; Ishiyama 1996, 1997, 1999; Holmes 1993; Moser 1995, 1998, 1999; Moraski & Lowenberg 1999; Taras 1997; Elster 1997). While there have been a number of descriptive studies of Eastern European courts (for example, Melone 1996, 1997; Sabaliunas 1996; Ovsepian 1996; Schwartz 2000), only a few stud-

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ies have focused on the design of judicial institutions (Magalhaes 1999; Smithey & Ishiyama, 2000). Even less systematic comparative work has concentrated on the political effects of constitutional choices on the performance of constitutional courts.

This article examines one consequence of empowering judicial institutions—the degree to which judges have become actively involved in deciding constitutional disputes. We examine the degree to which judges disallow the policy choices of other policy makers and explore several factors that contribute to such activity. We find that political factors, such as partisan competition and political support, make more of a difference than the formal institutional factors that have drawn many scholars to the field in the first place.

Conceptualizing Judicial Activism

Judicial activism is a multifaceted concept.[1] Though *activism* is defined in a number of ways, the ability of judges to exercise political power is at the heart of the concept. For example, Galligan defines judicial activism as "control or influence by the judiciary over political or administrative institutions, processes and outcomes" (1991:70). Courts wielding greater degrees of such control or influence are more activist.

We can begin to assess the degree of judicial activism by considering a court's jurisdiction and caseload. Broad jurisdiction allows courts to weigh in on a wider range of policy issues, increasing the scope of judicial policymaking. The volume of cases decided is also relevant—a court that seldom makes decisions has fewer opportunities to influence the course of public policy than does a more active bench.[2] In general, courts that decide more cases, across a greater range of issues, should be considered more activist than those that decide a smaller number of cases across a narrower range of subjects.

Case outcomes are also important. Courts influence the course of public policy in their everyday task of applying the laws

[1] For example, Canon (1982) identifies several factors included in the concept of judicial activism, including (1) Majoritarianism—the degree to which policies adopted through democratic processes are judicially negated; (2) Interpretive Stability—the degree to which earlier court decisions, doctrines, or interpretations are altered; (3) Interpretive Fidelity—the degree to which constitutional provisions are interpreted contrary to the clear intentions of their drafters or the clear implications of the language used; (4) Substance-Democratic Process distinction—the degree to which judicial decisions make substantive policy rather than affect the preservation of the democratic process; and (5) Specificity of Policy—the degree to which a judicial decision establishes policy itself as opposed to leaving discretion to other agencies or individuals.

[2] This is particularly true of courts that control their own dockets, since they have the power to choose which cases they will take up and which they will avoid. Opponents of judicial activism often argue that courts should take fewer cases, particularly in certain areas of law that they deem inappropriate for judicial decision.

to settle disputes.[3] Nevertheless, judicial review is considered a more significant source of court power since it allows judges to trump others' policy choices (for example, Galligan 1991; Holland 1991). Through judicial review, judges may substitute their judgment for that of other policy makers. The power looms particularly large because judicial decisions concerning constitutionality are very difficult to overturn; this makes them more permanent as well as more dramatic.[4] Nullification is therefore considered the highest form of activism by most commentators.[5]

This view of judicial activism conceives of courts as a separate branch of government in direct conflict with the legislative and/or executive branches. Sometimes, however, judicial power expands with the cooperation of other branches. The process of abstract review has increased the power of several Western European courts by creating a role for judges during the drafting of legislation (Stone Sweet 2000). "Abstract review takes place in the absence of a concrete case or controversy. . . . Abstract review processes result in decisions on the constitutionality of legislation that has been adopted by parliament but has not yet entered into force (France), or that has been adopted and promulgated but has not yet applied (Germany, Italy, Spain)" (Stone Sweet 2000:45).

The practice allows opposition parties to refer legislation to constitutional courts rather than accept legislative defeat, an opportunity that has been frequently utilized in recent years.[6] Once legislation has been referred, the constitutional court dictates the ways in which the legislation should be redrafted to pass constitutional muster. Referrals increase judicial influence by inserting judges into the policy formulation stage, rather than merely allowing for disallowance after the fact. Abstract review should therefore be seen as another avenue for activism because it reflects the "willingness of the courts to inject themselves publicly into the policy process and to impose judicially selected poli-

[3] For example, see Mather (1995).

[4] In the United States, for example, the constitutional decisions of the Supreme Court can only be overridden by a two-thirds majority of both houses of Congress and three-quarters of the states (or three-quarters of special state conventions). In other countries, a super-majority of the legislature is required to overturn a constitutional decision, which presents a slightly lower, but still significant, hurdle to change.

[5] For example, Schubert (1974:213) defines judicial activism based on a court's treatment of decisions made by other policy makers. He considers court decisions that conflict with those of other policy makers to be activist, and those which accept such policies to be restraintist.

[6] The referral procedure is used regularly in France, Germany, and Spain. In France, since 1981, about one-third of all legislation has been referred to the Constitutional Council. Through 1991, the German Court had reviewed 20% of all federal laws adopted and nullified 200 of them as well as 223 administrative or legal rules. Between 1981 and 1990, the Spanish Tribunal reviewed 101 laws and declared 53 unconstitutional, in whole or in part (Stone Sweet 2000:63–64).

cies at the expense of other branches of government" (Wenzel, Bowler, & Lanoue 1997:364).

How Active Have Post-Communist Courts Been?

Until recently, there was no discussion of judicial activism in Russia or Eastern Europe. In socialist systems, law and courts were subordinate to the people's interest, embodied by the dictates of the state. Judicial power to nullify such acts had no place in communist countries. Judicial activism became possible with the transition to democracy that began in 1989. Each post-communist regime in Russia and Eastern Europe adopted a constitution and authorized a constitutional court to enforce it. The question for students of judicial activism is to what extent judges in the former communist countries have made use of their new powers.

