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Judicial Politics in Unconsolidated Democracies: An Empirical Analysis of the Ecuadorian Constitutional Court (2008–2016)

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ABSTRACT

In this article, we test the extent to which decisions by the Ecuadorian Constitutional Court (ECC) are predicted by non-legal variables. Our theoretical argument proposes that not only the presence of public actors as plaintiffs—especially those working for the executive branch—but also political salience, i.e., the degree of importance attributed to a case by the government and public opinion, plays a crucial role in explaining the outcome of judicial decisions. Original data on all abstract review decisions issued by the ECC (2008–2016) is used to test our argument. We control for possible selection effects, incorporating a novel measure of the overall quality of argumentation and strength of cases brought before the ECC by both public and private parties, in the form of an expert survey. Consistent with our argument, the results show that even when controlling for a wide range of potential confounders, norms are more likely to be struck down by the ECC when (1) public officials claim unconstitutionality than when non-public parties do, and (2) cases are reported by media. In the light of the Ecuadorian case, we conclude that the formally powerful ECC is quite sensitive to governmental influence, even under an improved situation of *de jure* judicial protections.

KEYWORDS

Constitutional Court; judicial independence; Ecuador; judicial behavior

Introduction

Constitutional scholars and political scientists usually underscore the critical role of constitutional courts to check the elected branches, constrain political actors, and safeguard citizens' rights (Epstein, Knight, and Shvetsova 2001). Contrary to what is expected, certain conditions allow politicians to instrumentally use courts for circumventing constitutional limitations, while advancing their own policies and interests (Popova 2010). In this article, we particularly focus on the conditions under which courts will tend to favor the government. In spite of improved *de jure* judicial independence, we contend that under unified governments, powerful presidential regimes and unconsolidated democracies, judges will favor public actors—particularly those serving in the executive branch—when ruling politically salient cases.

This argument yields a set of empirical implications, which we test using an original dataset of all 111 abstract constitutional review decisions (*sentencias de acción pública de inconstitucionalidad)* issued by the Ecuadorian Constitutional Court (ECC) between 2008 and 2016. Quantitative analysis reveals that laws are more likely to be struck down by the ECC when (1) public officials, particularly those working for the executive branch, claim unconstitutionality compared to when non-public parties do; and (2)

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cases are reported by media. We accompany this analysis by an expert survey on the strength and overall quality argumentation of cases brought before the ECC by public and non-public parties, in order to avoid possible selection effects. In the light of these findings, we conclude that ECC's justices strategically vote in favor of the government depending on the political salience of cases.

We examine the Ecuadorian case because major constitutional reforms with regard to *de jure* independence conditions—particularly, rules improving the selection and removal of judges and strengthening the authority of the ECC—were implemented in 2008. From this year on, Ecuador embraced an eclectic model of constitutional adjudication, in which only the ECC's justices have the final say over the interpretation of constitutional provisions and the authority to declare the unconstitutionality of legal norms. Also from 2008, Ecuador has experienced an unexpected period of political stability with the consolidation of a unified government that weakened political competition (Conaghan 2016). These conditions allowed us to nuance our analysis appraising the effect of *de jure* protections on *de facto* independence.

This article unfolds as follows. In the first section we discuss the existing work that explains progovernmental judicial decisions. While there is abundant theoretical and empirical scholarship on judicial independence, this literature falls short in explaining the behavior of formally powerful courts in unconsolidated democracies. After discussing the background of this research in section 2, section 3 proposes two hypotheses modeled after our argument that judges may tend to support the government when ruling on politically salient cases. Sections 4 and 5 explain our unit of analysis and the methodology. In section 6, the hypotheses are tested. Our findings are then analyzed in the discussion section.

Background

Why do constitutional courts frequently rule in favor of the government? One answer is that courts do so only if they lack independence. Broadly discussed in the literature, a relatively abstract concept of judicial independence refers to the level of autonomy judges have when deciding cases (Kapiszewski and Taylor 2008; Ríos-Figueroa and Staton 2014; Russell 2001; Larkins 1996). Judicial autonomy is herein related to the lack of pressures exerted by elected branches of government (Fiss 2003). Along this line, if politically dependent courts check the elected branches, they run the risk of facing undesirable payoffs or retaliations on the part of the Congress or the President (Iaryczower, Spiller, and Tommasi 2002). Yet why do formally powerful courts still remain loyal to the government, that is, courts (1) who operate under strong *de jure* judicial independence features; (2) that concentrate all the powers of constitutional review; (3) issue binding jurisprudence; and (4) whose interpretation of constitutional provisions cannot be overruled by the legislature?

A first strand of literature grounded more in political science than in law underscores political and institutional conditions upon which judicial decisions are made (Spiller and Gely 2007). Scholars, in this respect, analyze courts' behavior and judicial review within the separation-of-powers approach (Segal 1997; Kaufman 1980), which asserts that unified governments tend to preclude judicial independence (Beer 2006; Brinks 2004; Chavez 2004; Ginsburg 2003; Ríos-Figueroa 2007), whereas political competition increases the probabilities of attaining independence (Dargent 2009; Finkel 2004; Magaloni, Magar, and Sánchez 2010).[1] Judicial independence is thus conceived as courts' ability to effectively act as veto players and overturn legislation emanated from the legislative and the executive (Clark 2009). Nevertheless, it is worth noting that judicial decisions vary depending largely on justices' anticipation of political rewards or retaliations coming from other political branches (Vanberg 2001).

Advancing the separation-of-powers approach, Helmke (2002) elaborates on what she calls the logic of strategic defection, a theory formulated on the basis of governmental power transfers in unconsolidated democracies. By unconsolidated democracies we mean regimes in which minimal requirements for democracy are met but that lack institutionalization of democratic values (e.g., political parties are volatile, citizens as well as public officials have deep-rooted mistrust on democracy, and individual rights and liberties are

[1]Still, fragmented governments may be able to control the judiciary, depending on certain institutional layouts (Popova 2010; Aydın 2013). For instance, Grijalva (2010, iv) evidenced that weak Ecuadorian legislative coalitions are able to influence constitutional justices under institutional conditions, such as "short terms in office, the threat of impeachment, and the possibility of reappointment."

constantly threatened (Popova 2010)). In light of unconsolidated Latin American democracies, Helmke's departing point is that, under normal circumstances, courts are constrained by political actors, especially by the executive branch. Thereafter, as soon as the incumbent government begins to lose political power, previously loyal judges will start questioning government's public policies. Testing this logic of strategic defection in Colombia, Rodríguez-Raga (2011, 95) maintains that courts strategically defer to the executive, "depending on the costs for the players associated with both giving up policy and clashing with each other."

Another part of the literature focuses on institutions. This research has indicated that judges face a set of formal (e.g., time in office, appointment procedures, legislative impeachment) and informal (e.g., budget cuts, non compliance, peer pressure) arrangements that in the long term determine their behavior and also motivate them for voting for or against the government (Epstein and Knight 2000). For the most part, research on institutions and judicial decision-making argues that judicial stability favors conviction voting, whereas instability encourages strategic voting (Iaryczower, Spiller, and Tommasi 2002). Nevertheless, extreme instability has also caused sincere judicial behavior (Basabe-Serrano 2012). In addition, scholars concede that as the number of political actors involved in justices' appointment procedures increases, the more likely it is that courts will tend to be independent (Ríos-Figueroa 2011).

Hitherto, our original question, referring to why do formally unfettered courts rule in favor of the government, remains unanswered. Tentatively, we believe politicians do not care equally about all constitutional review cases. Moreover, we argue, judges' incentives are not static but might depend on the salience of those issues presented before them (Taylor 2008). Following this argument, we propose that, in spite of strong *de jure* protections and almost unfettered powers, courts still have incentives to favor the government when ruling politically salient cases—i.e., those cases in which high importance is attributed by the government and public opinion to a case. To this date, the political salience effect remains critically understudied, as only Epstein and Posner (2015) have shown that U.S. justices are more likely to vote for their appointing president when cases are reported in newspapers compared to cases that are not reported. This political salience effect over judicial decision-making might be stronger among unconsolidated democracies, unified governments, and powerful presidential regimes, as in the Ecuadorian case, which will be the object of this study. In this context, the question then emerges whether constitutional courts tend to favor the government when ruling politically salient cases.

