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Source: *World Politics*, October 2012, Vol. 64, No. 4 (October 2012), pp. 587-621

Published by: Cambridge University Press

Stable URL: https://www.jstor.org/stable/41683128

# THE ORIGINS OF POSITIVE JUDICIAL INDEPENDENCE

By LISA HILBINK*

BUILDING the rule of law and improving rights protection are common goals for contemporary democrats, and as a means of achieving them, many scholars have pointed to the need to strengthen judicial institutions in democratizing countries.[1] Although courts are certainly not the only institutions that can or should provide rule of law and rights protection, it seems clear that if judges are to contribute to their realization, they must enjoy a healthy measure of formal autonomy or independence. The existence of an independent judiciary, operating outside the control of sitting government officials, affords both opposition leaders and average citizens the possibility of challenging the decisions of those in power to hold them to account for their actions.[2] Judicial reformers thus seek, above all, to find ways of preventing executive or legislative interference with or manipulation of courts, that is, of achieving judicial independence.

Much of the literature in the field of judicial behavior demonstrates, however, that such formal judicial independence, even when respected, does not necessarily produce assertions of judicial authority in defense of rights and the rule of law.[3] To be sure, "formal institutional arrangements correlate poorly (indeed, often negatively) with actual independent behavior on the part of courts."[4] Recent scholarly work on judicial independence thus draws a clear distinction between formal judicial autonomy—that is, formal or "negative" judicial independence—and

* I extend sincerest thanks to Teri Caraway, Kathleen Collins, Jodi Finkel, Jane Gingrich, Daniel Habchi, Matthew Ingram, Veronica Michel, David Samuels, three anonymous reviewers, and the editors of *World Politics* for their very helpful comments on prior drafts of this article, including the first version, presented at the 2009 LASA meeting in Rio de Janeiro. I also thank Faisal Al Hinai for his editing assistance on an early draft. All remaining errors are the sole responsibility of this author.

[1] See, e.g., Schedler, Diamond, and Plattner 1999; Prillaman 2000; Domingo and Sieder 2001; Widner 2001.

[2] MacCormick 1999, 176.

[3] See O'Brien and Ohkoshi 1996; Lovell and McCann 2005; Hilbink 2007a; Brinks 2008.

[4] Brinks 2005, 597.

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doi: S0043887112000160

independent judicial behavior or "positive independence."[5] The former refers to the rules (formal and informal) governing judicial appointment, discipline, tenure, jurisdiction, and budget, while the latter is *behavioral.* Positive judicial independence can be assessed only empirically, that is, through an examination of what judges actually do in cases involving politically powerful actors. It is what Kapiszewski has usefully labeled "judicial assertiveness," manifested when "courts challenge powerful actors in their rulings; that is, decide cases in ways that seek to nullify, restrict, or change the behavior of those actors."[6] Although there may be practical advantages to limiting scholarly inquiry to the formal or "negative" type of judicial independence,[7] ultimately it is positive independence that many scholars and citizens seek to explain or promote. And, to reiterate, formal or negative judicial independence, while perhaps enabling, does not automatically or inevitably lead to positive independence.[8]

What, then, are the factors that activate positive judicial independence or assertiveness? Some of the most influential recent literature in comparative judicial politics has pointed to political fragmentation, because of the concomitant competition it brings, as the key variable. Working within a common strategic framework, a number of authors have argued that judges are willing and able to take stands against powerful actors only when the political context is such that they can assert themselves without fear of retaliation. Thus, in polities where one party dominates and has the power unilaterally to punish individual judges, to curtail the jurisdiction or corporate prerogatives of the judiciary, or simply to overrule judicial decisions, judges have no incentive to assert themselves against powerful actors.[9] By contrast, where power is fragmented and diffused, either within or between government institutions, and/or where alternation of parties in power is regular or anticipated, judges understand that coordination is too difficult or retaliation too costly for political actors and hence they are willing and able to challenge them.[10] This argument has great intuitive appeal and

[5] See Russell 2001; Widner 2001; Burbank and Friedman 2002; Brinks 2005.

[6] Kapiszewski 2007, 18.

[7] Russell 2001.

[8] Moreover, positive judicial independence does not always translate to expanded judicial power, as compliance with and implementation of judicial decisions constitute a separate matter, as some analysts have noted (Kapiszewski 2007; Kapiszewski and Taylor 2008). However, it is clear that courts cannot be powerful (under any definition of the term) unless judges are willing and able to assert themselves in politically salient cases.

[9] Ramseyer and Rasmusen 2003; Ginsburg 2003; Chávez 2004.

[10] Chávez, Ferejohn, and Weingast 2003; Iaryczower, Spiller, and Tommasi 2002; Ginsburg 2003; Helmke 2005; Ríos-Figueroa 2007.

may indeed help explain the presence or absence of positive judicial independence in some cases.

In this article, however, I contend that political fragmentation/competition is neither necessary nor sufficient to activate positive judicial independence. While judges can and obviously do in some cases assess the likely responses of actors in the other branches before asserting their authority in ways that challenge such actors, the multiplicity of cases in which judges either ignore the high risks of assertiveness or decline clear opportunities for such action suggests the preeminence of other variables in activating positive judicial independence. What political fragmentation theories miss, I argue, is the important way that judicial attitudes and the social and institutional processes that constitute them affect judges' responsiveness to opportunities and constraints in their environment. Sincere judicial attitudes are not inert background characteristics, awaiting the right strategic conditions to be released or activated; rather, they are themselves crucial to explaining judges' proclivity to assert their authority against powerful actors. Moreover, judges' attitudes vary not only along a single left/right dimension but also in how they understand their function in a democratic system, that is, whether they believe their default approach should be to defer to or to question the decisions of state and government officials.[11] Such professional role conceptions, transmitted and sometimes altered through social and institutional processes, are crucial both in providing the motivation (or lack thereof) for positive judicial independence and in shaping judges' perceptions of and responses to the opportunities for and risks of such behavior. Otherwise put, ideas about the judicial role are a necessary factor explaining the presence or absence of judicial assertiveness across time and space, and a change in such ideas is key to accounting for the emergence of such behavior in places where it was previously absent.

In support of these claims, I first review a number of examples from the literature on comparative courts where judicial behavior has defied the expectations of political fragmentation theory, including Costa Rica, France, Italy, India, Israel, and Tanzania. I establish that in these cases, the presence, absence, or emergence of positive judicial independence has been independent of formal political fragmentation. I then offer a close primary analysis of two more such country cases, Spain and Chile. In Spain, some judges began taking a stand against the Franco regime well before a transition to democracy was under way,

[11] Sánchez, Magaloni, and Magar 2011, 215.

engaging in a form of "high-risk activism"[12] that is difficult to understand from a purely structural political fragmentation perspective. In Chile, by contrast, judges refused to assert their authority even through long periods of very competitive politics (before and after the Pinochet era) and have only very recently begun manifesting notable behavioral independence. Through this paired longitudinal comparison (one least-likely and one most-likely from a political fragmentation perspective), I demonstrate that professional role conceptions/ideologies were crucial in shaping judges' perceived interest in engaging in positive judicial independence. In both cases, judicial passivity, modeled and reinforced within the judicial hierarchy, was the rule, until an ideational shift transmitted through universities and other intellectual circles reshaped the professional self-understanding of some (younger) judges and, with it, their assessment of the opportunities for and risks of asserting themselves. Armed with a professional conception of and commitment to their role as guarantors of fundamental legal principles, these judges became, quite independently of the formal political context, willing and able to recognize, seize, and/or carve out strategic opportunities to "speak law to power."[13] In the final section of the article, I summarize and further support this argument with references to the same country cases presented in the first section.

