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The Comparative Law and Economics of Judicial Councils

Nuno Garoupa
ngaroup@gmu.edu

Tom Ginsburg

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* Garoupa is Professor of Law, University of Illinois and Research Professor of Law, IMDEA (Madrid); Ginsburg is Professor of Law, University of Chicago. We thank Luciana Gross Cunha, Emilio Gerelli, F. Andrew Hanssen, Richard McAdams, Maria Angela Oliveira, Daniela Piana, Limor Riza, Larry Solum, and Stefan Van Hemmen for helpful comments on earlier versions of the paper. We are grateful to Rebecca Crouse, Sofia Garcia, Christopher Minelli and Antonio Porto for research assistantship. The usual disclaimers apply.

I.
INTRODUCTION

Most theories of judicial independence place a great emphasis on selection mechanisms for judges.[1] An appointment mechanism that appears to link the selected judge too closely to the appointing body calls into question whether the judge can be relied upon to deliver neutral, legitimate, high-quality decisions. While there is near-universal consensus on this as a matter of theory, legal systems diverge greatly in the ways in which they appoint judges, as each tries to balance independence with accountability through institutional design. The diversity of systems of judicial selection suggests a lack of consensus on the best manner to guarantee independence.[2]

American states are exceptional in the range and variety of judicial appointment systems they employ, including various forms of election, appointment by political authorities, and the use of judicial commissions.[3] The merits of these various methods are hotly debated among scholars and state policymakers, with each method having its advocates.[4] However, it is safe to say the

1. There is a large body of literature on judicial independence and quality. *See, e.g.*, Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 B.Y.U. L. REV. 827; Eli Salzberger & Paul Fenn, *Judicial Independence: Some Evidence from the English Court of Appeal*, 42 J.L. & ECON. 831 (1999); F. Andrew Hanssen, *Is There a Politically Optimal Level of Judicial Independence?*, 94 AM. ECON. REV. 712 (2004); Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671 (1980); Daniel M. Klerman & Paul G. Mahoney, *The Value of Judicial Independence: Evidence from Eighteenth Century England*, 7 AM. L. & ECON. REV. 1 (2005); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975); J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994); J. Mark Ramseyer & Eric B. Rasmusen, *Judicial Independence in a Civil Law Regime: The Evidence from Japan*, 13 J.L. ECON. & ORG. 259 (1997); McNollgast, *Conditions for Judicial Independence*, 15 J. CONTEMP. LEGAL ISSUES 105 (2006). For a more comparative perspective, see Josefina Calcaño de Temeltas, Commentary, *To Promote and Strengthen Judicial Independence and the Rule of Law in the Hemisphere*, 40 ST. LOUIS U. L. J. 997 (1996).

2. *See generally* APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD (Kate Malleson & Peter H. Russell eds., 2006).

3. Kurt E. Scheuerman, Comment, *Rethinking Judicial Elections*, 72 OR. L. REV. 459 (1993) (providing overview of selection mechanisms); American Judicature Society on Judicial Selection in the States, http://www.judicialselection.us/judicial_selection_materials/index.cfm (last visited Oct. 23, 2008).

4. Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729 (2002) (providing summary of empirical evidence); Luke Bierman, *Preserving Power in Picking Judges: Merit Selection for the New York Court of Appeals*, 60 ALB. L. REV. 339 (1996) (advocating merit system for New York); Norman L. Greene, *Perspectives on Judicial Selection Reform: The Need to Develop a Model Appointive Selection Plan for Judges in Light of Experience*, 68 ALB. L. REV. 597 (2005) (determining the merit system is superior); Steven Zeidman, *Judicial Politics: Making the Case for Merit Selection*, 68 ALB. L. REV. 713 (2005); Lawrence H. Averill, Jr., *Observations on the Wyoming Experience with Merit Selection of Judges: A Model for Arkansas*, 17 U. ARK. LITTLE ROCK L. REV. 281 (1995) (Arkansas); Sara S. Greene, et. al., *On the Validity and Vitality of Arizona's Judicial Merit Selection System: Past, Present, and Future*, 34 FORDHAM URB. L.J. 239 (2007) (Arizona); Victoria Cecil, *Merit Selection and Retention: The Great Compromise?*

scholarly literature assumes that merit selection—involving nonpartisan judicial commissions rather than elections or appointment by politicians—is the optimal way to ensure independence.[5] We thus see the emergence of a new orthodoxy—merit selection is good and other methods are retrograde. Because there are few common metrics to evaluate the comparative independence or quality of American state judiciaries, the new scholarly consensus is largely theoretical, built on anecdotal rather than systematic evidence.[6]