In this article, we offer an assessment of judicial activism in eight post-communist countries during their first three years of interpreting their new democratic constitutions. We operationalize activism as the rate at which the constitutional courts strike down laws. We examine the court cases from the first three years following the adoption of the country's most recent constitution. We made this choice for two reasons: (1) the period overlaps with the initial election cycle in each country, so the degree of initial political party systems fragmentation can be assessed; (2) the period corresponds to the time when the most fundamental political debates occurred over the relationship between the court and other institutions—when judges might logically be expected to assert themselves as political actors, as part of a desire to institutionalize judicial power.

For our sample, we chose countries that seem to have made meaningful attempts to become electoral democracies (at a minimum, these states have had relatively fair and frequent elections). This excluded decidedly authoritarian regimes like those in Azerbaijan and Belarus, where the courts act at the behest of dictators. Our sample was further limited to constitutional courts that publish their decisions in languages familiar to the authors.[7] To be sure, other cases were available (Slovenia and Bulgaria, for instance), but the court decisions in these countries were too recent (meaning that the cases from the first three years after the adoption of the latest constitution were not available). After considering these criteria, we narrowed the sample to constitutional courts of the Czech Republic, Estonia, Georgia, Latvia, Lithuania, Moldova, Russia, and Slovakia.[8]

[7] Either in Russian (Russia, Georgia, Moldova), Slovak, or translated into English, as was the case with the Czech Republic, Estonia, Latvia, and Lithuania.

[8] The periods covered were 1993–1995 for the Czech Republic, Slovakia, Estonia, Latvia, and Lithuania; 1995–1997 for Moldova and Russia; and 1997–1999 for Georgia.

The activity rate of these constitutional courts varies significantly across countries. The number of cases reported varied from a low of 10 in the Czech Republic to a high of 96 in Slovakia, with a mean decision rate of 40.4 cases per court. Half the courts in the sample (Estonia, Latvia, the Czech Republic, and Georgia) reported fewer than 20 cases in the initial period, while the other half reported more than 40 each. Interestingly, there seemed to be an inverse relationship between the number of cases these courts heard and the percentage of times they nullified policies. Courts issuing fewer cases were much more likely to strike down the policies they did consider. The average rate at which "busy" courts upheld challenged policies was 59%, while the average rate at which the other four upheld challenged policies was only 27%. Although we make no strong claim to explain this pattern, we speculate that less active courts may hear only the most serious constitutional challenges, while courts with higher caseloads may process a higher percentage of less serious claims.

Table 1. Judicial Activity by Country

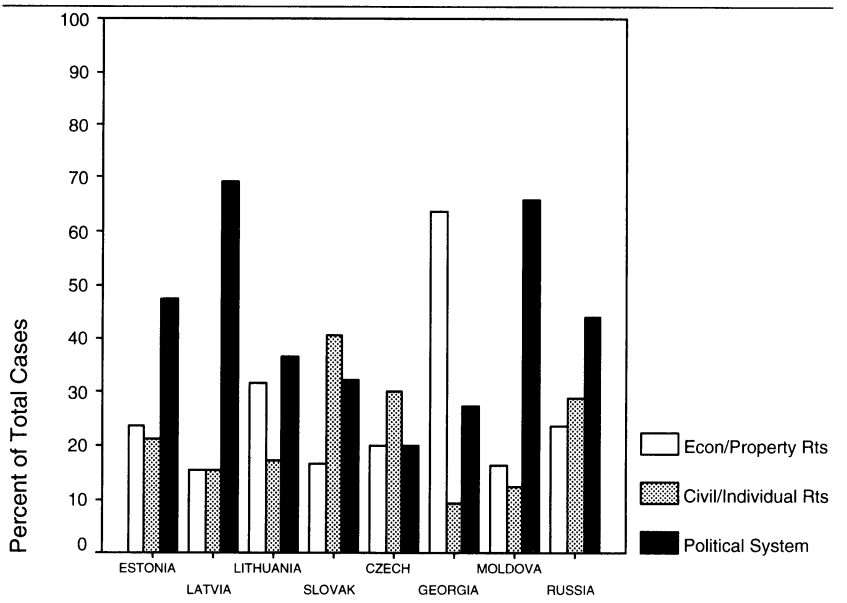
	Czech Republic	Georgia	Latvia	Estonia	Lithuania	Russia	Moldova	Slovakia
Number of cases	10	11	13	19	41	59	74	96
Percent of activist decisions	60	64	85	79	37	51	51	26

Courts in all these countries have jurisdiction over a wide range of issues. We grouped cases into three issue categories: those that raised economic or property rights issues, those that raised traditional civil liberties issues (such as freedom of speech, religion, and privacy), and those that raised concerns about the structure and processes of government (including separation of powers, federalism, and legislative procedures).[9] Figure 1 illustrates the relative incidence of the different issues in each country. Though economic/property rights cases were most prevalent for the Georgian court (nearly 70% of all cases), cases regarding the structure and operation of the political system were most prevalent for most of the countries in our sample. Cases in the political system category made up the highest proportion (by far) of the total number of cases for Estonia, Latvia, Lithuania, Moldova, and Russia, and were second-most prevalent for Slovakia, the Czech Republic, and Georgia. This would appear to reflect the time period in which the cases were decided. Policy makers sought judicial review to establish certain institu-

[9] The cases that were translated into English (Czech, Lithuania, Estonia, Georgia, and Latvia) were coded by two coders. The intercoder reliability coefficient for the two coders was at 0.93. The Russian and Moldovan cases were coded by one researcher (who reads and speaks Russian). The Slovak case was coded by one researcher and one research assistant (both who read Slovak). The intercoder reliability coefficient for this case was at 0.91.

tional arrangements and avoid others as part of the transition away from communist rule. This was true of the separation-of-powers conflicts that arose between the various institutions of the national government, as well as in the federal struggle between national and regional governments.