Hypotheses

Based on theoretical insights on judicial independence, we predict that, depending on the executive's political strength and the salience of the case, claims of unconstitutionality proposed by pro-government public authorities, especially those serving the executive branch, will tend be more successful than cases filed by non-public plaintiffs. Success is defined here as the number of cases where the court declares the unconstitutionality of a norm. Following this line of thought, if a case arises that is of high value to the government, and costs of pressuring the court are low, we expect to see a strategic defection of the court toward presidential interests, even in spite of strong *de jure* judicial independence. Under these circumstances, public plaintiffs will be more successful than non-public plaintiffs. We thus formulate the following hypothesis:

> H1: The presence of public actors as plaintiffs in constitutional review proceedings increases the probability of the norm being declared unconstitutional, when compared to constitutional review proceedings where the plaintiffs are non-public.

We add that justices may vote strategically depending on the political salience of cases. Following Helmke (2002), we understand political salience as a matter of importance attributed to a case by the government and the public opinion. Salience has been measured by the literature through different means. The frequency cases are cited in constitutional books (Slotnick 1979), cases in which amicus curiae were presented (Maltzman and Wahlbeck 1996), official case law compendiums (Epstein and Knight 1997), or dissenting opinion rates (Wahlbeck, Spriggs, and Maltzman 1998) have been used as indicators of salience.

Like Epstein and Segal (2000), we assume that cases reported by the newspapers in which public plaintiffs claim the unconstitutionality of a norm may entail larger political salience than other cases. Of

course, political salience encompasses further considerations than only media coverage (Clark, Lax, and Rice 2015). To avoid oversimplification and reduce omitted variable bias, we also undertake four additional legal considerations. First, we controlled for general regulation, that is, whether organic or ordinary laws issued by the National Assembly, might be more politically salient than local norms. Second, norms enacted while the current government is in office may entail higher salience than other kinds of regulation. Third, the content of a norm—in other words, whether it addresses fundamental rights or economic or taxation issues—may also determine the salience of a case. Finally, we assume that executive decrees might involve higher political stakes than other norms. When controlling for these factors, we expect that

> H2: Salient cases—i.e., those cases that have been reported by the newspapers—will increase the probability of a norm being declared unconstitutional, when compared to non-salient cases.

The Case of Ecuador

Political and Institutional Background of the Ecuadorian Constitutional Court

The hypotheses are tested in the context of Ecuador. Evidence gathered from 1997 to 2007 shows that partisan interests largely influenced the ECC (formerly known as the Constitutional Tribunal or CT) decisions due to institutional features such as short terms in office, the threat of legislative impeachment, and the possibility of immediate reappointment (Grijalva 2010). As shown in Table 1, CT justices were extremely sensitive to constant executive–legislative impasses, which eventually triggered several judicial turnovers and presidential breakdowns (Basabe-Serrano and Polga-Hecimovich 2013). In fact, none of the CT justices finished the term for which they were elected during this period.

When Rafael Correa was elected as president in 2006, the Ecuadorian political context was one of high political fragmentation and institutional weakness. In terms of Conaghan (2016, 111), "public confidence in institutions was at a low ebb [and] traditional checks and balances had long seemed inoperative." One of the first acts of Correa as president was to convene a referendum authorizing a constituent assembly (CA), whose mandate was to draft a completely new constitution. Not only in charge of designing the constitution, the CA also assumed full powers to govern the country (Oyarte 2014). The first act issued by the CA established the dismissal of the National Congress and ratified Correa as president. In October 2008, the new Constitution was enacted, after being approved by 69 percent of the electorate.

Since 2008, Ecuador experienced an unexpected period of political stability with the consolidation of a unified government, as Correa managed to hold the majority of seats at the National Assembly (i.e., the former National Congress) (Polga-Hecimovich 2013). Acknowledging previous institutional flaws that threatened judicial independence, the 2008 Ecuadorian Constitution reinforced the ECC's authority, eliminated immediate reappointment and legislative impeachment of justices, implemented a nine-year term in office, and a merit-based appointment procedure in

Table 1. Constitutional Tribunal turnovers.

Year	Executive	Legislative Coalition	Constitutional Tribunal (CT) Turnovers
1997	Fabián Alarcón (interim president)	Partido Social Cristiano, Pachakutic, Izquierda Democrática, Movimiento Popular Democrático, Democracia Popular	Congress removes all TC judges (February 6) and appoints new ones (May 13)
1999	Jamil Mahuad (removed in 2000)	Democracia Popular, Izquierda Democrática, Partido Roldosista Ecuatoriano	Congress removes all TC judges and appoints new ones (May 5 – June 17)
2003–2005	Lucio Gutiérrez (removed in 2005)	Partido Roldosista Ecuatoriano, Partido Renovador Institucional Acción Nacional, Partido Sociedad Patriótica	Congress removes all TC judges and appoints new ones (November 25)
2006	Alfredo Palacios (interim president)	Partido Social Cristiano, Partido Roldosista Ecuatoriano y Partido Sociedad Patriótica	Congress removes all TC judges and appoints new ones (February 22)

Source. Adapted from Grijalva, 2010.

Table 2. ECC institutional layout.

Period	Term in Office	Type of Government	Capacity to Impeach Justices	*De jure* Judicial Independence	Reappointment	Research
2008–2015	Long term	Unified	No	High	No	—
1996–2007	Short term	Divided	Yes	Low	Yes	Grijalva (2010); Basabe-Serrano (2012)

order to enhance *de jure* judicial independence. These reforms along with other important changes are depicted in Table 2.

The 2008 Constitution states that the starting and end points of justices' terms in office are not simultaneous. Instead, three (randomly selected) out of nine ECC justices have to be replaced every three years. The first official ECC took office in 2012. In 2015, three out of nine justices were replaced and another three (out of the six justices appointed in 2012) will be replaced in 2018.

Ideally, a staggered renewal of justices may pose several barriers for politicians to control appointments of justices.[2] However, major criticism has been addressed regarding the fact that the executive may easily appoint the new ECC's majority. Rafael Correa has a majoritarian legislative coalition supporting his government, which might easily influence the Transparency and Social Control Branch (Basabe-Serrano 2009). Despite this criticism, justices now enjoy greater isolation—at least formally—from political pressures than before 2008, as depicted in Table 3.

The Constitutional Court under Correa

In between 2006 and 2008, the story of the Constitutional Court is somewhat more complex. Before its dismissal, the Congress removed all former justices (who were in office for only a year) and appointed new ones. Along with the approval of the new Constitution, a "transition regime" was established in which no indication of a transitory Constitutional Court was provided. In the light of this situation, the former Constitutional Tribunal controversially proclaimed itself as an interim Constitutional Court assuming the new powers granted by the 2008 Constitution (Oyarte 2014).

The interim Court issued several pro-governmental decisions. Among the most salient ones, the Court authorized a referendum proposed by Correa in order to restructure the National Court (which has the functions of a Supreme Court) and the Judicial Council, amending the new Constitution (Grijalva 2011). The Court also delivered polemic decisions that favored public officials regarding the right to consultation, the right to water, and the organic law of the legislative function, among others (de la Torre and Ortiz 2016). This interim Constitutional Court remained in office until 2012.

The first official Constitutional Court took office in November 2012. Three of the justices serving for the interim Court were ratified, while the remaining newly elected justices were highly criticized because of their political closeness to Correa's government.[3] The new Constitutional Court remained loyal to the government (Conaghan 2016). In 2015, for instance, the Court issued a favorable opinion,

[2]Concerning the appointment procedure, Grijalva (2010) explains:

> The Constitutional Court justices are appointed as follows: The President, the National Assembly, and the Council of Citizen Participation and Social Control (also known as Transparency and Social Control Branch)—which is a new branch of the government created by the 2008, integrated by representatives of civil society organizations, and also has constitutional powers to appoint other high public officials—must send a list of nine candidates to a special commission previously appointed by the same nominating authorities. The special commission must organize a public and merit-based selection process to appoint the three new justices of the Constitutional Court.

According to provision 204 of the Ecuadorian Constitution (2008), "the Transparency and Social Control Branch of Government shall promote and foster monitoring of public entities and bodies and of natural persons or legal entities of the private sector who provide services or carry out activities for the general welfare, so they shall conduct them with responsibility, transparency and equity; it shall foster and encourage public participation; it shall protect the exercise and fulfillment of rights; and it shall prevent and combat corruption."