We look at this question from a comparative perspective, using evidence and experiences from other countries to inform this debate. Many foreign jurisdictions have adopted institutions known as judicial councils in recent years. These institutions, which closely resemble merit selection plans, are designed to help enhance judicial independence and external accountability and to strike a balance between the two. This paper describes these institutions and provides an economic theory of their formation and features. In another paper, we examine evidence as to whether different designs of judicial council affect judicial quality.[7] Although we found little relation between council adoption and quality, we believe that the eternal struggle for a balance between independence and accountability ensures that judicial councils—and by analogy, selection schemes in American states—will continue to be a locus of institutional reform.

In this paper, we use law and economics to develop a theory of judicial councils and examine the experiences of several countries in light of our theory. First, we discuss the emergence of judicial councils and their American counterparts, merit selection commissions. We then provide an economic theory of the

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Not Necessarily, 39 CT. REV. 20 (2002) (Florida); Jason J. Czarnezki, *A Call for Change: Improving Judicial Selection Methods*, 89 MARQ. L. REV. 169 (2005) (Wisconsin); Lenore L. Prather, *Judicial Selection: What is Right for Mississippi?*, 21 MISS. C. L. REV. 199 (2002) (Mississippi).

5. Reddick, *supra* note 4; Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1 (1994) (providing extensive history of merit selection and arguing for the merit plan); Joseph A. Colquitt, *Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support*, 34 FORDHAM URB. L.J. 73 (2007); Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J. L. & PUB. POL'Y 273 (2002) (arguing for appointment over election); Norman L. Greene, *The Judicial Independence Through Fair Appointments Act*, 34 FORDHAM URB. L.J. 13 (2007) (same); G. Alan Tarr, *Designing an Appointive System: The Key Issues*, 34 FORDHAM URB. L.J. 291 (2007) (same); Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and their Application to a Commission-Based Selection System*, 34 FORDHAM URB. L.J. 125 (2007); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995) (weakening the rule of law through judicial elections).

6. *But see* Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary* (John M. Olin L. & Econ., Working Paper No. 357, 2d series, 2007) (finding that judges in partisan systems are more productive in terms of number of opinions, but that appointed judges are cited more frequently); Eric A. Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. CHI. L. REV. 853 (2008) (arguing that judicial political bias is not necessarily harmful).

7. Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 209 (2009).

formation of judicial councils and identify some of the dimensions along which they differ. Next, we discuss the national experience of several legal systems in light of our theory, and we conclude with a discussion of the implications of the analysis for state judicial selection.

II.
THE TENSION BETWEEN ACCOUNTABILITY AND INDEPENDENCE[8]

A long and established literature argues that the ideal of judicial independence is a crucial quality of legal systems, and indeed inherent in the notion of judging.[9] Naturally, the ideal is not always met, for it remains the case that in every legal system judges are appointed and employed by the state. It would be unusual indeed if judges did *not* have a role in implementing social policy, broadly conceived.[10] Typically, then, in democracies, the degree of judicial independence actually granted reflects broad choices of the regime. It may make sense, for example, to have relatively greater judicial independence in the economic sphere so as to maintain credible commitments for investment. Alternatively, liberal polities may wish to use judicial power to ensure a zone of autonomy for individuals.

The delegation of power to judges implies some need for judicial accountability. While judicial independence has been widely studied,[11] accountability

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8. This section draws on Garoupa & Ginsburg, *supra* note 7.

9. *See* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen B. Burbank & Barry Friedman eds., 2002). In the introduction, the editors emphasize that independence and accountability are different sides of the same coin. Furthermore, the editors recognize that judicial independence does not have the same meaning through time.

10. *See* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981).