Figure 1. Types of Cases Considered by Post-Communist Constitutional Courts in First Three Years Following Adoption of Constitution



If we explore who originates cases in these countries, we find a variety of litigation sources. The constitutions of the eight countries provide different access procedures. Some countries make it very easy for individuals to bring suit, while others limit access to government officials. All grant some sort of standing to members of the legislature. There is no consistent pattern across countries with regard to what sort of party brings most cases. For example, individuals originate many of the cases in Slovakia (70%) and Russia (40.7%), but only a small percentage in Estonia (10%) and Georgia (10%). Cases are also brought by local and provincial governments, legal officers, and executives, to differing degrees (and sometimes not at all) depending on the country. The only source of constitutional cases in all countries is the legislature. Legislators have taken advantage of the power to refer cases via abstract review, or to challenge enacted policies, in all eight countries. While it is too early to draw any hard conclusions about this behavior, it does raise the possibility that courts and legislatures may begin working together in Eastern Europe as they have been in Western Europe.

Table 2. Overall Case Initiation by Country (in percentages)

	Estonia	Latvia	Lithuania	Slovakia	Czech Republic	Georgia	Moldova	Russia
Executive	3		1				7	2
	(15.8)		(2.4)				(9.5)	(3.4)
Cabinet		4	1				1	
		(30.8)	(2.4)				(1.4)	
Legislature	9	6	24	23	5	1	54	9
	(47.4)	(46.2)	(58.5)	(24.0)	(50.0)	(9.1)	(73.0)	(15.3)
Private person	2		13	68	5	10	1	24
	(10.5)		(31.7)	(70.8)	(50.0)	(90.9)	(1.4)	(40.73)
Local government	1	2		5			2	1
	(5.3)	(15.4)		(5.2)			(2.7)	(1.7)
Provincial government								14
								(23.7)
Legal officer	4	1	1				8	9
	(21.1)	(7.7)	(2.4)				(10.8)	(13.6)
Not specified			1				1	1
			(2.4)				(1.4)	(1.7)
Total	19	13	41	96	10	11	74	59

What Affects the Incidence of Activism?

So far, we have described the incidence of Eastern European judicial activity without offering much explanation for it. We now explore a variety of factors that may explain the rates of activism we have documented.

The literature on judicial politics suggests that a number of structural features are associated with judicial activism. Prominent among these are federalism, a written constitution, judicial independence, and a competitive party system. Certain cultural traditions are also positively related to judicial activism, including a common law tradition, support for the concept of limited government, high esteem for judges, and a social consensus on fundamental regime questions (Holland 1991:7–10).

It has been argued that a formal division of power between central and regional governments is associated with a powerful and active judiciary. This is due in part to the fact that federal systems provide built-in opportunities for jurisdictional conflict, thereby providing more opportunities for the court to be activist (Holland 1991:8). Constitutional designers may also consider that a constitutional court is needed to umpire the balance of federal power (Shapiro 1999). Another factor that has been cited as important in explaining an activist court is the presence of a written bill of rights. A bill of rights provides judges with justification for their power in that it signifies support for the idea that

individuals have fundamental rights and that judges have a particular role to play in enforcing them (Tate 1995:30).[10]

A third structural condition contributing to activism is the relative degree of judicial independence (Holland 1991). Indeed, the "notion that insulation from political pressure contributes to activism is virtually axiomatic among many who study judicial politics" (Wenzel, Bowler, & Lanoue 1997:366). Although independent judges will not always choose to "substitute their own policy judgment for that of others," independent judges are in a "good position to assert themselves in policy-making against or in competition with the legislative and executive branches" (Tate 1995:32–33). Thus, while judicial independence does not assure judicial activism, it certainly increases the potential for it. Since judges lack the power to fund or enforce their decisions, judicial power is highly contingent on the acceptance of other policy makers. The degree to which constitutional designers choose to empower judges and insulate them from political pressure should be particularly relevant in predicting the capacity for activism, at least in the period directly following constitutional design. We would therefore expect greater activism in countries with stronger support for judicial independence, as such support suggests that policy makers are more likely to acquiesce when judges overturn their decisions.[11]

A country's legislative party system may also affect its extent of judicial activism. Tate (1995) argues that a high degree of party competition within the legislature tends to invite challenges from the judiciary because highly fragmented party systems result in weak governing coalitions. Indeed, when "executives are unable to govern through disciplined parties and effective legislative majorities, they will find it difficult to develop effective policies with the political and public support that can sustain them through opposition challenges directed to the judiciary" (Tate 1995:31). Conversely, Holland (1991:9) argues that the lack of competitive parties limits the development of a powerful and activist judiciary. In such systems, judges invariably belong to the party of the chief executive or the legislative majority and are therefore likely to share the perspective of the party leadership.[12] Further, even judges who might be inclined to oppose

[10] The Canadian case seems to support this claim, as scholars tend to trace the expanded policymaking role of the Canadian Supreme Court to the adoption of the Charter of Rights and Freedoms in 1982 (for example, Morton and Knopff 2000, but see Epp 1998). Conversely, the absence of a written bill of rights is thought to constrain the potential for judicial power in England and Australia.