## A Word on Forms of Judicial Behavior

Most work on judicial behavior focuses on judicial rulings (that is, case decisions) as the sole object of empirical inquiry. Judicial behavior is measured at the individual level in terms of votes or opinions (concurring or dissenting) and at the court level in terms of majority rulings (for or against a particular party or policy). Moreover, most scholars limit themselves to studying behavior at the level of a country's high court (supreme court or constitutional court), though they aspire to construct general or "unified" theories of judicial behavior.[14] In this article, I depart from this practice in two ways. First, I discuss judicial behavior at different levels in different countries, often including but not limited to the behavior of high court judges. This is important because many rule of law matters (for example, most criminal justice issues) do not involve a country's high courts. Second, I include in the analysis

[12] McAdam 1986.

[13] Abel 1998.

[14] This is true for the United States, where political scientists have been studying judicial behavior the longest, and it is even more evident in comparative judicial studies (see, e.g., Dyevre 2010).

examples of positive judicial independence—that is, the assertion of legal authority against powerful actors in an effort to "nullify, restrict, or change the behavior of those actors"[15]—that occur outside the confines of particular cases and sometime even outside courts. In other words, I treat public action on the part of judges qua judges (that is, in their professional capacity as judges) both on and off the bench as relevant. As will be evident, professional assertiveness outside the courtroom may be particularly important in cases where political actors have limited the formal opportunities for judges to assert their authority against them, whether through the declaration of exceptional laws or through the narrowing of ordinary court jurisdiction.

## Political Fragmentation: Neither Necessary nor Sufficent for Positive Independence

Political fragmentation theories (PFT) build on the assumptions and insights of strategic models in the literature on American judicial behavior. As such, they hold that judges, understood to be policy seekers, will act on their sincere preferences when they can but that in many or most cases they are politically constrained and thus adjust their behavior in accordance with their calculations about how political actors outside the judiciary will likely respond to their decisions. The focus of PFT is thus on the political configurations or contexts that, through the provision of structural incentives, constrain or enable the expression of sincere judicial preferences. Although theorists of interbranch politics, going back to Publius, are clear that a structural separation of powers produces effective checks on power only to the extent that the sincere preferences of actors in the different branches diverge,[16] many arguments in the comparative judicial politics literature have centered on the structural context, emphasizing that "the judiciary is only as independent as the political branches are unable to agree."[17]

To be sure, from the perspective of PFT, the sincere preferences of judges are basically irrelevant in noncompetitive political regimes. In authoritarian or hegemonic-party contexts, political rulers have little to no coordination problems to overcome should they seek to overrule or otherwise curb judicial authority, and, knowing this, rational judges should avoid "speaking truth to power."[18] In other words, even judges

[15] Kapiszewski 2007, 18.
[16] See also Cox and McCubbins 2001; Helmke and Ríos-Figueroa 2011, 17.
[17] Helmke and Rosenbluth 2009, 361.
[18] Helmke and Rosenbluth 2009, 359.

sincerely opposed to the decisions/actions of powerful actors should, in such contexts, be dissuaded for strategic reasons from asserting themselves against such decisions/actions.[19] However, the comparative courts literature documents "many instances of principled judges standing up to overbearing governments."[20] Three prominent examples are Italy, India, and Tanzania.

Italy is a classic case of a democracy in which one party, the Christian Democrats, first alone and then in collusion with the Socialists, dominated politics and prevented alternation in power for decades. Indeed, postwar Italy was often compared to postwar Japan because of the hegemony and seeming "immortality" of its political elite.[21] And yet, the behavior of Italian judges did not follow the same pattern as that of their Japanese counterparts, who are to this day renowned for their overwhelming deference to political power.[22] Beginning in the 1970s, Italian judges "often took anti-governmental stances on labor and environmental issues" and "exercised a proactive power" in the fight against terrorism and the Mafia.[23] A few bold judges, including a group in Palermo, Sicily, ignored the odds of retaliation and several ultimately sacrificed their lives in their struggle on behalf of the rule of law. Their demonstrated commitment helped build for the judiciary a reservoir of public legitimacy, not to mention professional methods and findings, that other judges then drew on in the so-called Clean Hands movement of the early 1990s that contributed to the downfall of the postwar political class.[24]

India offers another example where a long stretch of single-party hegemony did not deter judges from asserting their authority. In the first three decades of the postindependence constitution (1950–77), the Congress Party was overwhelmingly dominant in the electoral realm, yet from very early on India's Supreme Court demonstrated positive independence. "During the first 17 years of the Supreme Court's existence, when it was supposedly in its restrained period, it struck down 128 pieces of legislation."[25] Most well known is the series of decisions upholding the constitutionally protected "fundamental right" to property against the government's land reform and nationalization pro-

[19] Only if they anticipate an imminent change in administration or regime, as in Helmke 2005, or other benefits to their future careers do judges have the strategic incentives to assert themselves.
[20] Helmke and Rosenbluth 2009, 359.
[21] Pempel 1990; Ginsborg 1996, 19.
[22] Ramseyer and Rasmusen 2003; Law 2009.
[23] Della Porta 2001, 5; Ginsborg 1996, 26.
[24] Della Porta 2001, 14–15; Vauchez 2004.
[25] Mehta 2007, 74.

grams.[26] The government responded by amending the constitution, but this did not deter the Court. Indeed, after a 1971 amendment sought to remove property rights from the jurisdiction of the courts, the Supreme Court "struck down those parts of the amendment that precluded judicial review of property rights claims, on the grounds that judicial review is a part of the basic structure of the Indian Constitution."[27] In other words, in this and another ruling on "unconstitutional constitutional amendments," they asserted absolute judicial supremacy.[28] Ultimately, their defiance of the government led to a move on the part of Indira Gandhi's government to pack the Court with socialist sympathizers, and, once emergency rule was declared (1975–77), the court relented and upheld the government's illiberal policies. This caused a marked decline in the public prestige of the court, but the judiciary nonetheless "emerged from [Gandhi's] premiership stronger than ever."[29] In the postemergency era, the Supreme Court actively sought "to refurbish [its] image . . . and to increase its political power *vis-à-vis* other organs of government," and building on the foundation laid in earlier decades, it succeeded in doing so.[30]

A final example of a country in which judges exhibited assertive and very purposeful behavior in a context of one-party rule is Tanzania, which was a central focus of Widner's study of how judicial independence was built in common law Africa from the late 1980s through the 1990s.[31] In Tanzania and neighboring countries, judges were crucial agents of institutional change, working assiduously to alter executive perspectives, to improve judicial effectiveness, and to cultivate a public constituency.[32] Their aim was nothing short of building a new legal culture, and to do so they engaged in many assertive off-the-bench activities, such as writing newspaper columns on legal issues, working in legal literacy programs, and speaking on radio broadcasts.[33] They acted strategically to strengthen their own position in the political system, to be sure, but their behavior was proactive and risk accepting, rather than reactive and risk averse.

In addition to these examples of positive judicial independence in the absence of political fragmentation, the comparative courts litera-

[26] Epp 1998; Mehta 2007.
[27] Epp 1998, 84.
[28] Mehta 2007, 73.
[29] Mehta 2007, 73.
[30] Sathe 2002, 107, 283–85.
[31] Widner 1999; Widner 2001.
[32] Widner 1999, 181–86.
[33] Widner 2001, 36.

ture also includes a variety of examples in which the judicial dog refused to bark throughout long periods of political fragmentation and competition and/or began to assert itself seemingly independently of changes in the formal political context. Although a lack of positive judicial independence in a context of political fragmentation is not per se puzzling for PFT, a persistent negative result in such a context seems an unlikely outcome given the assumption in PFT that judges seek to influence policy. In other words, in a stable context of divided government and/or alternation in power, it is puzzling that "legislators in robes"[34] would continuously opt not to assert themselves. Moreover, if political fragmentation is what activates positive judicial independence across time (by freeing up judges to assert themselves without fear of retaliation), positive outcomes should correlate with the arrival of political competition or alternation in previously unified regimes. Yet it is not difficult to find examples in which judges had structural incentives to assert themselves but did not. Consider the cases of Costa Rica, France, and Israel.