11. *See, e.g.*, Sanford Levinson, *Identifying "Independence"*, 86 B.U. L. REV. 1297 (2006) (providing different concepts of judicial independence and arguing that there might be too much independence); Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315 (1999) (explaining judicial independence in contemporary American history); Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565 (1996) (discussing historical reasons for judicial independence); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. Rev. 962 (2002) (arguing that independence and accountability aim at a well-functioning system of adjudication); John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41 (2002); John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353 (1999) (discussing institutional protections for judges and the judiciary and explaining interest theories of judicial independence); Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 MERCER L. REV. 835 (1995) (identifying different levels of independence, including decisional independence, personal independence, procedural independence, administrative independence; and different levels of accountability, namely internal versus external accountability); Frances Kahn Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625 (1999) (discussing institutional versus decisional independence); William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1 (making the point that the shape of the court system is too important to be left to the judiciary); Paul R. Brace & Melinda Gann Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, 59 J. POL. 1206

has been the subject of much less inquiry.[12] Accountability requires that the judiciary as a whole maintain some level of responsiveness to society, as well as a high level of professionalism and quality on the part of its members. This section discusses judicial councils as devices to ensure both independence and accountability.

A. Judicial Councils in Civil Law and Common Law Systems

Judicial councils are bodies designed to take appointment and promotion of judges away from the partisan political process, while ensuring some level of accountability. Judicial councils fall somewhere in between the polar extremes of letting judges appoint their own successors and maintain internal responsibility for judicial discipline, and the alternative of complete political control of appointments, discipline, and promotion. The first model of judicial self-selection arguably errs too far on the side of independence, while pure political control may make judges too accountable, in the sense that they will consider the preferences of their political principals in the course of deciding specific cases. As an intermediate body between politicians and judges, the judicial council provides a potential device to enhance both accountability and independence. There are a wide variety of models of councils, in which the composition and competences reflect the concern about the judiciary in a specific context.

One possible model is that pursued by France when the first High Council of the Judiciary (*Conseil Superieur de la Magistrature*) was established in 1946, in the aftermath of the Vichy regime and World War II.[13] This Council, which has been maintained under Article 64 of the 1958 French Constitution, was in charge of managing judicial personnel, but only a minority of members were themselves magistrates elected directly by fellow judges.[14] In 1958, Italy became the first country to create a judicial council (*Consiglio Superiore della Magistratura*) designed to completely remove the entire judiciary from political control, a model that served subsequently for other judiciaries.[15] Spain and Portugal have slightly different models, introduced after the fall of their dictator-

(1997). *See also* BURBANK & FRIEDMAN, *supra* note 9.

12. *See, e.g.*, Francesco Contini & Richard Mohr, *Reconciling Independence and Accountability in Judicial Systems*, 3 UTRECHT L. REV. 26 (2007) (Neth.); Wim Voermans, *Judicial Transparency Furthering Public Accountability for New Judiciaries*, 3 UTRECHT L. REV. 148 (2007) (Neth.); Daniela Piana, *From Judicial Independence to Judicial Accountabilities* (unpublished manuscript, on file with authors) (arguing that political insulation does not preclude accountability to other institutions that could be social in nature).

13. Although we characterize France and Italy as establishing the modern judicial council, a precursor for judicial councils is the use of formal nominations committees composed of various governmental officials. *See, e.g.*, Albanian Constitution art. 136, 147 (judicial nominations from a special committee of judges and other governmental officials).

14. *See* Cheryl Thomas, *Judicial Appointments in Continental Europe*, Lord Chancellor's Department, Research Series 6/97, 1997. Further discussion in section IV.C. *infra*.

15. *See* Thomas, *supra* note 14. For further discussion, see *infra* Section IV.D.

ships in the mid 1970s, in which judges constitute a significant proportion of the members.[16] These councils have final decision-making in all cases of promotion, tenure, and removal. Judicial salaries are also technically within their authority but usually tempered by the department in charge of the budget (typically the Ministry of Finance). The power of high-ranking magistrates has been dramatically reduced in most of these countries (as a consequence of the appointment of junior-ranking judges to the judicial council), and strong unions or judicial associations have emerged.[17]

The French-Italian model has been exported to Latin America and other developing countries.[18] Indeed, the World Bank and other multilateral donor agencies have made judicial councils part of the standard package of institutions associated with judicial reform and rule of law programming.[19]

The motivating concern for adoption of councils in the French-Italian tradition was ensuring independence of the judiciary after periods of undemocratic rule. To entrench judicial independence, most of these countries enshrined the judicial council in their constitution. Independence, however, is a complex and multifaceted phenomenon. Even though judges may be independent from political control, they may become dependent on other forces, such as senior judges in a judicial hierarchy, with just as much potential to distort individual decision-making as more conventional political influence.[20] In civil law countries, in particular, a large proportion of judges are recruited directly from law school using some form of public examination, with no or limited requirements of previous professional experience.[21] This model emphasizes socialization

16. *See* Carlo Guarnieri, *Judicial Independence in Latin Countries of Western Europe*, *in* JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 111 (Peter H. Russell & David M. O'Brien eds., 2001).