[3]See El Universo. 2017. "El Oficialismo se filtra en Corte Constitucional, El más poderoso ente de Ecuador." http://www.eluniverso.com/2012/11/11/1/1355/oficialismo-filtra-mas-poderoso-ente-pais.html.

Table 3. *De jure* judicial independence features (Constitution 1998 v. Constitution 2008).

Constitution	1998	2008
Number of Judges	9	9
Term in Office	4 years	9 years, two thirds of them shall be renewed every three years.
Reelection	Yes	No
Dismissal	Impeachment decided by the Congress (simple majority)	The dismissal of a judge shall be decided upon by two thirds of the members of the Constitutional Court
Nominating bodies	Presidency (2 candidates), Supreme Court (2 candidates), mayors and prefects (1 candidate), unions, peasants and Indians (1 candidate), business chambers (1 candidate)	Executive Branch (9 candidates), Legislative Branch (9 candidates) and Transparency and Social Control Branch (9 candidates)
Appointing bodies	Congress	Rating Committee, conformed by: a) 2 members nominated by Executive, b) 2 members nominated by the Congress and c) 2 members nominated by the Transparency and Social Control Branch
De jure Judicial Independence Score[1]	3 points	5 points

proposed by Alianza País—Correa's political party—allowing indefinite reelection of all elected public officials, along with a set of constitutional amendments backed by the president.

Constitutional Adjudication in Ecuador

Constitutional adjudication is fundamentally characterized as the combination of three main variables: type of adjudication (concrete or abstract), timing of the adjudication (*a priori* or *a posteriori*), and whether it can be exercised by all the judiciary or just by a special body (centralized or decentralized) (Ginsburg and Versteeg 2014). Since 2008, Ecuador embraced an eclectic model of constitutional adjudication, in which only the ECC's justices have the authority to declare the unconstitutionality of those norms emanated from other political branches or local governments. Within this centralized institutional framework, the ECC widely resolves concrete, abstract, *a priori*, and *a posteriori* constitutional review cases, depending on the type of petition submitted before the Court.[4] Additionally, the ECC may issue binding jurisprudence and its interpretation cannot be overruled by the legislature.[5]

Particularly, we analyze abstract review decisions that were made in absence of a concrete judicial case. Unlike judicial review in the United States—which generally entails the violation of somebody's constitutional rights—abstract constitutional review does not include a legal case where specific rights are being infringed (Ginsburg 2008). Instead, the ECC evaluates the conformity of any norm with the constitution. To this effect, when deciding public claims of unconstitutionality, the ECC does not resolve disputes between parties. Instead, any litigant can claim the unconstitutionality of a norm and the Court will decide whether to declare it as constitutional or not. Consequently, abstract review always entails *erga omnes* effects.

Because of its close relation with constitutional provisions, abstract review directly influences public policies. In addition to being an important instrument for checks and balances in democratic states and a useful instrument to correct law, constitutional review can also reshape political, economic, and legal conditions of a country (LaPorta et al. 2003). In this study we examine abstract constitutional review because it might show that even under strong *de jure* judicial independence features, such as longer terms in office, and no ECC judges' impeachment by the legislature, *de facto* judicial independence may be compromised depending on the political salience of cases. Furthermore, due to its institutional variability, the Ecuadorian case allows us to examine if political actors may influence Constitutional Court judges' decisions.

[4]Provisions 428, 436, 438, 439, and 443 of the Ecuadorian Constitution (2008).
[5]Provision 436 (6) of the Ecuadorian Constitution (2008).

Abstract Constitutional Review Proceeding

Both official authorities and citizens are equally entitled to challenge norms before the ECC, through a special proceeding denominated *public claim of unconstitutionality*. Unlike the 1998 Constitution, which required the support of the ombudsman or at least of 1,000 citizens for non-public plaintiffs to challenge any norm as unconstitutional, the 2008 Constitution allows universal legal standing without additional requirements for citizens to present public claims of unconstitutionality. This type of legal standing is known as *actio popularis* and was widely backed by Ecuadorian scholars who endorse this institutional change as beneficial for the protection of constitutional rights.[6] Nevertheless, this universal-standing system makes it more likely that plaintiffs, especially non-public ones, will bring weak cases before the ECC.[7]

Consequently, public claims of unconstitutionality are directly presented before the ECC through a lawsuit containing, among others, the following elements: the indication of the norm that is being challenged, the identification of the potentially infringed constitutional norms, and the arguments that support the case. Once the lawsuit is presented before the ECC, an ad hoc admissions committee formed by three ECC justices evaluates it. The admissions committee can reject the case only if: (a) the ECC lacks competence in order to rule on the issue; (b) the claim is time-barred; (c) the challenged norm has been recognized as constitutional by a judicial decision which has the effects of a final and non-appealable judgment with the authority of *res judicata*; or (d) the plaintiff has not completed the lawsuit within the period of five days after the ECC found it was incomplete. Otherwise, the committee shall admit the case or request the plaintiff to complete the lawsuit, according to legal requirements. If the case is admitted, the ECC should issue a writ of admission in which it requests information about the challenged norm and publicizes the proceeding.[8] In short, the ECC's admission procedure does not control for weak and strong cases. This rather limited supervision of formal requirements raises concerns about selection effects in our population that we will account when discussing our methodology.

Method

To answer the question whether the ECC tends to favor the government when ruling politically salient cases, we gathered a data set that contained information on all public claims of unconstitutionality decisions ($N = 111$)—*sentencias de acción pública de inconstitucionalidad*—issued by the ECC between 2008 and February 2016. This original database included a comprehensive set of variables concerning each decision. The outcome of the decision served as the dependent variable (*Constitutional Review*). It was dichotomously coded 1 if the Court upheld the constitutionality of the norm, and 0 if the norm was declared as unconstitutional.

We also created a series of dichotomous variables to capture the *Type of Plaintiff*. We coded 1 when the plaintiff was a public official and 0 otherwise. We included an additional variable to differentiate executive public actors. This variable was coded 1 if the public official was a member of the executive

[6]The main argument underlying this position is that universal standing procedures may increase the probabilities of constitutional violations being detected and repaired by the ECC. In addition, these scholars claim that universal-standing systems may help citizens to be aware about their constitutional rights (see Castro-Montero et al., 2016).

[7]Shapiro and Stone Sweet (2002) assert that universal-standing access before Constitutional Courts entails higher transaction costs and does not guarantee an average quality of claims. As a result, universal-standing systems will have lower win rates than restricted standing ones. From a political perspective, a universal-standing system will allow political losers access to constitutional decisions. This consideration links political instable environments—as the Ecuadorian one—with a constitutional review universal-standing system. Following Ginsburg (2002, 61), the possibility of a spurious claim increases the more open access the system is. Consequently, "more open access will lead to more claims of lower average quality." In alternative terms, restrictive admission systems will lead to higher success rates before courts. This assumption has already been empirically tested by the literature. For instance, Stone (1992) demonstrates that 52.1 percent of the laws referred to the French *Conseil Constitutionnel* have been found as unconstitutional between 1881 and 1992. During this time period, only a group of at least 20 percent of the deputies or some special bodies were allowed to file cases before the *Conseil Constitutionnel*. In contrast, the success rate of petitions before the German Constitutional Court was 2.25 during 1991. As opposed to the French system, special bodies, legislative majorities, and citizens were allowed to file petitions before the German Constitutional Court.

[8]Provisions 9, 79, 80, and 84 of the Organic Law of Jurisdictional and Constitutional Guarantees and Constitutional Control.

branch and 0 otherwise. The president, ministers, as well as the most important authorities of institutions of the Ecuadorian government's executive branch were grouped in this category.[9] We also created a three-category variable coded 0 in the case of non-public plaintiffs, 1 in the case of public non-executive plaintiffs, and 2 for public executive plaintiffs. This three-category variable also had a statistically significant effect on the probability of the decision being declared unconstitutional, while finding similar effects of the other variables compared to models that included the binary plaintiff variables. The results of the three-category variable are not reported due to the small number of observations in the executive public plaintiff group ($n = 15$) and the non-executive public plaintiff group ($n = 9$). As previously explained, we expect that the Court would tend to strike down legislation when public officials, especially those working for the executive branch, claim unconstitutionality.