In Costa Rica, the courts were overwhelmingly passive and played a "minor role" during four decades of robust political competition and party alternation in power.[35] Only after a reform in 1989, which created a specialized constitutional chamber, did the Costa Rican Supreme Court begin to assert itself both to enforce individual rights and to check the other branches of government.[36] Although there were no changes in the country's formal political dynamics, the Costa Rican Supreme Court rapidly became one of the most activist courts in the world.[37]

Another example is France: Gaullist party dominance ended in 1981, but ordinary judges did not begin actively investigating and convicting powerful political and economic actors until the 1990s.[38] "Before this period, even when they had knowledge of illegalities in which politicians were implicated, most judges did not permit themselves to pursue or investigate them, as they would have for 'ordinary defendants.'"[39] However, the 1990s witnessed "the emergence and expansion of apparently new modes of judicial action" which marked a "rupture with those that had been routine up until that time."[40]

[34] Sánchez, Magaloni, and Magar 2011, 215 (critiquing this conception).
[35] Wilson and Handberg 1999, 531; Wilson 2011, 4.
[36] Wilson and Rodríguez Cordero 2006; Wilson 2011.
[37] Wilson 2011.
[38] Roussel 2002.
[39] Roussel 2002, 8, translated by author.
[40] Roussel 2002, 18, translated by author.

Similarly, in Israel, more than a decade passed between the year that Labor lost its dominance in the Knesset (1977) and the point that the High Court of Justice (HCJ) began demonstrating a "dramatically expanded willingness to weigh in on the appropriate balance between administrative power and individual liberties and rights," particularly in matters of religion.[41] While the HCJ had gradually built up a rights jurisprudence during the 1970s and 1980s, Woods notes that it "explicitly avoided challenging state religious authorities" between 1969 (when the court asserted the power of judicial review) and 1988.[42] In all of these countries, then, political fragmentation does not appear to have been sufficient to trigger positive judicial independence.

In sum, in a variety of cases, the degree of political fragmentation does not appear to explain the presence, absence, or emergence of positive judicial independence. In a number of countries, judges have ignored the potentially high costs of taking a stand against powerful actors and have engaged in behavior that has put their individual and/or institutional power—and sometimes their livelihood or very lives—at risk.[43] In other places, throughout long periods of time, judges have not taken the opportunities presented by formal political fragmentation and competition to assert themselves and thereby potentially expand their power, and when they have begun to do so, the change in their behavior has been, at least in terms of timing, independent of changes in the formal political sphere. The multiplicity of counterintuitive cases demands a reexamination of the political fragmentation hypothesis.

## Socially Constituted Attitudes, Attitudinally Dependent Strategies

As noted above, PFT focuses on the structural incentives that the formal political context provides to judges, constraining or enabling the expression of their sincere preferences. But the previous discussion suggests that political fragmentation may be less determinative than PFT claims. In Italy, India, and Tanzania, judges exercised positive judicial independence despite a lack of political fragmentation. In Costa Rica,

[41] Woods 2008, 9.

[42] Woods 2008, 41.

[43] I should note that the behavior I am highlighting here is, from a conventional strategic perspective, irrational; that is, it cannot be accounted for using the conventional assumptions of rational choice theory (see Helmke and Rosenbluth 2009, 359). This does not mean the behavior was irrational in a more general sense, however (see p. 612 below; and Wood 2003, chap. 8).

France, and Israel, judges declined to assert themselves, notwithstanding the arrival and persistence of political fragmentation.

At a minimum, these cases suggest that formal political fragmentation is not as central to positive judicial independence as theorists have suggested and that analysts should instead pay more attention to substantive judicial attitudes/"sincere preferences." Yet it is important to go beyond the tautological statement that "judges assert themselves against powerful actors when they have sincere preferences for doing so, and don't when they don't." *Why* is it that judges in numerous dominant-party, even authoritarian, settings have proved willing to assert themselves against powerful actors, while judges in many fragmented and competitive settings have not been so willing? If political fragmentation does not activate positive judicial independence across time, then what does?

To answer this, I argue, we must first accept that judicial attitudes are more complex than American attitudinalist models allow;[44] this requires that we look beyond simple party identification or left-right political ideology to include professional role conceptions. Moreover, I contend that judicial attitudes are not necessarily private/individual and exogenous but are often socially and/or institutionally constituted.[45] In other words, processes of professional education and socialization shape judicial attitudes and preferences, encouraging or discouraging assertiveness in general. This is not to dismiss the fundamental insights of strategic theorists. Judges, like all other political actors, must assess the risks involved in any action they choose to pursue. But strategies are affected by attitudes; that is, an actor's perception of risks and opportunities and her willingness to accept and act on them are a function of her subjective attitudes, not an objective response to formal constraints. Hence, as attitudes (in my analysis, attitudes about the professional role) vary and shift over time, so do strategic calculations. To explain and potentially predict judicial behavior, then, one must have a good sense of the complex attitudes that judges hold and how social processes shape and reconstitute them over time.

To support this argument, I offer a close primary analysis of two cases that defy the predictions of PFT: Spain and Chile. In Spain, some judges began asserting positive independence under the Franco regime, several years prior to the introduction of formal political competition, in a setting in which their actions were very high risk. In Chile, by con-

[44] Segal and Spaeth 2002.

[45] As Peter Hall (2005, 152) puts it, actors' preferences are "induced" through "a process in which experience and interpretation intertwine."

trast, judges eschewed positive independence through long stretches of political fragmentation, behaving quite similarly to judges in authoritarian or one-party regimes and only beginning to demonstrate assertiveness in the last several years. Through this paired longitudinal comparison, I demonstrate not simply that attitudes were crucial to motivating positive judicial independence in these cases but also that an attitudinal change, fostered by a broader normative trend in the juridical sphere, emboldened a new cohort of judges to begin asserting their professional authority against powerful actors. The two countries shared a similar judicial structure and comparable experiences with brutal authoritarian regimes (to be sure, General Pinochet modeled his regime after that of General Franco). Yet in Spain, judges began asserting themselves before the end of authoritarianism, whereas in Chile, judges were passive long before and well after the authoritarian interlude. Indeed, it took fifteen years after the democratic transition for positive independence to materialize in Chile. The common denominator that accounts for the arrival of positive judicial independence in the two countries, I contend, is the ideational shift that took place a generation earlier in Spain than it did in Chile. While ideas in some pure, abstract sense did not cause judges in either case to begin taking a professional stand against powerful forces, it was not until the emergence and spread of a new, more active and engaged role conception that judges in both countries perceived and acted on opportunities in the wider institutional and political context to assert their authority. In other words, ideational change was necessary to activate positive judicial independence.

## High-Risk Judicial Activism in Spain[46]

Spain today is a vibrant, competitive liberal democracy, with a judiciary that is both formally independent and behaviorally assertive. In the early 1970s, however, it was still very much an authoritarian regime, whose aging leader, Francisco Franco, had promised to leave the country "tied up, and well tied up."[47] Throughout his long dictatorship, Franco had proved himself unhesitant to use brutal repression on the population, and in the early 1970s, the government intensified its repressive policies, declaring periodic states of emergency in which basic

[46] All translations from Spanish-language sources and interviews in this section and the next are those of the author.