17. A good summary can be found in THIERRY RENOUX, LES CONSEILS SUPERIEURS DE LA MAGISTRATURE EN EUROPE 320 (2000). *See* Willem de Haan, Jos Silvis & Philip A. Thomas, *Radical French Judges: Syndicat de la Magistrature*, 16 J.L. & SOC'Y 477 (1989), for an explanation of the role of the unionization of the judiciary in France. *See also infra* Sections IV.C., IV.D.

18. *See e.g.*, Rebecca Bill Chávez, *The Appointment and Removal Process for Judges in Argentina: The Role of Judicial Councils and Impeachment Juries in Promoting Judicial Independence*, 49 LATIN AM. POL. & SOC'Y 33 (2007) (Arg.).

19. *See* Linn Hammergren, *Do Judicial Councils Further Judicial Reform? Lessons from Latin America* (Carnegie Endowment Rule of Law Series, Working Paper No. 28, 2002). *See also* Pedro C. Magalhães, *The Politics of Judicial Reform in Eastern Europe*, 32 COMP. POL. 43 (1999) (discussing the judicial institutional design in Bulgaria, Hungary and Poland and how it relates to the bargaining process between the different political actors); Peter H. Solomon, Jr., *Putin's Judicial Reform: Making Judges Accountable as well as Independent*, 11 E. EUR. CONST. REV. 117 (2002) (discussing the reforms to the Judicial Qualification Commission); Lauren Castaldi, *Judicial Independence Threatened in Venezuela: The Removal of Venezuelan Judges and the Complications of Rule of Law Reform*, 37 GEO. J. INT'L L. 477 (2005) (discussing the current situation in Venezuela).

20. *See* Owen M. Fiss, *The Right Degree of Independence*, *in* TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY 55 (Irwin P. Stotzky ed., 1993) (focusing on independence within the judicial hierarchy).

21. Nicholas L. Georgakopoulos, *Discretion in the Career and Recognition Judiciary*, 7 CHI. L. SCH. ROUNDTABLE 205 (2000).

within the ranks of the judicial profession and creates the potential for institutional pressures on judges to decide individual cases in ways that are at odds with their own consciences or reading of the law. Perhaps because of concerns over this structural problem, external accountability emerged at some point as a secondary goal of councils.

For example, some civil law countries, such as Germany, Austria, and the Netherlands, have judicial councils with fewer competences than in the French-Italian model.[22] These councils are limited to playing a role in selection (rather than promotion or discipline) of judges or are heavily influenced by regional and federal governments. The political impact of these councils on the judiciary has been less clear than in the four European countries utilizing the French-Italian model.[23]

The councils in civil law jurisdictions vary in their relationship with the Supreme Court. In some countries, such as Costa Rica and Austria, the judicial council is a subordinate organ of the Supreme Court tasked with judicial management.[24] In other countries, judicial councils are independent bodies with constitutional status.[25] Further, in some countries they govern the entire judiciary, while in others councils only govern lower courts.[26]

Recruitment of the judiciary in common law countries has traditionally drawn from more senior lawyers, who have a wider range of previous experience and socialization than do judges in the civil law jurisdictions.[27] These judiciaries are sometimes characterized as "recognition" judiciaries, because judges are appointed in recognition of their professional accomplishments.[28] Therefore, external accountability has been a major motivating factor in shaping the design of judicial appointment systems. Compared to civil law judges, common law judges have relatively few opportunities for advancement, and hence there is less capacity for political authorities to use the promise of higher office to influence judicial decision-making. Accordingly, common law appointment processes have received serious attention, since judges are fairly immune from pressures once appointed. In the UK, the Constitutional Reform Act 2005 created the Judicial Appointments Commission, which is responsible for

22. *See infra* Section IV.F on the Netherlands and recent reforms.

23. *See* Thomas, *supra* note 14.