We operationalized the variable *Media Coverage* by means of a binary variable (1 when the case was reported in a nationally distributed newspaper and 0 otherwise).[10] To ensure the adequate temporal order of the exposure of a case and the ECC decision, we coded only reported cases that were in newspapers prior to when the actual decision was adopted by the Court. In this way we assured that we captured contemporaneous salience, rather than retrospective salience.

Several other binary variables were used as control variables. *Type of Norm* (whether the challenged norm was a national law or not), *Norm Promulgation* (law enacted during Correa's presidential term or not), and three variables that reflect the applicable area of the law—that is, civil and political rights (whether the case addressed civil and political rights or not), economic social and cultural rights (whether the case addressed economic, social, and cultural rights or not), collective rights (whether the case addressed collective rights or not), and taxation or economic issues (whether the case involved any taxation or economic issues or not)—were measured and controlled for.

We created a continuous variable to capture the rate of individual dissenting (counter majority) votes per case. This variable was constructed by dividing the number of dissenting votes by the number of votes of the majority. We added a *Dissenting Rate* variable as a proxy of the complexity of each case. The underlying argument of this logic was that justices would tend to issue more dissenting votes in complex cases.

From a methodological perspective, using *Dissenting Rate* as a control variable can be questionable because this would result in a circular argument by which the ECC decision was both the cause and the effect of ECC justices' dissenting votes. This assumption would lead to an endogeneity problem, as our independent variable *Dissenting Rate* would be derived from our dependent variable *Constitutional Review*, instead of being one of its explanatory causes. Aware of this problem, we ran our models with and without *Dissenting Rate*. We did not observe any differences that gave rise to concern.

Alternatively, *Dissenting Rate* could serve as an outcome variable. We operationalize this variable as the rate of justices voting for unconstitutionality. Such a continuous measure would provide a less binary view of how convinced the justices were to decide in favor or against the plaintiff. We find similar patterns and results as presented below when using *Dissenting Rate* as a dependent variable instead of *Constitutional Review*. However, using a percentage or rate as an outcome variable would not be as reliable and stable as the final decision adopted by the Court. In the ECC, decisions are approved with at least five votes—in spite of absences, concurring (pro majority), or dissenting (anti majority) votes. The number of judges voting in each case varies, largely because judges are frequently absent. Consequently, a dissenting rate in one decision may not have the same meaning as a dissenting rate in another decision. This is why only the results of the analysis with *Constitutional Review* are reported.

Due to the dichotomous nature of the variables under consideration, logistic regression analysis was used to test the effect of the predictors on the dependent variable. We report the logistic coefficients, odds ratio, standard errors, significance levels, and predicted probabilities (with confidence intervals)

[9]For a more detailed description of the Ecuadorian executive branch, see http://www.planificacion.gob.ec/wpcontent/uploads/downloads/2015/11/Estructura-Org%C3%A1nica-de-la-Funci%C3%B3n-Ejecutiva-10-09-2015.pdf (accessed October 13, 2016).

[10]Influential newspapers and news agencies such as *El Comercio, El Hoy, La Hora, El Telégrafo, El Universo, Ecuador Inmediato*, and *Agencia Andes* were used to extract relevant information on judicial cases. We chose those newspapers because they are nationally distributed, and also because of their ideological variance. All the newspapers have online databases available. Name of plaintiff, challenged law, and case facts were used as key words for the quest of each case.

Table 4. Quality of cases.

	Norm Identification		Clarity		Coherence		Legal Sources		Strength of Case	
Type of Plaintiff	*Mean*	*St. Dev.*	*Mean*	*St. Dev.*	*Mean*	*St. Dev.*	*Mean*	*St. Dev.*	*Mean*	*St. Dev.*
Public	5.64	0.44	5.33	0.17	5.04	0.4	3.24	0.25	2.7	0.33
Non-public	5.03	0.67	4.75	0.74	4.45	0.24	3.08	0.26	2.46	0.39

for each of the explanatory variables. It is worth noting that we ran the analyses with and without control variables, with no meaningful differences compared to the results presented below.

Possible selection effects were an important concern. The plaintiff effect that this study intends to test might be confounded by a selection effect where public plaintiffs bringing strong cases to court, and non-public plaintiffs—mostly citizens—bring primarily weak cases. To address this issue, we analyzed the strength and the overall quality of cases. For this purpose, an expert survey was held in which a number of experts assessed the strength of 40 cases. First of all, we randomly selected 20 cases brought to the ECC by public plaintiffs and 20 cases brought by non-public plaintiffs from the population ($N = 111$). We summarized the most important arguments presented by plaintiffs in their lawsuits an expert to qualify the accuracy of the summary of the case on a four-point scale—a value of 1 representing that the summary did not indicate the arguments presented in the lawsuit, and a value of 4 representing that the arguments presented in the lawsuit were accurately presented in the summaries that we developed. During this phase, the expert was provided with the lawsuit and the ECC's final decision. All details about the type of plaintiff or case identification were removed from the summaries and the official documents in order to prevent that knowing who the plaintiff was would affect the expert's assessment.

Once we achieved a reliable accuracy rate on the summaries of the 40 cases, we surveyed seven other experts. First-class graduate students were surveyed. These students were aware of both Ecuadorian constitutional procedural law as well as of theories of legal reasoning and argumentation. Because they received legal training but were not (or not always) aware of the facts and outcomes of the cases they were asked to assess, they were suitable informants to report the strength and quality of argumentation of cases presented before the ECC.

Based on Basabe-Serrano's (2016) index on judicial decisions in high courts, the questionnaire was designed taking into account four dimensions of the theory of legal argumentation: (a) the ability of the plaintiff to identify the challenged norm and the potentially infringed constitutional norm (*Norm Identification*); (b) the ability of the plaintiff to present clear and comprehensible arguments (*Clarity*); (c) the ability of the plaintiff to present coherent and systematically organized arguments (*Coherence*); and (d) the ability of the plaintiff to support their arguments with legal sources, such as jurisprudential precedents or legal doctrine (*Legal Sources*). For each one of these dimensions, the experts assessed each case on a scale of 1 (extremely low ability) to 7 (extremely high ability). Respondents were also asked to qualify the case as 4 = very strong, 3 = strong, 2 = weak, or 1 = very weak (*Strength*). Finally, in order to prevent further biases, the respondents were asked if they had any previous knowledge about the final decision issued by the ECC concerning the constitutionality of the norm. This analytical approach allowed us to evaluate differences between the lawsuits presented by public and non-public actors, as well as controlling for external biases.

Table 4 shows the mean of the means of the five-abovementioned dimensions for each type of plaintiff. We identify a pattern tending to indicate that public plaintiffs bring slightly better cases than non-public ones. However, it does not become clear from the results whether this difference between lawsuits' quality is sufficiently large to claim that cases brought by non-public actors are repetitively weak or that the cases brought by public actors are consistently strong. The impression that the descriptive results provide is that both public and non-public plaintiffs score low on variable *Strength*.

Two-way analyses of covariance (ANCOVAs) were conducted to detect statistically significant differences between cases brought before the ECC by public plaintiffs and non-public plaintiffs. We used the mean score of each component of the survey, namely, *Norm Identification, Clarity,*

Coherence, Legal Sources, and *Strength* as dependent variables in separate analyses. All models included *Type of Plaintiff* (whether the case was brought by a public official or not) as a fixed factor and *Knowledge of the Case* (whether the respondent knew the ECC decision) as a covariate. This last variable was captured in the form of a continuous variable by dividing the number of respondents that previously knew the outcome of the case by seven, which was the total number of respondents. ANCOVAs were conducted with and without variable *Knowledge of the Case*. The tests produced similar results.

While controlling for *Knowledge of the Case* as a covariate, the results showed a significant effect of *Type of Plaintiff* on *Norm Identification*, $F(1, 39) = 11.430$, $p = .002$, $\eta^2 = .236$, on *Clarity*, $F(1, 39) = 6.423$, $p = .016$, $\eta^2 = .148$, and on *Strength*, $F(1, 39) = 5.556$, $p = .024$, $\eta^2 = .131$. No significant differences were found for *Legal Sources* $F(1, 39) = 1.460$, $p = .235$, $\eta^2 = .038$, and for *Coherency*, $F(1, 39) = 5.168$, $p = .051$, $\eta^2 = 0.378$. The results indicate that significant differences exist between those cases brought before the Court by the government and by citizens. More importantly, the results suggest that public actors bring better argued—and, in general, stronger—cases before the Court compared to non-public plaintiffs could confound the plaintiff effect over the judicial decision. Consequently, the possible differences in cases that public actors and non-public actors bring to court may need to be taken into account when testing the political salience effect. We will further address this issue in the Results section.