[47] Encarnación 2008, 33.

rights were suspended and issuing new criminal laws to increase penalties for political resistance and criticism.[48] Regime opponents were generally tried in military courts or in the Tribunal of Public Order, where due process guarantees were weak or absent and verdicts were more or less predetermined.[49]

The ordinary courts were not subjected to the government's direct manipulation, as in totalitarian systems,[50] but were the targets of a number of indirect controls. From 1938 to 1964, judges were required to swear "unconditional adhesion to the Caudillo of Spain [Franco]" and then, from 1964 on, "absolute loyalty to the Head of State [and] strict fidelity to the basic principles of the National Movement."[51] To guarantee their strict loyalty to the state, all judges were prohibited from belonging to political parties and unions. Moreover, judicial discipline and promotions were handled by the country's highest court, the Tribunal Supremo (TS), which used its power to reinforce the traditional view of the judge as a "civil servant," whose role was to maintain "an attitude of blind submission and obedience" to the sovereign will.[52]

From a political fragmentation perspective, Spanish judges in the early 1970s had little incentive to assert themselves against actors in the Franco regime. They operated within a closed, elitist bureaucracy, controlled from the top by a "coopted gerontocracy,"[53] at a moment in which the regime was "ratcheting up its repressive policies."[54] Challenging the government in any way was thus an extremely high risk activity for judges. At a minimum, such behavior might put their judicial career in peril; even more seriously, it might lead to their detention or exile or to threats on their lives or on those of their loved ones.[55] The "rational" response, then, was to play along, performing their professional duties in a narrow or passive manner, and this is in fact what most judges did.[56]

However, in the early 1970s a group of judges and prosecutors under the name Justicia Democrática (JD) began taking public stands against the regime and on behalf of liberal legal principles. On the bench, JD members resisted submission to the government, refusing to prosecute

[48] Johnston 1991, 164; Arango 1995, 76.
[49] Arango 1995, 76; Beirich 1998.
[50] Toharia 1974–75.
[51] Andrés Ibáñez 1988, 61.
[52] Toharia 1975, 27.
[53] Toharia 1975, 59.
[54] Encarnación 2008, 33.
[55] Andrés Ibáñez 2007; Hilbink 2007b.
[56] Andrés Ibáñez 1988, 66; Poblet 2001, 309.

people for exercising their human rights[57] and seeking to prosecute the police for abuses of power.[58] Off the bench, but still acting in their professional capacity as judges and prosecutors, JD members clandestinely published four annual documents,[59] denouncing the government's many affronts to legal principles and to the professional integrity of the judiciary, whose raison d'être was to protect such principles.[60] In the documents, they also proposed specific legislative reforms aimed at enhancing formal rights protection and bolstering the authority and likelihood of judges to uphold them.[61] They distributed the publications widely to media outlets both within the country and in the European Community.

As noted above, by professionally challenging the legal legitimacy of the Franco regime in these ways, the judges and prosecutors of Justicia Democrática assumed tremendous personal and professional risks.[62] It would have been far safer and easier for them simply to play along with the regime, keeping themselves above the political fray and taking refuge in traditional conceptions of judicial neutrality and independence. This is certainly the path their counterparts in Chile chose under dictatorship,[63] as did the majority of their colleagues. What, then, were the conditions that inspired and permitted these displays of positive independence?

I contend that the Justicia Democrática judges came to be motivated to take stands against the Franco regime's legal abuses thanks to a redefinition of the proper role of law and courts in public life, transmitted from democratic Europe and a liberalizing Catholic Church and absorbed by a new generation of legally trained professionals. Once oriented and primed in this way, they drew on and forged alliances

[57] For example, in Andalucía, it became widely known that a prominent member of JD, Judge Plácido Fernández Viagas, refused to sanction the detentions of workers and students arrested for exercising their right to assembly, to expression, or to strike (see Burgos 1998).

[58] Jiménez Villarejo 2002. Specific lower-court records documenting this activity are difficult to access, but the judicial action taken by various members of the group against members of the political police for violations of criminal procedure was significant enough to elicit a reaction from the regime in 1974, in the form of amendments to the Law of Criminal Procedure. The reform took jurisdiction over police prosecutions away from district-level courts and placed them under the control of the regional courts (*Audiencias Provinciales*), which the regime knew were more "reliable" (Andrés Ibáñez 2007, 18).

[59] All four are reprinted in Justicia Democrática 1978.

[60] See Justicia Democrática 1978, 22–23.

[61] For further discussion of the contents of these documents, see Hilbink 2007b.

[62] To be sure, JD members identified by the Franco regime suffered retaliation in the form of transfers to geographically isolated posts, suspension from office without pay, and direct and indirect threats to their careers and to their personal liberty and security (Andrés Ibáñez 1988, 74, 78; Poblet 2001, 102; Jiménez Villarejo 2002; Mena 2004).

[63] See Hilbink 2007a.

both inside and outside of the country to support their challenges to the authoritarian government. Otherwise put, the ideological shift, or "cultural reframing," offered JD judges and prosecutors a sense of mission or professional duty to defend legal principles, acting to "push" them to positive independence,[64] as well as to cultivate ties to clandestine political parties, progressive clergy, sympathetic media outlets, and the Council of Europe, which protected them and enhanced the efficacy of their efforts.[65]

To begin, it bears recalling that Spain did not have a robust liberal history, even prior to the rise of Franco. Law had long been a mere tool of whoever held power,[66] and the judiciary, while professionally trained and formally independent,[67] was expected to function in "complete servility to the other parts of government."[68] Beginning in the late 1950s, however, a new generation of legal professionals came to identify with a politically liberal understanding of law and the judicial role, one that was transmitted with support from various elements of the Catholic Church and through universities, the media, and other intellectual circles. This ideological change occurred gradually, as the Franco regime's reliance on the church for much of its legitimacy and its desire for the economic benefits of European integration opened the country to an influx of goods and ideas from surrounding countries.

From the 1950s onward, Catholic intellectuals from the Jesuit-based Asociación Católica Nacional de Propagandistas (ACNP) and the conservative organization Opus Dei held key positions both within the state and in civil society, and, whether for more strictly economic (in the case of Opus) or more political reasons (in the case of ACNP), they promoted the idea of a more independent, professionally competent, and rights-oriented judiciary. The more radical version of this new understanding was reflected in and cultivated by "the only critical magazine of the time," *Cuadernos para el Diálogo*. The magazine was founded by top ACNP leader and former minister of education Joaquín Ruiz Giménez, who had broken with the regime in the late 1950s.[69] It brought together a broad spectrum of dissidents of the Franco re-

[64] As Johnston (1991, 66) explains, the emergence of a new cultural frame involves "the mobilization of new meanings" regarding "what is just and unjust" and "the spread of new definitions of what is possible" in terms of "appropriate avenues to rectify the situation."

[65] Compare to McAdam 1986, 87–88.

[66] Beirich 1998, 5.

[67] Toharia 1974–75.

[68] Beirich 1998, 53.