24. *See infra* Section IV.B. *See also* Hammergren, *supra* note 19, at 10 (Costa Rica). On Austria, see EXTERNAL RELATIONS, FEDERAL MINISTRY OF JUSTICE, THE AUSTRIAN JUDICIAL SYSTEM (2006) (judges are appointed by the Federal Ministry of Justice by recommendation of the president of a court of appeal).

25. Data on file from Comparative Constitutions Project.

26. Hammergren, *supra* note 19, at 13 (Colombia).

27. Georgakopoulos, *supra* note 21. Debate in common law countries tends to focus on the merits of the appointees and diversity concerns. *See, e.g.*, Kate Malleson, *Selecting Judges in the Era of Devolution and Human Rights*, *in* BUILDING THE UK'S NEW SUPREME COURT: NATIONAL AND COMPARATIVE PERSPECTIVES 295 (Andrew Le Sueur ed., 2004).

28. *See* Georgakopoulos, *supra* note 21.

appointments based solely on merit.[29] There remains, however, a good deal of debate regarding the compatibility of the merit principle with other functionalist goals, such as affirmative action or promoting diversity of certain attributes across the judiciary.[30] The advantages of a Judicial Appointment Commission have also been at the heart of the debate in New Zealand and in Australia, where judicial appointments are still in the competence of the Attorney General. Currently, judicial appointment protocols have been developed with the aim of enhancing independence and external accountability (by including mandatory consultation with several office holders).[31]

Within the common law world, the case of Singapore is also noteworthy. There is a Legal Service Commission in Singapore, headed by a Registrar who reports to the Chief Justice, but the Commission's role is limited to supervising the placement of subordinate court judges and magistrates.[32] Although the Chief Justice is directly involved in judicial appointments, by recommending candidates for lower courts and consulting on appointments to the Supreme Court, this hardly guarantees independence. The Chief Justice is well paid and tends to help ensure not only high quality justice in ordinary cases but also subservience in politically charged cases, which is the core characteristic of Singapore's judiciary.[33]

B. Balancing Independence and Accountability

This brief survey illustrates that it is clearly impossible to eliminate political pressure on the judiciary. While adequate institutions might minimize the problems of a politicized judiciary and enhance judicial independence, increasing the powers and independence enjoyed by judges risks creating the opposite problem of over-judicializing public policy, since judicial decisions have an im-

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29. *See infra* Section IV.G.

30. For a discussion on the extent to which merit selection is consistent with affirmative action in the judiciary, see Kate Malleson, *Rethinking the Merit Principle in Judicial Selection*, 33 J.L. & SOC'Y 126, 127-140 (2006). *See also* Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of Appointment Method in Establishing Gender Diversity in State Supreme Courts*, 83 SOC. SCI. Q. 504 (2002) (presenting empirical evidence that appointed systems of judicial selection produce more diversity than election systems).

31. Empirical analysis is provided by Mita Bhattacharya & Russell Smyth, *The Determinants of Judicial Prestige and Influence: Some Empirical Evidence from the High Court of Australia*, 30 J. LEGAL STUD. 223 (2001) and Pushkar Maitra & Russell Smyth, *Judicial Independence, Judicial Promotion and the Enforcement of Legislative Wealth Transfers – An Empirical Study of the New Zealand High Court*, 17 EUR. J.L. & ECON. 209 (2004). *See also* John M. Williams, *Judicial Independence in Australia*, *in* JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY, *supra* note 16, at 173 (making the point that while the structural guarantees are quite robust and few attempts have made to remove judges, there are serious proposals for reforming).

32. *See* Kim Teck Kim Seah, *The Origins and Present Constitutional Position of Singapore's Legal Service Commission*, 2 SING. ACAD. L.J. 1 (1990).

33. Gordon Silverstein, *Singapore: The Exception that Proves Rules Matter*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 73 (Tom Ginsburg & Tamir Moustafa eds., 2008).

portant impact on politics and government.[34] It is our view that the periodic reforms of judicial appointments and management that we observe within and across countries reflect a dialectic tension between the need to de-politicize the judiciary and the trend toward judicializing politics. Independence is needed to provide the benefits of judicial decision-making; once given independence, judges are useful for resolving a wider range of more important disputes. As the judiciary begins to take over functions from democratic processes, however, the pressure for greater accountability mounts.