Table 5. Descriptive results.

Variable	Outcome	Percentage (*n*)
Decision	Unconstitutionality	29.7 ($n = 33$)
	Constitutionality	70.3 ($n = 78$)
Plaintiff	Public Plaintiff	21.6 ($n = 24$)
	Non Public Plaintiff	78.4 ($n = 87$)
Executive Plaintiff	Executive Plaintiff	13.5 ($n = 15$)
	Non-Executive Plaintiff	86.5 ($n = 96$)
Media Coverage	Reported by Newspapers	32.7 ($n = 36$)
	Not reported	67.3 ($n = 74$)
Type of Norm	National Norm	50.5 ($n = 56$)
	Local Norm	49.5 ($n = 55$)
Executive Decree	Yes	87.4 ($n = 97$)
	No	12.6 ($n = 14$)
Promulgation of the Norm	While Correa is in office	73.9 ($n = 82$)
	Before Correa's presidential term	26.1 ($n = 29$)
Civil and Political Rights	Yes	14.4 ($n = 16$)
	No	85.6 ($n = 95$)
Economic, Social, and Cultural Rights	Yes	25.2 ($n = 28$)
	No	74.8 ($n = 83$)
Collective Rights	Yes	14.4 ($n = 16$)
	No	85.4 ($n = 95$)
Economic Taxation Issues	Yes	30.6 ($n = 34$)
	No	69.4 ($n = 77$)
Year 2009	Yes	9.9 ($n = 11$)
	No	90.1 ($n = 100$)
Year 2010	Yes	8.1 ($n = 9$)
	No	91.9 ($n = 102$)
Year 2011	Yes	4.5 ($n = 5$)
	No	95.5 ($n = 106$)
Year 2012	Yes	24.3 ($n = 27$)
	No	75.7 ($n = 84$)
Year 2013	Yes	11.7 ($n = 13$)
	No	88.3 ($n = 98$)
Year 2014	Yes	8.1 ($n = 9$)
	No	91.9 ($n = 102$)
Year 2015	Yes	32.4 ($n = 36$)
	No	67.6 ($n = 75$)
Private Legal Sponsorship	Yes	26.1 ($n = 29$)
	No	72.1 ($n = 80$)

Results

Preliminary Quantitative Exploration

As illustrated in Table 5, the ECC upheld the challenged norm in most cases (70.3%), meaning that the Court rejected the majority of public claims of constitutionality. The results also show that public plaintiffs filed fewer public claims of constitutionality than non-public plaintiffs, who were mostly citizens and private legal persons. Executive actors intervened as plaintiffs only in 13.5 percent ($n = 15$) of the observed cases. Concerning media coverage, the newspapers reported 32.7 percent ($n = 36$, one missing value) of the cases. It is worth noting that in all the cases in which executive actors acted as plaintiffs and were reported by the newspapers, the norm was declared unconstitutional by the ECC.

Although executive actors filed fewer public claims of constitutionality than non-public actors, the former were far more successful. Success is defined here as the number of claims presented by either public or private plaintiffs, in which the ECC declares the unconstitutionality of a norm. We used chi-square tests to determine the association between the binary independent variables *Public Plaintiff* (whether the plaintiff was a public official or not) and *Executive Plaintiff* (whether the plaintiff was a public actor working in the executive branch or not) and the dependent variable *Constitutional Review* (whether the norm was declared as constitutional or unconstitutional by the ECC). The models have a good fit based on the Hosmer-Lemeshow test (Model 1: $\chi^2 = 10.606$, df $= 8$, $p = .23$, Model 2: $\chi^2 = 4.898$, df $= 8$, $p = .77$, Model 3: $\chi^2 = 9.046$, df $= 8$, $p = .34$).

The relationship between the variables *Public Plaintiff* and *Constitutional Review* was highly significant (Model 3, $\chi^2 = 15.740$, df $= 1$, $p < .001$), as was the relationship between variables *Executive Plaintiff* and *Constitutional Review* (Model 1, $\chi^2 = 26.913$, df $= 1$, $p < .001$). These results illustrate that there is a strong relation between public and executive actors challenging a norm and the ECC declaring the norm unconstitutional. It is also worth mentioning that executive actors mostly were interested in challenging general norms, as 73 percent of the laws challenged by executive actors were either organic or ordinary laws.

In Figure 1, we compare public and non-public plaintiff win rates per year, which were calculated by dividing the number of successful complaints by the total number of complaints filed by each type of actor. Only in those years in which public actors did not challenge norms, their success rate before the Court was lower than non-public actors' win rate. Figure 1, showing trends in success rate before the ECC, strongly supports our hypotheses that public actors as plaintiffs in constitutional review proceedings increases the probability of the norm being declared unconstitutional.

Regression Analysis Results

Logistic regression analysis was used to predict ECC decisions. We ran three logistic regression models to test the hypothesis and to assess the impact of the predictors on the decision issued by the ECC. Model 1 tests *Executive Plaintiff* (whether an official authority working for the executive branch acted

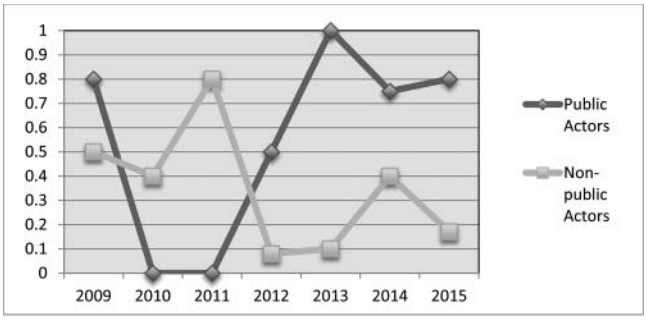

Figure 1. Plaintiffs' success rate per year.

Table 6. Logistic regression results.

Variable	Statistics	Model 1	Model 2	Model 3
Executive Plaintiff	Coefficient	−2.848*	−2.727*	
	Standard Error	1.198	1.246	
	EXP(b)	0.058	0.065	
Public Plaintiff	Coefficient			−1.293
	Standard Error			0.940
	EXP(b)			0.274
Media Coverage	Coefficient	−1.707*	−1.548*	−1.601*
	Standard Error	0.696	0.754	0.676
	EXP(b)	0.181	0.213	0.202
Executive Plaintiff* Media Coverage	Coefficient		−0.748	
	Standard Error		1.350	
	EXP(b)		0.473	
	N	108	108	108
	Chi-Sq.	55.56	55.87	50.32
	Prob > Chi-Sq.	0.0000	0.0000	0.0001
	Log likelihood	−38.69	−38.54	−41.18
	Cox & Snell R Square	0.40	0.40	0.37

Notes. Dependent variable = Constitutionality of the norm. $^{*}p < .05$; $^{**}p < .01$; $^{***}p < .001$. Control variables: Type of Norm, Executive Decree, Norm Promulgation, Civil and Political Rights, Economic and Social Rights, Collective Rights, Economic and Taxation issues, Year (fixed effects), Private Legal Sponsorship, Dissenting Rate.

as a plaintiff or not) and *Media Coverage* (whether the case was reported by the newspaper or not) as separate variables, the decision (whether the court declares a norm as constitutional or unconstitutional) being the outcome variable. In Model 2 we tested the interaction of *Executive Plaintiff* and *Media Coverage* on the decision. In Model 3, we dropped variable *Executive Plaintiff* but included *Public Plaintiff* (whether an official authority in general acted as the plaintiff or not) and *Media Coverage* separately. Models also include year fixed-effect variables. The results of the logistic regression analysis for the three models are presented in Table 6.

In these logistic regression models, a positive coefficient for any of the explanatory variables increases the probability of a ruling declaring the constitutionality of the norm. Conversely, negative coefficients indicate that explanatory variables decrease the probabilities of the norm being declared as constitutional. Put differently, negative coefficients indicate that the probabilities of a norm being declared unconstitutional by the ECC increases when the plaintiff is a public compared to when it is not.