[69] Carr and Fusi 1979, 31.

gime as editors and contributors, with a "moral and cultural mission"[70] of preparing Spain's heavily Catholic society ideologically for democracy.[71] Because of the intellectual weight of its founders and the magazine's unique legal status (it was not censored), *Cuadernos* was widely distributed and discussed in and around universities and in reform-minded professional circles. In the early 1970s, the magazine published a series of articles arguing that legal professionals, as intellectuals and as jurists, had an obligation "to seek the realization of Law (*Derecho*), and not just automatic compliance with the law," and "to constitute a social guarantee" of the human person "before the absolute power of the State."[72] The editors supported what they identified as "the growing understanding among jurists that the training they receive in university classrooms and in subsequent professional practice has not been given for their own benefit, but rather in order to offer to society . . . a [means of] protection and juridical control."[73]

Justicia Democrática drew directly on such articles to support some of the arguments in their clandestine documents.[74] Moreover, in firsthand accounts, Justicia Democrática participants underscored how such debates in and around the universities in the late 1950s and 1960s helped raise the political consciousness of would-be lawyers and judges[75] and how, from 1968 on, the traditional scholastic, positivist methods of legal training fell out of favor and the nature of law school training underwent an "awesome transformation."[76] They emphasized that any Spaniard who sought a higher degree in law in the 1950s and 1960s got training in Germany, Italy, and France, returning to Spain imbued with new convictions about how a modern, democratic, and fully European legal system should function.[77] These scholars, in turn, disseminated their new understandings through instruction, publication, and informal discussions.[78]

Meanwhile, the profound ideological changes within the Catholic Church, backed by the papacy in the Vatican II sessions (1962–65) and put into practice by Jesuit priests and other Catholic leaders in Spain,

[70] Rodríguez de Lecea 1985, 332.
[71] Gimbernat 1985, 342.
[72] Cuadernos para el Diálogo 1970b; Peces-Barba 1970; Castellano 1972.
[73] Cuadernos para el Diálogo 1970a.
[74] See, e.g., Justicia Democrática 1978, 24, 35, 130.
[75] Mena 2004.
[76] Andrés Ibáñez 2004.
[77] Ortega 2007; Rubio 2007; Díaz 2007; Peces-Barba 2007; García Fernández 2007.
[78] As Pérez-Díaz (1993, 148) writes, "from the sixties on, the content of debates among a large minority in Spanish university circles became increasingly homogenous with that of European universities, and its evolution continued on a par with it." On this point, see also Johnston 1991, 70–71.

were a source of inspiration for the "generation of dissent," offering them a combination of "religious authenticity with a commitment to the struggle for justice and freedom."[79] Thus, the members of Justicia Democrática, though diverse in their individual political orientations, could coalesce around the notion of professional "mission," "duty," or "social responsibility"[80] and could be confident that the appeal to such notions would resonate far beyond the confines of their organization.[81]

Impelled by this ideological commitment, JD members sought out organizational space and cultivated alliances to evade and buffer the regime's expected retaliation. Many of the founders of JD had personal or familial ties with the clandestine communist and socialist parties, giving them "the capacity and familiarity with the technique" for operating a clandestine group.[82] Moreover, JD began in Barcelona, where a well-coordinated democratic resistance was under way by the early 1970s,[83] offering JD regular contact with and support from (still illegal) Catalonian leftist parties.[84] The group was also able to secure support, moral and physical, from sympathetic clergy. The Franco regime had granted the church the right of assembly and freedom from state censorship, which meant that it was in a position, when clergy were so inclined, to provide protective cover to oppositional organization.[85] Such clergy helped publish and distribute JD's critical documents and used their special standing with the regime to back up the judges' legal complaints and demands.[86] In addition, JD members, largely individually and on an informal basis, made contacts with sympathetic judges in France and Italy, where similar groups (Syndicat de la Magistrature and Magistratura Democrática) had already formed.[87] With help from these groups, JD's publications were disseminated both to the European media and to institutions in the European Community. JD's 1973 report, for example, trumpets the fact that the document covering the previous year received press coverage in both France (*Le Monde*) and Britain (the BBC).[88] And one of the group's veterans emphasized that

[79] Pérez-Díaz 1993, 162–63, 157; see also Johnston 1991, 67–81.
[80] Such references are found throughout Justicia Democrática 1978.
[81] Cuadernos para el Diálogo 1970a; Cuadernos para el Diálogo 1970b; Peces-Barba 1970; Doñate 2004.
[82] Doñate 2004.
[83] Johnston 1991.
[84] Marín Gámez 2003, 338–39.
[85] Johnston 1991, 57.
[86] See Hilbink 2007b.
[87] Mena 2004; Andrés Ibáñez 2004; Martín Pallín 2007.
[88] Justicia Democrática 1978, 72.

> we knew our annual reports were followed and analyzed in the Council of Europe, which naturally energized us to keep going forward, because we knew that was a source of big political pressure, and we knew our reports could carry great weight there. They represented a voice from within the judiciary itself—ours wasn't an analysis by a particular political party interested in demonstrating that nothing was working, but rather a view from inside of what we saw happening, and this collective voice had great value in that platform.[89]

In sum, JD members were willing to take risky professional stands against the illegalities of the Franco regime thanks to a regionally diffused and socially inspired sense of mission or duty to protect citizens from the abuses of state power that spurred them to seek out alliances with clandestine political parties, sympathetic clergy, regional peers, domestic and foreign media, and the Council of Europe. Socialized into a new (European and democratic) conception of their professional role, the young judges of JD became more risk accepting than the generations of magistrates who had preceded them, and they proactively worked to mitigate the threats from the institutional and political structures in which they functioned and ultimately, indeed, to change those structures.

## Judicial Self-Limitation and Late Awakening in Chile

In important contrast to Spain, Chile has a long history of constitutional and democratic rule. To be sure, the seventeen-year dictatorship of Augusto Pinochet rivaled the Franco regime in brutality and repression (as noted above, Pinochet explicitly modeled himself after Franco), but it interrupted a long and relatively stable democratic history, in which law served as the source of governmental legitimacy.[90] Formal (or "negative") judicial independence was in place by the 1930s[91] and prior to the coup in 1973, Chile had enjoyed decades of robust party competition and regular party alternation in power.[92] Political fragmentation theory would thus lead us to expect significant levels of positive judicial independence in Chile, both before 1973 and again after 1990, when competitive politics was restored.

Yet the striking thing about judicial behavior in Chile was how consistent it was across time. Not only during the dictatorship of the infamous Pinochet, but also long before and well after his seventeen-

[89] Doñate 2004.
[90] Arriagada 1974, 122; see also Huneeus 2007, 149.
[91] See Hilbink 2007a.
[92] Scribner (2011, 264) notes that Chile has had seventeen minority presidents.

year reign, Chilean judges only weakly defended citizens' rights and were reluctant to exercise their powers of judicial review of the constitution.[93] Across democratic administrations and through significant regime change, courts were overwhelmingly reticent about asserting themselves in defense of constitutional rights or about arbitrating constitutional conflicts between the executive and the legislative branches, even though both the 1925 and 1980 constitutions authorized them to do so.[94] This held true "even in cases where the president and the congress were at odds,"[95] and a recent statistical analysis confirms that the political environment, in particular the level of political fragmentation, has had no effect on the adjudication of rights cases in Chile.[96]

Interestingly, judicial behavior in Chile long resembled that of judges in Japan, who are consistently identified as among the most deferential in the world.[97] Some scholars have attributed this lack of judicial assertiveness to the lack of party alternation in Japanese government.[98] In Chile, however, there was frequent party alternation in power in the forty years prior to the 1973 military coup, and while the same coalition has controlled the presidency and the legislature since the return to formal democracy in 1990, there has been plenty of competition within that grouping and between it and opposition parties throughout. Something other than levels of political fragmentation or competition is needed to explain the consistent lack of positive judicial independence in twentieth-century Chile, as well as the incipient emergence of such behavior since 2005.