[11] Gibson (1989, 1991) finds that in the United States, compliance with court decisions is most likely when the courts are viewed as legitimate policy makers. This might explain the compliance of American presidents such as Truman and Nixon to the adverse decisions of the Supreme Court in *Youngstown Sheet and Tube v. Sawyer* (1952) and *U.S. v. Nixon* (1974), respectively. For more on such cases, see O'Brien (1998).

[12] This is the reason offered for the relative passivity of Japanese judges despite the existence of the constitutionally guaranteed right of judicial review. The lack of party

government policies are not likely to do so if they face united legislative coalitions. Partisan dominance of the legislature makes it easier to achieve the necessary majorities to override judicial decisions or adopt court-curbing legislation, thus creating stronger incentives for judicial deference.[13] Thus, the degree of party competition in the legislature is likely to influence the potential for judicial activism.

Finally, we examine the effects of mass public attitudes vis-à-vis the executive, legislature, and judiciary. When the public views major political institutions as corrupt and self-serving, support for courts tends to be higher. In such situations, "reputations for expertise and rectitude, [give judges] as much or more legitimacy as that of executives or legislatures" (Tate 1995:31). Public support for the judiciary, especially when accompanied by strong rights consciousness, seems to encourage judicial activism.[14] We would therefore expect higher levels of judicial activism when judicial institutions are accorded more popular respect and legitimacy than other governmental institutions.[15]

Methodology and Design

Dependent Variable—Judicial Activism

At this point we measure the degree of judicial activism based on the extent to which the constitutional courts strike down laws. To explore the factors influencing activism, we employed two different techniques: First, we examined the pooled cross-sectional data and measured activism by a dichotomous dependent variable of whether the court nullified a law or policy. Pooling the data created a large enough data set to allow for sophisticated quantitative analysis. However, without weighting our results to account for the fact that some countries publish more decisions than others, the results could be distorted, with busier courts having a disproportionate influence on the results. Thus, we adopted a technique borrowed from Randazzo and Herron (forthcoming) that weighted the cases proportionally to minimize the distortion caused by a disparate number of cases for some countries in the sample. This weighting technique involved measuring the proportion of cases from each country and weighting cases by the inverse. Thus, one-third of the cases in the

competitiveness in the Japanese dominant party system seems to constrain judges from opposing government policies (Holland 1991; Tate 1995).

[13] For further discussion of this point, see Epstein and Knight 1998.

[14] For example, see Epp 1998.

[15] We are not arguing that trust in one institution will necessarily be negatively correlated with that for others. People may like both Parliament and the Court. We often find that support for various institutions, though at different levels, tracks together (for example, see Easton 1975). The issue is whether the public supports one institution more. We expect that a court will be more assertive when it is the public's relative favorite.

sample were accounted for by a single country, and then that country would receive a weight of 3. This procedure promoted the comparability of national cases in the data set.

Second, to compare across countries to determine whether cross-national differences existed between states, we compiled an aggregate measure of activism by country[16] by dividing the number of cases where the court nullified a law or policy by the total number of nullification opportunities that the court had.[17] We excluded cases in which constitutional courts were asked to clarify clauses of the constitution or to rule on who won elections as a board of final certification (as is the case in Moldova). The resulting proportion represented our national judicial activism score.

Independent Variables

We analyzed the following predictors of activism: the extent to which constitutional courts are independent and constitutionally powerful; the presence of a formal bill of rights; the extent to which systems have federal characteristics (or more empowered regional governments); the degree of competition among legislative parties; and public opinion toward the judiciary relative to the other major institutions of government.

Judicial Power

The concepts of judicial power and judicial independence are related. As part of the transition to democracy, constitutional designers in the post-communist countries fashioned constitutional provisions that both gave power to courts and protected them from outside pressures. Constitutional designers made choices about the range of issues over which constitutional courts would have jurisdiction, the nature of the remedies that their judges would be qualified to grant, and the types of responses that would be available to policy makers who disagreed with court decisions. Decisions also had to be made as to how easy or difficult it would be to influence the judiciary from the outside, including the length of judicial terms, the security of judicial salaries, and the method of removal and/or reappointment of judges. Some designers chose to enhance the potential for judicial power by granting courts broad authority and limiting the avenues for political backlash against the courts, while others de-

[16] This method allowed us to reduce further the danger that our pooled data were suggesting relationships for all countries, which may only hold true for a few.

[17] In some cases, several clauses of laws were discussed. If the court ruled against even one clause, the case was coded as an instance of nullification.

signed judicial institutions in ways that made them both less powerful and more vulnerable to attack.[18]

For our purposes in examining judicial activity in the period immediately following the adoption of new regimes, we examined the degree of formal power and independence outlined in the constitutions of the post-communist states. In general, we expected that the greater the power described and the greater the presence of safeguards against political attack, the greater the potential for judicial activism. Since we are interested in the degree to which constitutional provisions grant courts independence, we primarily focused on formal measures of political power and insulation. Such measures, although not designed to capture completely the degree of judicial power in practice, do reflect the degree to which constitution makers intended to create the *potential* for an independently powerful judiciary. The variable *judicial independence* has six components, measuring the extent to which the constitution grants power to the constitutional court and the extent to which it protects the court's independence from other policy makers. The first measure answers this question: Can the judicial body responsible for determining constitutionality have its decisions overturned by other actors?