As hypothesized, the coefficients of variables *Public Plaintiff* and *Executive Plaintiff* are negative in all regression models. The negative coefficients are in accordance with the hypothesis that the presence of public actors, and especially of those actors coming from the executive branch, increases the probability of a law being declared unconstitutional.

The results also show that when cases were reported in the newspapers, the probability of a law being struck down increased. This tendency appears to be consistent, as *Media Coverage* is robust in the three models. Only in Model 3, which includes *Public Plaintiff* and *Media Coverage* as separate variables, the effect of the public plaintiff variable is not statistically significant. No interaction effect of *Executive Plaintiff* and *Media Coverage* was found.

Furthermore, when controlling for variables such as *Type of Law* (whether the challenged norm was an organic or ordinary law or not), *Law Promulgation* (whether the challenged norm was enacted during Correa's presidential term or not), *Executive Decree* (whether the challenged norm was an Executive decree or not), or the type of rights addressed by the challenged norm, the impact of executive actors as plaintiffs and *Media Coverage* over the final decision persisted. In sum, *Executive Plaintiff* and *Media Coverage* are the variables that best explain the voting decisions made by the ECC. This is in accordance to what we expected.

Because coefficients are not always intuitive for interpretation purposes, we plot odds ratio with 95 percent confidence intervals in Figure 2. This figure highlights a key trend consistent with our hypotheses, since all odds ratio values for our explanatory variables are lower than 1.

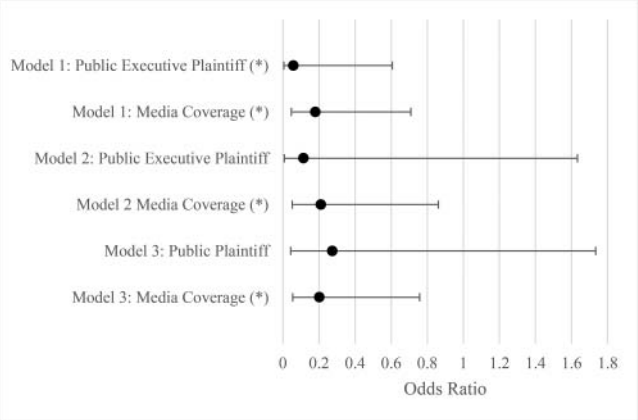

Figure 2. Explanatory variables (odds ratio). *Notes*: Dependent variable = Constitutionality of the norm. Control variables: the same as reported in Table 6. $^{*}p < .05$.

When we interpret the results following Model 1, the probability of a constitutional decision becomes 0.059 more likely when the plaintiff is an executive public plaintiff compared to when it is a non-executive public plaintiff (controlling for other factors). This means that the probability of an executive plaintiff obtaining a favorable decision is approximately 17 times higher than non-executive public plaintiffs. In the case of media coverage, we observe similar effects, as the odds of a norm being declared constitutional if newspapers reported the case are 0.161, compared to when the case was not reported. In other words, cases reported by newspapers are approximately six times more likely to be declared unconstitutional than cases that were not reported. As shown below, these effects hold for our three models.

In the previous section, it was concluded that the plaintiff effect might be confounded by the difference in cases that public plaintiffs and non-public plaintiffs bring to court. To test this, we ran several

Table 7. Influence of cases' quality and strength on constitutional review.

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6	Model 7	Model 8
Public Plaintiff			−1.939	−1.559	−1.870	−2.095	−1.641	−2.536*
			(1.098)	(1.276)	(1.160)	(1.160)	(1.155)	(1.280)
Executive Plaintiff		−6.841*						
		(2.811)						
Media Coverage	−2.234*		−2.367*	−2.467*	−2.395*	−2.435*	−2.371*	−2.208*
	(0.889)		(0.996)	(1.027)	(0.994)	(1.031)	(1.004)	(1.074)
Legal Sponsorship			0.893	1.059	0.871	0.695	0.836	0.939
			(0.623)	(1.156)	(1.109)	(1.140)	(1.110)	(1.180)
Norm Identification	−0.620	2.569		−0.516				
	(1.022)	(2.003)		(0.945)				
Clarity	1.786	−3.482			−0.181			
	(2.008)	(3.226)			(1.010)			
Source of Law	0.009	0.050				−0.604		
	(0.152)	(0.281)				(0.890)		
Coherency	−0.468	−0.695					−0.868	
	(0.372)	(0.515)					(1.155)	
Strength	0.727	9.976						−0.416
	(2.683)	(6.887)						(1.602)
N	39	40	39	39	39	39	39	39
Chi-Sq.	15.62	23.73	19.57	19.88	19.61	20.04	20.16	20.81
Prob > Chi-Sq.	0.016	0.000	0.000	0.001	0.000	0.000	0.000	0.000
Log likelihood	−17.01	−11.07	−15.672	−15.520	−15.656	−15.435	−15.378	−14.005
Pseudo R^2	0.314	0.55	0.384	0.39	0.385	0.393	0.396	0.426

$^{*}p < .05$, $^{**}p < .01$.

logistic regressions including *Constitutional Review* as the outcome variable and *Type of Plaintiff, Media Coverage, Private Legal Sponsorship*, along with variables *Norm Identification, Clarity, Coherency, Legal Sources*, and *Strength*, as explanatory ones. As depicted in Table 7, the quality of cases did impact the effects of the main predictors of the present study (i.e., *Executive Plaintiff, Type of Plaintiff* and *Media Coverage*) on the dependent variable *Constitutional Review*.

We did not include variables *Executive Plaintiff* and *Media Coverage* in the same model due to the small number of observations. The result of adding the quality variables, however, is that the plaintiff effect, as well as media coverage, becomes stronger rather than weaker. This suggests that the results that are reported above are underestimates. Moreover, the findings are evidence against the idea that it is not the type of plaintiff that impacts the outcome variable but the differences in strength and quality of the cases that public plaintiffs and non-public plaintiffs bring to court. Consequently, the evidence does not support the idea that the plaintiff effect is confounded by the quality variables in that controlling for case quality would reduce or diminish the plaintiff effect. In fact, the results suggest the opposite.

Overall, the results support the proposition that when public plaintiffs, namely, executive actors, intervene in politically salient constitutional review proceedings, which have been reported by the newspaper, ECC justices tend to declare the norm as unconstitutional.

Discussion

A near consensus in the field is that institutional conditions such as unified governments, powerful presidential regimes, and unconsolidated democracies tend to preclude judicial independence. However, this literature falls short in explaining why formally powerful courts tend to rule in favor of the government. In this study, we develop an alternative but, at the same time, integrative approach arguing that, apart from the above-mentioned conditions, political salience—the importance attributed to a case by the government and public opinion—may trigger courts' loyalty toward the government and thus preclude independence, even in spite of formal protections for the judiciary. We then operationalize this concept of political salience through two main explanatory variables, namely type of plaintiff (assuming that public actors would be more likely involved in salient abstract review cases) and media coverage (assuming that cases reported by newspapers entail larger interests than non-reported cases).

We test our argument in the context of Ecuador, a system that fits well into the description of an unconsolidated democracy that concentrates political power in the executive power. Along this line, we characterize the ECC as a formally powerful institution because it operates under an improved environment of *de jure* judicial protections, concentrates all the powers of constitutional review, issues binding jurisprudence, and its interpretation cannot be overruled by the legislature.

Supporting our argument, we find that norms are more frequently struck down if executive plaintiffs claim unconstitutionality compared to non-public plaintiffs. In a system that concentrates political power in the executive, we should not wonder why executive actors are particularly more successful before the ECC than the rest of public actors. Conversely, when non-public actors challenged norms that were enacted during Correa's mandate, these claims hardly ever succeeded.

It seems unlikely that consistent failures of non-public actors are nothing but the result of a recurring misunderstanding of the law. Even when we included variables that controlled for the strength of cases, we still observe a radical disparity of win rates among public and non-public actors. Hence, public actors' consistent success before the ECC does not seem to stem from a better comprehension or argumentation of the law. This result gives rise to challenge literature arguing that the enactment of stronger *de jure* protections furthers *de facto* independence. Interestingly, ECC's loyalty toward the governmental interests persisted even when better *de jure* judicial independence conditions were granted for justices.