In the past five years, some lower-court judges, especially those in criminal courts, have begun taking independent and innovative stands in defense of fundamental rights, challenging their institutional superiors and clashing with elected officials. These young judges have earned public notoriety and, in some cases, condemnation for such actions as challenging the legal legitimacy of military jurisdiction,[99] publicly debating politicians who seek to limit due process guarantees,[100] and exposing and demanding action to correct inhumane conditions in the

[93] Hilbink 2007a.
[94] See also Brahm 1999; Couso 2002; Couso 2005; Faúndez 2007; Gómez 1999.
[95] Faúndez 2007, 134.
[96] Scribner 2011.
[97] O'Brien and Ohkoshi 1996; Law 2009.
[98] Ramseyer and Rasmusen 2003; Ginsburg 2003; Law 2009.
[99] Narváez and Rebolledo 2007; Carvajal 2007; Universidad Diego Portales 2008.
[100] Pérez G. 2007a.

country's overcrowded prisons.[101] They have also formed a professional association, Jurisdicción y Democracia, that organizes public lectures and discussions, and they have published essays, written newspaper editorials, and even appeared on television news and talk shows to articulate and defend the principles of a "democratic rule of law" (*Estado democrático de derecho*).[102] In addition, they have made active use of the new mechanism by which ordinary judges can file "constitutional questions" with the Constitutional Tribunal (an organ, on the continental model, separate from and superior to the ordinary judiciary).[103]

What explains why Chilean judges did not avail themselves of the opportunities presented during decades of political fragmentation and competition, both before and after the military regime, and then, after 2005, began asserting themselves without major changes in the formal political sphere? As in the Spanish case, I argue that positive judicial independence in Chile required an ideological shift to provide judges with a motivational "push" to action. The notion that judges should be active guarantors of citizens' rights against the state was slow to arrive and take root in Chile, but by the turn of the twenty-first century, the so-called neoconstitutionalist theory of judging was ascendant in the country, as in the region as a whole, and informing the training of new judges. In contrast to the Spanish case, however, judges in Chile did not build or rely on alliances with forces outside of the judiciary to support their novel assertions of authority; rather, their behavior was enabled by changes within the institution. Reforms from the late 1990s through the mid-2000s afforded a new generation of judges the professional confidence, security, and formal mechanisms needed to act in previously unthinkable ways.

In other work, I have discussed at length the institutional ideology of apoliticism that prevailed in the Chilean judiciary throughout the twentieth century.[104] Its roots lie in nineteenth-century legal positivism, which consigned judges to the role of "slaves of the law," but in a context in which law, particularly public law, was understood as the will of the executive. In order to achieve political stability through the "rule of law," Chilean state-builders imposed a strict understanding of the separation of powers doctrine: judges handled private law (property and contract), whereas politicians handled public law (public order and

[101] Cuevas P. 2006; Pérez G. 2007b.
[102] See, e.g., Guzmán 2008; Zapata 2007; Zapata 2008a; Zapata 2008b.
[103] Couso and Hilbink 2011, 116.
[104] Hilbink 2007a.

morality).[105] Rather than defend legal principles embodied in the constitution or in the idea of constitutionalism, then, in public law cases, judges were expected to defer to the other ("political") branches of government. They were thus trained and socialized to view "law" and "politics" as two entirely distinct and unrelated pursuits and to limit themselves strictly to the former, eschewing any action that might appear "political."

This dominant professional ideology was enhanced and reproduced by the institutional structure that was established in the 1920s, when reformers sought to end executive manipulation of the courts and professionalize the judicial career. At this time, the formal judicial hierarchy was established and higher-ranking judges were given control over recruitment, training, discipline, and promotion within the career, with the Supreme Court even controlling nominations to its own ranks. This structure henceforth provided incentives for judges to look primarily to their superiors—rather than to any other audience or reference group—for cues about how to decide cases. In this "commissarial" model,[106] lower-court judges functioned as deputies, servants, or soldiers of the Supreme Court, and the Supreme Court itself functioned to keep its subordinates in line and (thereby) to preserve the integrity of the institution, which was ultimately to serve the executive.[107] The best way to do one's professional duty in this system and to enhance one's career prospects was to respect and submit to the institutional "chain of subordination."[108] And thus the institutional structure and ideology of the Chilean judiciary combined to discourage positive independence under both democracy and dictatorship.[109]

After the transition to democracy in 1990, however, ideological and institutional changes began to erode the barriers to positive judicial independence in Chile, such that after 2005, an incipient judicial activism was in evidence, at least in the lower ranks of the institution.[110] On the ideological front, the neoconstitutionalist wave that swept Latin America in the 1980s and 1990s filtered into Chile's legal academy, gradually transforming the content of legal education away from traditional legal positivism, which cast judges as slaves or mouthpieces of the law, to the idea of judges as guardians of a rights-based constitutional

[105] See Barros 2002, 112–14; and Couso 2002, 152.
[106] Atria 2007.
[107] Note the similarity to Spain prior to and during the Franco regime (see p. 598 above).
[108] Damaska 1986, 21.
[109] See Hilbink 2007a.
[110] Couso and Hilbink 2011.

order.[111] As in Spain during the 1960s and 1970s, the new political theory of judging was transmitted from beyond the country's borders via academic and professional connections.[112] Chilean jurists trained in Spain, Germany, the UK, Canada, and the United States returned to the country well acquainted with and often heavily influenced by neoconstitutionalist understandings of the judicial role.[113] Many subsequently took up teaching positions in the country's law schools and offered courses in the Judicial Academy. In addition, a growing number of judges themselves began pursuing degrees in Europe and/or in the United States.[114]

Meanwhile, responding to the failure of the judiciary to provide any legal defense in the face of the military regime's human rights abuses,[115] successive posttransition governments in Chile promoted judicial reforms aimed at increasing the liberal-democratic credentials of the judiciary.[116] Among these were the 1996 creation of the Judicial Academy to provide initial and continuing professional training of judges, and a "revolutionary" criminal procedure reform[117] that went into geographically staged effect beginning in 2000. With these reforms, Chilean judges came to be trained in a radically new vision of the judicial role. Many instructors at the Judicial Academy, particularly in its early years, were experts in human rights law and gave classes that focused on the judicial duty to monitor and limit the police power of the state. In addition, the key authors of the new criminal procedure code offered seminars and workshops that placed heavy emphasis on the role of the judge as rights guarantor.[118]

In firsthand accounts, Chilean judges who have been in the forefront of the incipient activism highlight their common professional training experience in the late 1990s and early 2000s, as well as their shared vision of what the judicial function should be.[119] They hold that the role of the judge is "to preserve and promote the fundamental rights of all

[111] Couso 2010.

[112] Clergy have not played a similar role in Chile to the role they played in Spain, although support from the Catholic Church was central to keeping the human rights struggle alive during the Pinochet years.

[113] Couso 2007; Couso 2010.

[114] Couso and Hilbink 2011, 107.

[115] Informe 1991.

[116] Couso and Hilbink 2011.

[117] Langer 2007.

[118] Avilés 2008; Zapata 2009.