The second measure concerns the extent of judicial review powers. Does the constitutional court have a priori (abstract) judicial review, or is it limited to incidental review power? Under the system known as a priori or abstract review, parties are allowed to challenge the constitutionality of statutes and decrees prior to their application. In general, such abstract review provides the courts with real power to affect policy, allowing them to influence the policy agenda and defuse potential constitutional disputes. By contrast, in a system limited to incidental review, parties are limited to challenging government actions once they have been implemented. This limits constitutional review to concrete disputes brought by litigants and therefore somewhat limits judicial power relative to courts with abstract review powers.

The third measure concerns the length of judges' terms. To a large extent, the longer the term of the judges, the more likely they are to possess some degree of independence from other actors. However, to some extent this depends on how long the term is relative to the terms of other actors. For instance, if the term of

[18] Democratic regimes vary in the degree of insulation they give their courts. For example, U.S. state judges are unusually subject to political pressure because they are often elected by the public or subject to retention elections after an appointed probationary period. Federal judges enjoy greater insulation, serving until resignation, death, or impeachment for an absence of "good behavior," but their selection is influenced by political factors during their selection by the president and approval by the Senate. Other regimes provide greater insulation from politics. For example, in Namibia, "in order to ensure that the judges would not be the handmaidens of the government . . . the appointment and dismissal of judges is taken almost completely out of the hands of the legislature and the executive and entrusted to the Judicial Service Commission" (Steytler 1995:495–96).

a judge is *less* than a single parliamentary term, then a parliament within a single session may punish a judge via removal or nonrenewal. The fourth measure relates to the number of actors involved in the nomination and confirmation process. It is likely that judges who are selected as the result of a process that involves several political actors will be more independent than judges who are all selected by the same actor.

The fifth measure focuses on the question of control of judicial procedure—who sets the rules for the proceedings of court cases? A constitutional court that determines its own procedures is likely to possess considerably more potential independence than one that has all of its procedures determined by another political actor. Finally, the sixth measure concerns the degree of difficulty in removing judges from office. The easier the constitution makes it to remove a judge, the less independent the judges will be. Sometimes constitutions do not specify the exact method of removal. We consider constitutional vagueness in this area to be to the advantage of judicial independence, since such vagueness allows judges to interpret removal provisions to their benefit.

We combined these six aspects of judicial power and independence in our index of formal judicial independence. The constitutions of all eight countries were coded for each of the six dimensions. The first component, focusing on whether the court's decision could be overturned or not, was coded 0 if the court's decision could be overturned and 1 if not. The second, whether judicial review could occur prior to the adoption and implementation of a statute or executive action, was coded 1 if broad a priori review powers were assigned to the court. A value of 0.5 was assigned if a priori review was restricted to particular policy areas, such as international treaties. A value of 0 was assigned to courts that were only allowed incidental review.

The third component, the terms of judges relative to the longest term of either executive or legislative actors, was coded 0 when the term of the constitutional court judge was less than or equal to one term of the actor with the longest constitutional term, 0.33 when it was less than or equal to two parliamentary sessions, 0.66 when it was more than two parliamentary sessions (but had a constitutionally specified limit on the number of terms), and 1 when the term was life or until voluntary retirement. The fourth component, involving the number of political actors involved in the nomination and confirmation process, was coded 0 when only one actor was involved in the process, 0.5 for two actors, and 1 for when three or more institutional actors were involved.

The fifth component, whether the court defined its own procedures, was coded 0 if procedures were established outside of the court and 1 if procedures were established by the court itself.

Finally, the removal component involved a three-part scoring. Cases received a score of 0 if judges were removable for any reason loosely described as violation of the law. Cases were scored 0.5 if judges were removable only under specific conditions listed under the constitution (such as for treason). And cases were scored 1 if the constitution either guaranteed that judges could not be removed for any reason or included no provisions for removal.

Table 3. Scores for Components of Judicial Power

Country	(A) Can Judicial Decisions Be Overturned?	(B) Presence of a priori Review?	(C) Judge's Term Relative to Other Political Actors	(D) How Many Actors Are Involved in Selection of Judges?	(E) Who Establishes Court Procedures?	(F) Conditions for Judicial Removal?	Judicial Power Score (A+B+C+D +E+F/6)
Armenia	1.0	0.5	1.0	0.5	1.0	1.0	0.83
Azerbaijan	1.0	0.5	1.0	0.5	0	0	0.50
Belarus	1.0	1.0	0.67	0	0	0	0.45
Bulgaria	1.0	0	0.67	1.0	1.0	0.5	0.70
Croatia	1.0	0	0.33	0	1.0	0.5	0.47
Czech Republic	1.0	0	0.33	0.5	1.0	0.5	0.56
Estonia	1.0	0	0.33	0.5	0	0.5	0.39
Georgia	1.0	0	0.33	1.0	0	0	0.56
Hungary	1.0	0	1.0	0.5	0	1.0	0.58
Latvia	1.0	0	1.0	0.5	0	1.0	0.58
Lithuania	1.0	0	0.67	1.0	1.0	0.5	0.70
Macedonia	0	0	0.67	1.0	1.0	1.0	0.61
Moldova	1.0	0	0.33	1.0	1.0	1.0	0.72
Mongolia	0	0	0.33	1.0	1.0	0	0.39
Poland	0	0	0	0	0	0	0
Romania	1.0	1.0	0.67	1.0	1.0	1.0	0.95
Russia	1.0	0	1.0	0.5	0	0	0.42
Slovakia	1.0	0	0.33	0.5	0	0	0.31
Slovenia	1.0	0	0.33	0.5	1.0	0.5	0.56
Ukraine	1.0	0.5	0.67	0.5	0	0.5	0.53

Judicial power mean score = 0.54. Standard deviation = 0.20.