Concerning media coverage, we predicted that not all cases entail the same political burden, nor do they raise the same level of political attention. In fact, many cases affect particular or private interests. Instead, cases reported by the newspapers are more likely to involve national

issues, which are attractive for public opinion and thus entail higher benefits for the government. In this line, media generally reports salient cases, as it represents one of the most relevant political arenas in which societal issues are debated (Bennett et al. 2004; Helbling and Tresch 2011). As public awareness increases, a case might entail larger costs or benefits for incumbents (Warntjen 2012). Under unconsolidated democracies, public actors therefore maximize their choices by claiming the unconstitutionality of those norms that attract social attention.

On a strict legal basis, we would expect that the quality of argumentation and case strength would determine the outcome of decisions. Moreover, some argue that ECC justices' behaviors can be explained only through "the facts of the case in light of the plain meaning of statutes and the Constitution" (Segal and Spaeth 2002, 48). However, if we maintain that only strict legal arguments predict judicial behavior, a non-statistically significant association between any of those variables that capture political indicators (i.e., *Executive Plaintiff, Media Coverage*, and *Constitutional Decision*) would have been observed.

Additionally, we included a set of variables concerning institutional conditions that would maximize the benefits of pressuring courts. We assumed that nationally oriented norms (organic or ordinary laws) and executive decrees enacted during Correa's mandate would hardly ever be struck down by the ECC. We did not find clear or sufficient evidence for this.

Attitudinal theorists would claim that ideology should be added into the analysis to establish if justices cast sincere or strategic votes. Despite the fact that political and judicial preferences can be well explained by ideology, we did not use the attitudinal model due to three reasons. First, Correa's government—as well as its supporting political coalition—has rapidly changed its ideological preferences (de la Torre 2013). Volatile ideological preferences would therefore produce unreliable results. Second, justices are not always able to state their preferences when deciding cases, as they are constrained by the constitution and laws. Finally, the National Assembly does not appoint Ecuadorian constitutional justices. In this regard, political parties' and justices' ideological preferences could not be directly associated, as in other systems in which legislatures appoint justices.

Conclusion

This article presents an empirical study of the ECC with respect to judicial independence, in the context of Ecuador—a system that fits well into the description of an unconsolidated democracy that concentrates political power in the executive branch. We analyzed all abstract review decisions from 2008 to 2016. In doing so, we see an ECC that is constrained by the interests of the president. The results show that norms are more likely to be struck down by the ECC when (1) public officials, namely, those working for the executive branch, claim unconstitutionality than when non-public parties do; and (2) media reports cases. Conversely, when non-public actors challenged norms that were enacted during Correa's mandate, these claims hardly ever succeeded. We accompany this analysis by an expert survey on the strength of cases brought before the Court by public and non-public plaintiffs to avoid potential selection effects. While much of the literature focuses on institutional conditions, as political environment and *de jure* protections, as determinants of independence, our interpretation is that judges favor public actors—particularly those serving in the executive branch, in the case of the ECC—when ruling politically salient cases. Extending traditional approaches, this article suggests that, even under strong *de jure* judicial independence, politicians will still be able to control formally powerful courts, depending on the salience of cases.

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References

Aydın, Aylin. 2013. "Judicial Independence across Democratic Regimes: Understanding the Varying Impact of Political Competition." *Law and Society Review* 47(1): 105–34.

Basabe-Serrano, Santiago. 2009. "Ecuador: Reforma constitucional, nuevos actores políticos y viejas prácticas partidistas." *Revista de Ciencia Política* 29(2): 381–406.

———. 2012. "Judges without Robes and Judicial Voting in Contexts of Institutional Instability: The Case of Ecuador's Constitutional Court, 1999–2007." *Journal of Latin American Studies* 44(1): 127–61.

———. 2016. "The Quality of Judicial Decisions in Supreme Courts: A Conceptual Definition and Index Applied to Eleven Latin American Countries." *Justice System Journal* 37(4): 1–17.

Basabe-Serrano, Santiago, and John Polga-Hecimovich. 2013. "Legislative Coalitions and Judicial Turnover under Political Uncertainty: The Case of Ecuador." *Political Research Quarterly* 66(1): 154–66.

Beer, Caroline C. 2006. "Judicial Performance and the Rule of Law in the Mexican States." *Latin American Politics and Society* 48(3): 33–61.

Bennett, W. Lance, Victor W. Pickard, David P. Iozzi, Carl L. Schroeder, Taso Lagos, and C. Evans Caswell. 2004. "Managing the Public Sphere: Journalistic Construction of the Great Globalization Debate." *Journal of Communication* 54(3): 437–55.

Brinks, Daniel. 2004. "Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium." *Texas International Law Journal* 40: 595.

Castro-Montero, José, Llanos Escobar, Luis, Valdivieso Kastner, Pablo, and García Vinueza, Wladimir. 2016. "La Acción de Protección como mecanismo de garantía de los derechos: Configuración institucional, práctica y resultados." *Ius Humani. Revista De Derecho* 5: 9–43.

Chavez, Rebecca Bill. 2004. *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina*. Stanford: Stanford University Press.

Clark, Tom S. 2009. "The Separation of Powers, Court Curbing, and Judicial Legitimacy." *American Journal of Political Science* 53(4): 971–89.

Clark, Tom S., Jeffrey R. Lax, and Douglas Rice. 2015. "Measuring the Political Salience of Supreme Court Cases." *Journal of Law and Courts* 3(1): 37–65.

Conaghan, Catherine M. 2016. "Ecuador under Correa." *Journal of Democracy* 27(3): 109–18. doi:10.1353/jod.2016.0040.

Dargent, Eduardo. 2009. "Determinants of Judicial Independence: Lessons from Three 'Cases' of Constitutional Courts in Peru (1982–2007)." *Journal of Latin American Studies* 41(2): 251–78.

de la Torre, Carlos. 2013. "El tecnopopulismo de Rafael Correa:¿ Es compatible el carisma con la tecnocracia?" *Latin American Research Review* 48(1): 24–43.

de la Torre, Carlos and Andrés Ortiz Lemos. 2015. "Populist Polarization and the Slow Death of Democracy in Ecuador." *Democratization* 23(2): 221–41. doi:10.1080/13510347.2015.1058784.

Epstein, Lee, and Jack Knight. 1997. *The Choices Justices Make*: Thousand Oaks: Sage.

———. 2000. "Toward a Strategic Revolution in Judicial Politics: A Look Back, a Look Ahead." *Political Research Quarterly* 53(3): 625–61.

Epstein, Lee, Jack Knight, and Olga Shvetsova. 2001. "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government." *Law and Society Review* 35(1): 117. doi:10.2307/3185388.

Epstein, Lee, and Eric A. Posner. 2015. "Supreme Court Justices' Loyalty to the President." Available at https://ssrn.com/abstract=2702144

Epstein, Lee, and Jeffrey A. Segal. 2000. "Measuring Issue Salience." *American Journal of Political Science* 44: 66–83.

Finkel, Jodi. 2004. "Judicial Teform in Argentina in the 1990s: How Electoral Incentives Shape Institutional Change." *Latin American Research Review* 39(3): 56–80.

Fiss, Owen. 2003. *The Law as It Could Be*. New York: NYU Press.

Ginsburg, Tom. 2002. "Economic Analysis and the Design of Constitutional Courts." *Theoretical Inquiries in Law* 3(1): 49–85.

———. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge: Cambridge University Press.

———. 2008. The Global Spread of Constitutional Review. In *The Oxford Handbook of Law and Politics*, edited by Keith E. Whittington, R. Daniel Kelemen, and Gregory A. Caldeira, 81–98. Oxford: Oxford University Press.

Ginsburg, Tom, and Mila Versteeg. 2014. "Why Do Countries Adopt Constitutional Review?" *Journal of Law, Economics, and Organization* 30(3): 587–622.

Grijalva, Agustín. 2010. *Courts and Political Parties: The Politics of Constitutional Review in Ecuador*. Pittsburgh: University of Pittsburgh.

———. 2011. Independencia judicial y derechos en Ecuador. *Ecuador Debate* 83: 35–42.