[119] Avilés 2008; Jorquera 2008; Olave 2008; Souza 2008; Zapata 2009. See also Sanhueza 2011, in which one of these judges, María Francisca Zapata, is quoted thus: "this movement was created when we began to ask ourselves what the role of the judge is in the 21st century, in a modern democratic society," which is understood "in the entire world" to be the protection of "the rights of citizens."

persons with strict adherence to the law and to the constitution,"[120] and, in contrast to previous generations of judges, they define law not merely in terms of national codes but also in terms of the Constitution, international law, and principles internal to law itself.[121] They take pride in their familiarity with rights doctrines and court decisions from Spain, the US, and supranational tribunals. They invoke these to defend their actions, and they lament the "very poor training in constitutional law" that characterizes the older judicial guard.[122] Confident and passionate jurists, they scoff at peers who refuse to follow their lead out of fear: "Fear of what!?" they answer.[123]

This clear vocational zeal informs the response of these young judges to the new institutional context introduced by recent structural and procedural reforms to Chile's court system. From 1996 to 2005, a combination of reforms designed to modernize the courts—that is, to improve the caliber of personnel and the efficiency and effectiveness of judicial procedures—began to take effect at the base of the judicial pyramid.[124] These included, in addition to the creation of the Judicial Academy, a substantial increase in judicial salaries, particularly at the entry level; a massive increase in the number of judges, again at the trial-court level; and a reform of the Constitutional Tribunal that transferred concrete review power away from the Supreme Court and created a new mechanism by which ordinary lower-court judges could challenge the constitutionality of a law affecting a case before them.[125]

These reforms had three major effects. First, the increase in starting salaries, along with the competitive process established for entry into the Judicial Academy, enhanced the intellectual and professional profile of individuals entering the judiciary. In the prereform era, it was generally not the best and brightest law students who pursued judicial careers, but rather poor to average performers who had few professional options and turned to the judiciary as a stable and respectable, but certainly not prestigious, career. They received no specialized education but were instead trained on the job. They thus tended not to have the intellectual resources and professional alternatives that would encourage them to take bold stands.[126] The reforms changed all this. The new

[120] Zapata 2007, 7.
[121] Avilés 2008; Guzmán 2009
[122] Guzmán 2009; Flores 2009.
[123] Flores 2009; Zapata 2009.
[124] See Vargas 2007.
[125] For details, see Couso and Hilbink 2011.
[126] See Hilbink 2007a.

generation of judges is of a higher intellectual caliber, with greater formal training and evident professional security and confidence. Hence they bristle under the pressures for unity and obedience that operate in the hierarchical institutional setting in which they work.[127] As one judge put it, "such clothing doesn't fit us."[128] Second, the expansion of positions at the base of the judicial pyramid, in combination with the improved salaries at the entry level, rendered ascension in the judicial hierarchy both less likely and less necessary for the career judge. While hierarchical superiors maintain the power to evaluate, discipline, and nominate individuals for promotion, the reforms did reduce somewhat the incentives for lower-court judges to cater and conform to the views of the judicial elite. Some lower-court judges thus perceive "a space [in which to act] that wasn't there before."[129] Third, and finally, the transfer of concrete powers of judicial review to the Constitutional Tribunal institutionalized the opportunity for ordinary judges to raise constitutional issues directly before the Constitutional Tribunal, thus circumventing their hierarchical superiors on the Supreme Court. As Couso and Hilbink put it, "This new ability of lower-court judges to get around the supreme court and appeal to an external body . . . means that a lonely judge at the bottom of the regular judicial hierarchy can now (in theory) be crucial in getting a law declared unconstitutional without needing to persuade his or her superiors in the supreme court."[130] In short, the reforms have given lower-court judges better intellectual and material resources, greater internal independence, and more opportunities to assert themselves; propelled, in turn, by their commitment to neoconstitutionalism, they have begun to do so.

To summarize, decades of political fragmentation in Chile, before and after the Pinochet era, were not enough to induce judges to demonstrate positive judicial independence; the mutually reinforcing structure and ideology of the judiciary rendered judges unwilling and/or unable to challenge powerful actors in defense of rights and the rule of law. Only in the last several years, with the growing presence of neoconstitutionalism within Chile's legal community and the implementation of reforms that have altered institutional dynamics within the judiciary, have judges taken an interest in exercising positive independence.

[127] Damaska 1986.
[128] Sanhueza 2011, 41.
[129] Flores 2009.
[130] Couso and Hilbink 2011, 111.

## Discussion: Ideas, Incentives, and Theorizing Judicial Behavior

Under what conditions will judges prove willing and able to assert themselves against powerful actors who violate the law and trample on the rights of citizens? The dominant view in the comparative judicial behavior literature in recent years has been that "the judiciary is only as independent as the political branches are unable to agree." Judges will challenge powerful actors in defense of rights and rule of law principles only if the formal political context allows them "room for maneuver."[131]

Examples in this article, however, drawn from both primary and secondary studies on courts in a variety of times and places, challenge the explanatory power of this hypothesis and demonstrate clearly that political fragmentation is neither necessary nor sufficient for judges to demonstrate positive independence. In the later years of Franco's Spain, as in Italy, India, and Tanzania, judges who did not enjoy obvious "room for maneuver" *did* decide to take stands against powerful actors in their countries, asserting themselves in ways that appear "irrational" from a separation-of-powers perspective.[132] In these cases, something other than political fragmentation is needed to explain assertive judicial behavior. Meanwhile, in democratic Chile, as well as in Costa Rica, France, and Israel, robust levels of political competition were not enough to induce judges to challenge powerful actors. In all four cases, political fragmentation persisted or increased for years—in some cases, decades—before judges opted to assert their authority to challenge powerful actors. Again, something more was required to trigger positive judicial independence in these cases.

Drawing on my primary analysis of the Spanish and Chilean cases and returning now to the secondary literature on the other cases, I contend that variation in positive judicial independence across time and space cannot be adequately explained without reference to the professional understandings held by judges. Professional role conceptions serve both to motivate (or to discourage) positive judicial independence in the abstract and to orient judges' calculations about the concrete factors that constrain and enable such behavior. Ideas about the judicial role are thus a necessary element of any explanation of judicial assertiveness (or its absence) and, in particular, of the explanation of the emergence of assertive behavior in contexts where it was previously absent.[133]

[131] Helmke and Rosenbluth 2009, 361, 362.

[132] Helmke and Rosenbluth 2009, 359.

[133] For a parallel and supporting account of the role of ideas in the timing and content of judicial reform, see Ingram 2012.

The Spanish case indicates the importance of professional convictions and commitments in contexts where a single party dominates and therefore where it is strategically unadvisable (or potentially even suicidal) to challenge powerful actors. As McAdam has argued with regard to participation in social movements, "an intense attitudinal and personal identification" with the movement is necessary, though not sufficient, for individual participation in "high-risk" activism.[134] JD members in Spain were driven to defy the Franco regime in part out of a strong sense of professional mission. Studies of Italy and Tanzania also indicate that an ideological commitment was a key factor in the positive independence shown by judges in politically inhospitable environments. Della Porta argues that the anticorruption judges in Italy were "motivated by a civic mission" and viewed themselves as "charged with a general responsibility towards society and community," particularly in a context in which "the political class appears to have failed."[135] Widner, too, makes clear that an important part of building positive judicial independence in Africa involved the embrace and dissemination by judicial leaders (such as Tanzania's chief justice, Francis Nyalali) of a new and more political judicial role conception that rejected the profession's traditional "executive-mindedness."[136]

The Chilean case, for its part, demonstrates that all the political fragmentation and competition in the world will not lead judges to challenge powerful actors in defense of rights or the rule of law unless and until they possess an understanding of their role that permits and compels them to do so. In Chile, the development of a (neo)constitutionalist view of the judicial role within the legal community is very recent and has been key to sparking rights activism in that country. In France and Israel, as well, ideological variables are central to explaining the emergence of positive judicial independence. In her analysis of the "rupture" in judicial behavior that took place in France during the 1990s, Roussel emphasizes the new understanding of "what a judge can and must do" that characterized the generation of magistrates that asserted themselves so energetically against elite corruption in that decade.[137] She emphasizes that many of the individuals who asserted

[134] McAdam 1986, 73.