Table 3 summarizes the values for the six components that make up our index of formal power and independence. The values for the six components are added together and divided by six to create a value ranging from 0 to 1. Low values indicate an extremely weak constitutional court and high values an extremely powerful court, at least in terms of the potential assigned to the courts by constitutional designers. For the eight courts in our sample, the judicial power score varied from a low of 0.31 for Slovakia to a high of 0.72 for Moldova.[19] Most countries clustered

[19] This situates our eight-country sample in the middle of the distribution of judicial power in post-communist constitutions in general. The range for a larger sample of 20 countries ranged from a high of 0.95 for Romania to a low of 0 for pre-1997 Poland (Smithey & Ishiyama 2000). Judicial power has since expanded in Poland after a new constitution was approved in mid-1997 by referendum. The new Polish constitution provides for greater judicial power by removing the Sejm's ability to override the decisions of the constitutional tribunal (Schwartz 1998:104). However, these changes did not take effect until October 1999. So we based our coding for Poland on the constitution adopted

within one standard deviation of the mean, suggesting courts that are extreme in neither their weaknesses nor their strengths. From this we might conclude that there is a mid-level degree of support for judicial independence in most post-communist countries. In most of these countries, constitutional designers have created a certain amount of judicial independence but also balanced it with significant checks.

Degree of Party Competition

We measured an additional independent variable by the average number of "effective" political parties in the legislature following the adoption of the latest constitution (Taagepera and Shugart 1989). This measure provided a rough approximation of the extent to which party politics is competitive. We calculated the measure based on the share of seats each party or organization receives in the lower house of the legislature, using the following formula:

$$\textit{Effective Number of Parties} = 1/\acute{O}p_i^2$$

where p_i = fractional share of the ith component (meaning the seat shares for each party) and ? = the summation of the overall squared components. The value ranged from zero to infinity. If all the components had extremely small seat shares, then the number of effective parties would be very large; if, at the other extreme, one party received all of the seats, then the number of effective parties would be quite small.

Popular Attitudes toward the Judiciary

To measure popular attitudes toward the judiciary, we derived a simple measure from data collected by the *New Democracies Barometer II and III;* the *New Russia Barometer II, III, and IV;* and the *Nationalities in the Baltic States Survey I and II.* In particular, we paid attention to questions posed to respondents on how much they trusted the courts and the judicial process. The percentages of respondents who said they trusted the courts "a lot" or "some" were compiled to measure the extent to which there is popular trust of the courts. However, it may be the case that activism is not merely a product of the degree of trust that the courts enjoy, but of how much the courts are trusted relative to other institutions. In particular, we measured the difference in the degree of trust that the courts enjoy vis-à-vis the legislature.

Presence of Bills of Rights

As noted above, some scholars argue that the presence of a bill of rights that ensures individual rights makes it more likely

in the early 1990s, during the country's period of democratic transition and initial institutional choice.

that constitutional courts will be active (Holland 1991; Tate 1995). Communist constitutions tended to treat rights as subject to the will of certain groups within society. In contrast, post-communist constitutions embody more of a natural law perspective, placing a wide array of rights beyond the control of any particular class.[20] The rights declared in these constitutions are more extensive than those provided in the U.S. Constitution (Sunstein 1992). What varies from country to country is the number and kind of rights that are guaranteed.

Post-communist constitutions contain three generations of rights, as outlined by Sunstein (1992). First-generation rights are the conventional political and civil liberties, including right to property, freedom of speech, and freedom of religion. Nearly all post-communist constitutions have guarantees of the right to own and inherit private property, which were absent in communist constitutions. They also guarantee minority rights, as discussed in the 1990 Helsinki Conference (Schwartz 1991), as well as other fundamental rights that are familiar from Western constitutions.

Second-generation rights are premised on government responsibility to provide for individual well-being, including rights to social security, housing, leisure, and food. These are often seen as the clearest links between the communist and post-communist constitutions (Elster 1993; Schwartz 1992). Positive rights play a very strong role in the new constitutions—nearly all post-communist constitutions contain some guarantee for welfare, social security, and education. This creates an interesting interplay between the rights guaranteed to the individual and those guaranteed to the collective (Howard 1992).

Third-generation rights, or postmodern rights, are societal goals and ambitions, such as the right to a healthy environment, peace, and economic development. Some of these reflect the abuses that took place under communist governments, but others seem to reflect the increasing importance of particular issues in governmental affairs. While these rights are almost impossible to enforce legally, they are meant to provide these new societies with basic goals for government policy.

To measure the strength of rights clauses, we employed a content analysis of the rights sections of the new constitutions (normally contained in the second chapter of the new constitutions, the exception being the Czech Republic). Since courts are more likely to protect rights that are guaranteed in explicit constitutional provisions (Sunstein 1997), we created an additive index by counting all rights that were explicitly guaranteed by the constitution. We gave double the weight to first-generation

[20] Schwartz (1991) and Elster (1993) both argue that rights protection was one of the primary aims of constitutional designers.

rights, which are almost unanimously considered to be of the greatest importance in the literature, than we gave to their second- and third-generation counterparts. Using this coding scheme, we found 113 different rights guarantees in the sample of constitutions, resulting in a weighted maximum score of 179. After the coding was complete, we divided each country's total by 179, producing a score between 0 and 1, with higher scores indicating greater a degree of rights guarantees.

Federalism

Finally, we measured the degree of federalism by the extent to which subnational units are granted some degree of political autonomy, theorizing that the increased opportunity for jurisdictional conflict will encourage judicial activism (Holland 1991:8). To measure the degree of local political autonomy, we used the number of elected subnational tiers of government (electoral decentralization), as estimated by the World Bank Development Report (1999). This measure roughly approximated the extent to which a system is "federal" because it reflects the existence of multiple layers of government, each with its own degree of electoral legitimacy. Countries that hold elections for a greater number of subnational tiers are more federal in nature than those with fewer elected tiers, creating more opportunities for judicial resolution of federal conflicts.