Helbling, Marc, and Anke Tresch. 2011. "Measuring Party Positions and Issue Salience from Media Coverage: Discussing and Cross-validating New Indicators." *Electoral Studies* 30(1): 174–83.
Helmke, Gretchen. 2002. "The Logic of Strategic Defection: Court–Executive Relations in Argentina under Dictatorship and Democracy." *American Political Science Review* 96(2): 291–303.
Iaryczower, Matias, Pablo T. Spiller, and Mariano Tommasi. 2002. "Judicial Independence in Unstable Environments, Argentina 1935–1998." *American Journal of Political Science* 46: 699–716.
Kapiszewski, Diana, and Matthew M. Taylor. 2008. "Doing Courts Justice? Studying Judicial Politics in Latin America." *Perspectives on Politics* 6(4): 741–67.
Kaufman, Irving R. 1980. "The Essence of Judicial Independence." *Columbia Law Review* 80(4): 671–701.
LaPorta, Rafael, Florencio Lopez-de-Silane, Cristian Pop-Eleches, and Andrei Shleifer. 2003. *Judicial Checks and Balances*. Cambridge, MA: National Bureau of Economic Research.
Larkins, Christopher M. 1996. "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis." *American Journal of Comparative Law* 44(4): 605–26.
Lax, Jeffrey R., and Charles M. Cameron. 2007. "Bargaining and Opinion Assignment on the US Supreme Court." *Journal of Law, Economics, and Organization* 23(2): 276–302.
Magaloni, Beatriz, Erik Magar, and Arianna Sánchez. 2010. "Activists vs. Legalists: The Mexican Supreme Court and Its Ideological Battles." *Courts in Latin America*, edited by Gretchen Helmke and Julio Ríos-Figueroa, 187–218. Cambridge: Cambridge University Press.
Maltzman, Forrest, and Paul J. Wahlbeck. 1996. "May It Please the Chief? Opinion Assignments in the Rehnquist Court." *American Journal of Political Science* 40 : 421–43.
Oyarte, Rafael. 2014. *Derecho constitucional ecuatoriano y comparado*. Quito: Corporación de Estudios y Publicaciones.
Polga-Hecimovich, John. 2013. "Ecuador: Estabilidad institucional y la consolidación de poder de Rafael Correa." *Revista de Ciencia Política* 33(1): 135–60.
Popova, Maria. 2010. "Political Competition as an Obstacle to Judicial Independence: Evidence from Russia and Ukraine." *Comparative Political Studies* 43 (10): 1202–29.
Ríos-Figueroa, Julio. 2011. "Institutions for Constitutional Justice in Latin America." In *Courts in Latin America,* edited by Gretchen Helmke and Julio Ríos-Figueroa, 27–54, Cambridge: Cambridge University Press.
———. 2007. "Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002." *Latin American Politics and Society* 49(1): 31–57.
Ríos-Figueroa, Julio, and Jeffrey K. Staton. 2014. "An Evaluation of Cross-national Measures of Judicial Independence." *Journal of Law, Economics, and Organization* 30(1): 104–37.
Rodríguez-Raga, Juan Carlos. 2011. "Strategic Deference in the Colombian Constitutional Court, 1992–2006." In *Courts in Latin America*, edited by Gretchen Helmke and Julio Ríos-Figueroa, 81-98. Cambridge: Cambridge University Press.
Russell, Peter H. 2001. "Toward a General Theory of Judicial Independence." In *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World*, edited by Peter H. Russell and David M. O'Brien, 1–25. Charlottesville: University of Virginia Press.
Segal, Jeffrey A. 1997. "Separation-of-powers Games in the Positive Theory of Congress and Courts." *American Political Science Review* 91(1): 28–44.
Segal, Jeffrey A., and Harold J. Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge: Cambridge University Press.
Slotnick, Elliot E. 1979. "Who Speaks for the Court? Majority Opinion Assignment from Taft to Burger." *American Journal of Political Science* 23: 60–77.
Spiller, P. T., and Gely, R. 2007. "Strategic Judicial Decision Making." National Bureau of Economic Research no. w13321. http://www.nber.org/papers/w13321.
Taylor, Matthew. 2008. *Judging Policy: Courts and Policy Reform in Democratic Brazil*. Stanford: Stanford University Press.
Vanberg, Georg. 2001. "Legislative–Judicial Relations: A Game-Theoretic Approach to Constitutional Review." *American Journal of Political Science* 45: 346–61.
Wahlbeck, Paul J., James F. Spriggs, and Forrest Maltzman. 1998. "Marshalling the Court: Bargaining and Accommodation on the United States Supreme Court." *American Journal of Political Science* 13: 294–315.
Warntjen, Andreas. 2012. "Measuring Salience in EU Legislative Politics." *European Union Politics* 13(1): 168–82.

Appendix 1. Logistic Regression Results

Variable	Statistics	Model 1	Model 2	Model 3
Executive Plaintiff	Coefficient	−2.848*	−2.727 *	
	Standard Error	1.198	1.246	
	EXP(b)	0.058	0.065	
Public Plaintiff	Coefficient			−1.293
	Standard Error			0.940
	EXP(b)			0.274
Media Coverage	Coefficient	−1.707*	−1.548*	−1.601*
	Standard Error	0.696	0.754	0.676
	EXP(b)	0.181	0.213	0.202
Executive Plaintiff * Media Coverage	Coefficient		−0.748	
	Standard Error		1.350	
	EXP(b)		0.473	
Type of Norm	Coefficient	0.548	0.606	0.321
	Standard Error	0.780	0.788	0.739
	EXP(b)	1.730	1.828	1.379
Executive Decree	Coefficient	1.304	1.242	1.234
	Standard Error	1.398	1.390	1.358
	EXP(b)	3.684	3.463	3.435
Norm Promulgation	Coefficient	−0.518	−0.433	−0.208
	Standard Error	0.885	0.899	0.855
	EXP(b)	0.595	0.648	0.812
Civil and Political Rights	Coefficient	0.071	−0.183	0.669
	Standard Error	0.927	0.962	0.889
	EXP(b)	1.074	1.201	1.953
Economic and Social Rights	Coefficient	−0.188	−0.197	−0.046
	Standard Error	0.802	0.807	0.790
	EXP(b)	0.829	0.822	0.955
Collective Rights	Coefficient	2.782*	2.860*	3.652***
	Standard Error	1.275	1.311	1.267
	EXP(b)	16.148	17.470	38.542
Economic and Taxation Issues	Coefficient	1.721	1.623	1.813*
	Standard Error	0.924	0.933	0.909
	EXP(b)	5.592	5.070	6.130
Year 2010	Coefficient	0.842	0.834	0.689
	Standard Error	1.426	1.425	1.406
	EXP(b)	2.320	2.304	1.992
Year 2011	Coefficient	1.607	1.602	1.539
	Standard Error	1.641	1.638	1.612
	EXP(b)	4.988	4.961	4.662
Year 2012	Coefficient	2.891	2.973	2.501
	Standard Error	1.570	1.586	1.504
	EXP(b)	18.015	19.559	12.199
Year 2013	Coefficient	2.822	2.790	2.095
	Standard Error	1.771	1.772	1.651
	EXP(b)	16.807	16.280	8.122
Year 2014	Coefficient	1.879	1.971	1.899
	Standard Error	1.362	1.383	1.372
	EXP(b)	6.545	7.176	6.676
Year 2015	Coefficient	1.937	1.927	1.750
	Standard Error	1.373	1.366	1.291
	EXP(b)	6.937	6.866	5.574
Year 2016	Coefficient	22.902	22.702	23.138
	Standard Error	40192.0	40193.0	40193.0
	EXP(b)	8839040106	7232566719	1.118E+10
Private Legal Sponsorship	Coefficient	0.605	0.510	0.952
	Standard Error	0.957	0.983	1.034
	EXP(b)	1.830	1.666	2.590

(*Continued on next page*)

Variable	Statistics	Model 1	Model 2	Model 3
Dissenting Rate	Coefficient	0.051	−0.066	−0.914
	Standard Error	4.485	4.449	4.659
	EXP(b)	1.052	0.936	0.401
	N	108	108	108
	Chi-Sq.	55.56	55.87	50.32
	Prob > Chi-Sq.	0.0000	0.0000	0.0001
	Log likelihood	−38.69	−38.54	−41.18
	Cox & Snell R Square	0.40	0.40	0.37

Notes. DV = Constitutionality of the norm.

$^{*} = p < .05$;

$^{**} = p < .01$;

$^{***} = p < .001$. Reference category (Year) = 2009. The year 2016 only has one observation, which explains the inflated results. Removing the 2016 year dummy variable yields similar results as reported.