[135] Della Porta 2001, 16.

[136] Widner 2001, 29, 175-76, 183–86. Most analyses of the Indian case focus on the postemergency period, when the Congress Party lost its dominance in the electoral sphere. For example, Sathe argues that "post-emergency judicial activism was inspired by a philosophy of constitutional interpretation" that required judges to give rights in the bill of rights "maximum expanse" (2002, 12). But he also notes that the roots of this activism lie in the late 1950s, when "the Court started perceiving the larger dimensions of its constitutional role" (2002, 53). Further research on the origins and development of positive judicial independence in preemergency India is needed.

[137] Roussel 2002, 34, translated by author.

themselves during the 1990s, in particular, had started out in different careers and had, in their professional "conversions," come to view their role in exalted terms—not merely as "administration" but as "rendering justice" in the service of democracy.[138] Woods, also, argues that it was a new sense of mission, developed in and nurtured by the socioprofessional community of judges and lawyers in Israel that was "the most important determining factor" in the Israeli high court's dramatically increased engagement with rights issues and challenges to administrative power and religious authorities after 1988.[139]

What all of these cases suggest is that judges are unlikely to assert themselves in *any* context without the conviction that doing so is professionally appropriate or even obligatory. In other words, what judges think they *ought* to do matters.[140] This is by no means the sole cause of judicial behavior, but it is a crucial ingredient. As Della Porta puts it, in addition to features of the institutional and political context, "concrete behaviors are also influenced by systems of norms and values that are shaped by the professional culture as well as by the reference groups of individual judges."[141] Understanding these factors—how they vary within and between courts and across time, and how they interact with different structural factors—is essential to theorizing on judicial behavior.

This is emphatically not to deny that judges are rational actors. Judges who engage in positive independence clearly do so intentionally, in pursuit of their goals and with consideration of the risks involved. However, what they perceive as constraining and enabling factors and how they assess and respond to perceived risks are context dependent and influenced by their professional understandings and commitments. Hence, it may not be the formal political context that sets the parameters for positive independence, as political fragmentation theory holds. Rather, obstacles to or support for positive independence may derive, as in Chile, from institutional factors (that is, within the judicial sphere) or may be found, as in Spain, beyond the other branches of the state.[142]

[138] Roussel 2002, 91, 93, translated by author.

[139] Woods 2008, 2. I have not found a parallel study that emphasizes ideational factors in the Costa Rican case. However, Dr. Alejandro Rodríguez Vega, the first president of the Sala Cuarta, wrote in 1991: "The new ideas about the effective enforcement of fundamental rights, about the normative value of the Constitution, and about the transformation of the 'rule of law' into the 'rule of constitutional law,' have brought about a thoroughgoing revolution in constitutional justice in Costa Rica" (cited in Barker 1991, 393). As with the Indian case, further research is required on this matter.

[140] See Gibson 1986, 150.

[141] Della Porta 2001, 18.

[142] Strategic scholars have recognized this in part, pointing to the need to expand our analytic scope to take into consideration the broader strategic environment in which judges function (see, e.g., Vanberg 2005; Staton 2004; Brinks 2008; and Scribner 2011).

To be sure, in Spain, JD members turned to important media sources, religious authorities, and judges and political leaders in democratic Europe to support their challenges to the legal abuses of the Franco regime. In the high-risk institutional and political context in which they found themselves, these resources encouraged them "to make good on [their] strongly held beliefs."[143] In Italy, too, assertive judges in the 1970s and 1980s relied on support from public opinion, which "endowed the magistracy with a form of direct legitimacy."[144] And one of Widner's main claims is that in "building the rule of law" in Africa, judges depended on both "linkages across borders" and the support of the press, which in turn helped cultivate "a base of support among members of the general public."[145]

By contrast, in Chile, it was institutional constraints and opportunities that first inhibited and then encouraged positive independence. Judges trained and socialized in the prereform era (that is, before the mid-1990s) were conditioned to view assertions of positive judicial independence as professionally inappropriate and risky and thus eschewed such behavior. But the reforms of the 1996–2005 period altered the traditional institutional dynamics, rendering the new cohort of judges at once both more inclined and better equipped to recognize and seize opportunities for and accept the risks of positive independence. Similarly, in France, the introduction of a national qualifying exam and obligatory training in the new National Judicial School after 1959 changed the social and intellectual profile of judicial recruits and professionalized the judiciary, severing the historically tight social ties between judges and elected officials and rendering it far easier for the new generation of judges to contemplate challenging politicians.[146] In Costa Rica, institutional reforms that made the Supreme Court more accessible to citizens (eased standing rules) and lowered the bar for declaring laws unconstitutional appear to have been central to the major shift from judicial passivity to activism at that level.[147] And in Israel, the liberalization of the rules of standing in the 1980s enabled greater positive independence after 1988 simply by "allowing almost anyone with a claim against the government to bring a case to the High Court of Justice."[148]

[143] McAdam 1986, 88.
[144] Della Porta 2001, 5.
[145] Widner 2001, 395, 311. More research is needed to verify whether a parallel exists in the case of preemergency India.
[146] Roussel 2002, 32–33.
[147] Wilson and Handberg 1999; Wilson and Rodríguez Cordero 2006.
[148] Woods 2008, 176.

It bears noting, though, that in the Israeli case, the enabling institutional change was judicially initiated;[149] indeed, judges themselves were active agents in the expansion of judicial authority and power in Israel from the 1960s forward.[150] And such judicial agency is by no means unique to Israel. In their quest to build the rule of law in Tanzania, Uganda, and Botswana, judges did not simply make choices within existing constraints but rather proactively worked to change the constraints that they faced.[151] To be sure, their efforts were enabled by favorable "shifts in regional circumstances" and a "conducive international political climate";[152] but judges did not wait until the strategic conditions were 100 percent favorable for positive judicial independence. Rather, they engaged in positive independence in order to "build constituencies" for themselves that they hoped would support and expand judicial independence going forward.[153] Similarly, in Spain, judges with new and strongly held beliefs about the judicial role actively sought out support for their actions from important media sources, religious authorities, and judges and political leaders in democratic Europe. In other words, they did not wait for strategic space to open up for them but, acting on their convictions, affirmatively and audaciously worked to build alliances with forces that would help them to forge a (new, democratic) system in which the space for positive judicial independence (and hence a democratic rule of law) would be institutionalized.[154]

To conclude, the analysis presented here indicates that with judges as with other political actors the relationship between their motives and opportunities or between preferences and situations is complex and dynamic.[155] Judges' "utility functions" are historically, socially, and sometimes institutionally constituted, in a dynamic process that itself can alter how individual judges perceive and weigh the costs and benefits of different possible actions. Thus, beyond simply urging scholars of judicial behavior to "bring attitudes back in," my account underscores the need to pay more attention to the sociological, historical, and institutional contexts in which judges act and how these influence their (interrelated) willingness and ability to exercise positive independence. Moreover, it suggests that we need to allow more room for the

[149] Woods 2008, 55.
[150] Woods 2008; Woods 2009.
[151] Widner 1999; Widner 2001.
[152] Widner 2001, 392.
[153] Widner 2001, 35–36.
[154] For yet another example of judicial agency driven by ideational factors, see Ingram 2012.
[155] Katznelson and Weingast 2005.

possibility of judges acting as imaginative and creative agents, that is, as political entrepreneurs who work to alter the structures and attitudes within and around the judiciary, rather than merely responding to the incentives inherent in the situations they confront.[156]

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[156] See Mehta 2007, 78; Widner 2001; and Ingram 2012.

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