Analysis

We analyze below the impact of these factors (the extent of constitutional power, the degree of party competition, the level of popular support for the judiciary, the extent of rights protection, and the degree of federalism) on judicial activism in our eight-country sample. Table 4 summarizes the values for the dependent and independent variables for the eight countries.

Table 4. Variable Scores for Countries

Country	Judicial Activism Score	Judicial Power Score	Number of Effective Parties	Popular Trust of Courts	Relative Trust of Courts Compared to Parliament	Relative Trust of Courts Compared to President	Rights Index	Number of Subnational Elected Tiers of Government
Czech Republic	0.60	0.56	4.4	33	+10	−5	0.10	1
Estonia	0.79	0.39	5.4	63	+9	−15	0.02	1
Georgia	0.64	0.56	3.9				0.08	2
Latvia	0.85	0.58	6.1	50	+18	−17	0.00	1
Lithuania	0.37	0.70	3.0	31	−2	−24	0.06	1.5
Moldova	0.51	0.72	3.6	19	+6	−19	0.08	1.5
Russia	0.51	0.42	5.8	19	+6	+7	0.17	2
Slovakia	0.26	0.31	4.6	31	+6	+5	0.15	1

Table 5 illustrates the results of the binary logistic regression procedure for the weighted pooled data set using individual cases as the units of analysis. We ran two separate models, necessitated by the extremely high degree of collinearity between the number of effective parties and the degree of trust in the courts ($\sqrt{\text{VIF}}$ [or square root of the variance inflation factor] = 21). In the first model in Table 5, of the four independent variables, the only two significant relationships are that between the number of effective parties and judicial activism (coefficient = 0.089) and that between the number of elected layers of government and judicial activism (coefficient = 0.883). In Model 2, although judicial power appears to be related to judicial activism, the sign is in the opposite direction of what was expected (coefficient = –0.342). Similar to the results in Model 1, in Model 2 the number of elected layers of government is also positively related to judicial activism, indicating that the greater the extent to which the system is federal, the more likely that the court took an activist stance in the first three years after the adoption of the new constitution. Finally, the degree to which there is popular trust in the courts also increases the probability that the court will take an activist stance.

Table 5. Coefficient Estimates Weighted Binary Logistic Model

Variable	Model 1 Coefficient	Wald Statistic	Model 2 Coefficient	Wald Statistic
Judicial Power	–0.168	0.511	–0.342	4.764*
	(0.235)		(0.157)	
Effective Number of Parties	0.089	11.568***		
	(0.026)			
Rights Index	–1.568	2.298	–0.239	0.054
	(1.034)		(1.03)	
Number of Elected Layers of Government	0.883	7.288**	1.425	11.134***
	(0.325)		(0.427)	
Popular Trust in Courts			0.044	6.528**
			(0.017)	

Pseudo R square for Model 1 = 0.11. Pseudo R square for Model 2 = 0.09. n = 323.

However, to see if these relationships hold when *comparing across countries*, we focused on the relationships between the degree of judicial activism and the independent variables using country cases as the units of analysis. To recap, these include the degree of formal judicial power and independence of the constitutional court, the number of effective political parties, the popular approval of the court overall and relative to parliament, and the rights index.

An interesting relationship appears to exist between the degree of formal judicial power and the degree of judicial activism—at lower levels of judicial power, the degree of activism increases along with the degree of judicial power. However, this appears to reach a maximum point at around 0.55 on the judicial

power score and then dips downward. In other words, judicial activism is highest in the middle ranges of judicial power (such as with the cases of Latvia, Georgia, Estonia, and the Czech Republic) but lower for Slovakia (with the lowest judicial power score of the eight courts, at 0.26) and Moldova and Lithuania (at 0.72 and 0.70, respectively, for the judicial power scores). Thus, courts that are either very low in terms of formal judicial power *or* very high in terms of formal judicial power appear to be less activist.

We did find a positive relationship (R square = 0.31) between the number of effective parties (a measure of the degree of party system fragmentation) and the degree of judicial activism. This finding tends to support Tate's (1995) observation that high degrees of electoral competition (which results in the fragmentation of the party system and the weakness of governing coalitions) tend to create incentives for litigation, which in turn allows courts to assert themselves as political actors. The two general exceptions to this are Russia and Slovakia where party fragmentation is rather high (with the number of effective parties from 1994 to 1997 at around 5.8 for Russia and from 1993 to 1996 at 4.5 for Slovakia) but rates of judicial activism are rather low. The impact of strong executive power may have been sufficient to overwhelm the effects of party fragmentation in both countries, given the notable assertion of executive authority by Boris Yeltsin in Russia and Prime Minister Vladimir Meciar in Slovakia.[21]

A fairly strong linear relationship appears to exist between the degree of popular trust in the courts and the degree of judicial activism (R square = 0.49). The relationship between public support and activism strengthened when we measured it relative to support for parliament (R square = 0.60).[22] It is important to note here that the Georgian case is omitted from Tables 4 and 5 because of the absence of data regarding popular trust of institutions. Nonetheless, the results for the remaining cases support the claim (see, for example, Tate 1995; Morton and Knopff 2000) that judges benefit when parliaments are relatively less popular than courts.

We did not find the expected relationship between the rights index and the degree of judicial activism. We used the rights index to measure the sweep of individual rights clauses embedded in the national constitutions. Contrary to our expectations, higher scores on the rights index are associated with lower degrees of judicial activism (R square = 0.55). This contradicts the

[21] This seems particularly likely in the Russian case, given that in 1993 Yeltsin abolished the first constitutional court because of its opposition to his policies. Schwartz (2000) notes that the judges on the Russian Constitutional Court have been deferential to executive authority since the court was reconstituted.

[22] By contrast, the court's popularity relative to the president and judicial activism was not a strong predictor of activism (R square = 0.11).

argument that stronger constitutional emphasis on individual rights makes for a more activist judiciary.[23]

Finally, the cross-national comparisons reveal no significant relationship between federalism (as measured by the number of elected subnational layers) and the degree of judicial activism, with an R square score of only 0.03. This stands in contrast to the results of the individual (case) level of analysis illustrated in Table 5. These mixed results may be due to the lack of weighting in the cross-national results (i.e., that each country was given equal weight despite disparate numbers of cases in the data set) and hence differences across cases "wash out." However, the results may also indicate that some degree of federalism presents the possibility for conflict but that it does not guarantee the nature of the judicial response to such conflict. Other studies may find that the presence of federalism is useful in predicting the number of cases brought, without being able to predict how judges respond to challenges brought on federal grounds.[24] Whatever the case, it is difficult to assess the true relationship between federalism and judicial activism.

In sum, the only two relationships that are consistently supported across both the pooled/weighted data set and the cross-national comparisons are, first, the relationship between the number of effective parties in the first elections and the degree of judical activism and, second, the degree of popular trust of the courts and judicial activism.

Discussion and Conclusions

In this article, we have provided an initial exploration of the degree of judicial activism among the constitutional courts in post-communist Eastern Europe and a further exploration of possible explanations for that activism. The relatively small size of our current sample (eight cases) makes our results more sensitive than is ideal to the countries included. We realize that the addition of other countries to the sample could lead to some reassessment of our findings. However, we find some reassurance in the correspondence of the weighted, pooled results and the cross-national comparisons. Both approaches suggest that the number of effective political parties (as a measure of party system fragmentation) and the degree of popular trust in the court (relative to parliament) affect the degree of judicial activism in these

[23] Although it is consistent with Epp's (1998) findings that the presence of a bill of rights is not sufficient for an active judiciary.

[24] Mullen (2002) suggests that it is the nature of the federal bargain, in combination with political influences on judicial selection, that affects the approach that judges take to federal questions. Some federal arrangements are designed to be more centralizing than others, and judges are more or less influenced by these arrangements, depending on the degree to which they are subject to outside influences.

countries. These initial findings tend to support the argument, made by Tate (1995) and others, that constitutional courts can increase their policy influence when other branches of government are weakened by partisan division or lower levels of public support.

However, we did not find a consistent relationship between judicial activism and the other independent variables (the extent of constitutional rights protection, the scope of formal judicial power, and the degree of federalism). Against expectations, there was an inverse relationship between the rights index and the degree of judicial activism. The more rights mentioned in constitutions, the less active the court.[25] Constitutionally entrenched rights may provide judges with opportunities for activism, but the number of rights protected does not ensure that judges will take a particular approach in interpreting them.

Also against expectations, judicial activism did not directly increase with the formal degree of judicial power. This finding supports the arguments made by Holland (1991) and Tate (1995) that judicial independence and formal powers will not assure judicial activism, though they may facilitate it. And, against expectations, we found no consistent relationship between activism and the degree of federalism. While federalism (or at least more diffusion of political power) creates the possibility for constitutional conflict between center and periphery, it does not guarantee that judges will respond by nullifying a higher number of policies on federal grounds.

Our findings support an understanding of judicial activism based more on political behavior than on institutional design. The strength of the first two predictors, and the weakness of the last three, suggest that it is political context, rather than institutional design, that provides insight into the process of judicial activism. This is consistent with what we know about the strength of other political institutions as well. Political power often flows more from historic precedent than from constitutional design, even in regimes with long constitutional traditions.[26] Judges have incentives to establish themselves early as important players in these new regimes. When public support and fragmented party systems have created a political context favorable to judicial

[25] This rather surprising finding may be due to the legacy of the communist past, since communist regimes often had extensive rights guarantees that were not protected in fact. Rights clauses provided no practical means for judges to challenge state authority. This may have led people to associate formal rights guarantees with judicial weakness. For example, Soviet-era constitutions (such as the 1936 Stalin constitution) were replete with an enormous number of "guaranteed rights," which represented little more than window dressing. They did not furnish courts with any real power.

[26] For example, a significant degree of the U.S. president's power is based on past assertions of executive authority, some of which conflict with the way executive authority was conceived by the framers of the U.S. Constitution.

power, judges in post-communist countries seem to have taken advantage of it.

Though our findings support behavioral over institutional explanations for judicial activism, we are not advocating that scholars abandon institutional explanations. Indeed, it may be the case, for instance, that federalism turns out to be positively related to judicial activism (at the very least, our pooled results appear to indicate this), but the evidence remains decidedly mixed. Though our analysis indicates that institutional explanations seem to provide little predictive power, we accept that institutional structures often do influence individual behavior and may prove to be more important at other times and places. For example, we know that rules create opportunity structures, encouraging some forms of behavior and discouraging others. As such, in the judicial context, it may still be worthwhile to consider the degree to which institutional rules allow legislatures to refer policies to constitutional courts. Such rules create incentives for legislative action, which will in turn increase assertive behavior from judges over time. In general, however, because institutional rules are imperfect guides to actual behavior, they will tell us less about politics in practice than we want to know, particularly with regard to the post-communist courts' behaviors in the initial period of democratic transition and consolidation.

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