When judges have little influence over public policy and politics, concerns over independence tend to dominate, and reformers may push for a move from a politically dependent, weak judiciary to a strong, self-regulated judiciary. This shift gives rise to a judiciary that has some control over its own affairs. Frequently, though not inevitably, judges use this independence to increase their influence over public policy, perhaps because of exogenous events. However, once politics is judicialized in a significant way, pressures arise for greater political accountability. The judiciary remains strong but is subject to more oversight and control. Sometimes these pressures for more accountability can lead to assaults on judicial independence, particularly if a small group of principals is able to control the process of supervision. In such circumstances, a politically accountable, strong judiciary may revert back to a politically dependent, weak judiciary, as in a rising authoritarian regime. This dynamic framework provides a tool for understanding the various institutional adjustments observed in different countries.

Institutional configurations can be stable for long periods of time, and judiciaries need not shift their location in the framework. What we believe, however, is that there is a potential cycling among different models of judicial governance, and hence changes in the nature of the pressures that judiciaries face in particular configurations. We expect that judicial councils, in particular, will develop reforms to respond to different pressures for accountability and independence.

III.
THEORY

This section presents a theory of judicial councils drawn from the economic concept of principals and agents.[35] Judicial councils are monitoring devices designed to maintain the relationship between the principal, society, and its agents,

34. Stephen Burbank, *Judicial Independence, Judicial Accountability and Interbranch Relations* (U. Pa. L. Sch., Working Paper No. 102, 2006), *available at* http://lsr.nellco.org/upenn/wps/papers/102 (arguing that judicial independence in the United States is at a tipping point because of a characterization of judicial politics as ordinary politics).

35. On principal-agent models, see Eric Posner, *Agency Models in Law and Economics*, *in* CHICAGO LECTURES ON LAW AND ECONOMICS 225 (Eric Posner ed., 2000).

the judges. But the actual incentives faced by judges depend on the particulars of the institutional setup, which varies across countries.

A. Judicial Councils as Intermediaries Between Principal and Agent

In this section, we develop a principal-agent model of judicial councils. We treat judges as the agents and society as the principal, on whose behalf the judges exercise power. The standard problem that arises in principal-agent models is produced by information asymmetry: as the agent's expertise increases, her potential effectiveness increases as well, but her accountability decreases. There is thus a risk that the agent will act in accordance with her own preferences rather than those of the principal.

The judicial council is an intermediate body analogous to regulatory agencies in the regulatory literature[36] and boards of directors in the corporate literature.[37] Just as shareholders utilize a board as a system to provide representative intermediate governance for corporations, the public may wish to set up (and pay for) a judicial council to manage judicial agents. Like a board, the council might have a representative appointment system, where different stakeholders have agents who then negotiate governance in order to minimize possible rents created by asymmetric information. The council thus serves as an intermediary-trustee whose role is both to exercise expert oversight and to filter out political influence.[38]

Generally speaking, there are two types of stockholders within the principal: a majority (the general public), which is vastly uninformed and uninterested in monitoring the judicial agents because the opportunity costs to information acquisition are high, and a very well informed minority with leverage to influence agents (interest groups that would like favorable decisions by courts, as well as lawyers). The principle of judicial independence aims to avoid possible capture by the minority and also to align the interests of the judges with those of the majority, the general public. But given the asymmetry of information between the vast majority on one hand and the minority, as well as the judges, on the other hand, an intermediate body might be necessary to limit opportunism and minimize agency costs. The judicial council serves as just such a body. Its role is to limit agency costs and reduce the likelihood that an informed minority will use the court system to its advantage vis-a-vis the vast majority of the population.

Asymmetry of information and specialization may create a new problem, however, namely the capture of the judicial council by the judiciary itself or by

36. JEAN-JACQUE LAFFONT & JEAN TIROLE, A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION (1993).

37. STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS (2002).

38. The intermediary is also, of course, an agent of the principal, whose job is to control another agent. Notice that the intermediate body is paid by the principal, the taxpayers, as in the usual economic model.

an external body that wishes to manipulate the judiciary. This is the classic question of "who guards the guardians?"[39] Therefore, periodic reforms may be required to correct deviations when a judiciary becomes either too accountable or too independent. We imagine that judicial governance requires learning by doing to some extent and that as new agency problems materialize, there may be shifts among governance structures to try to rectify them.[40]

An important point to take into account in understanding council structure is the interaction between preferences, incentives, and politicization. When appointed judges are subject to any form of political scrutiny, we should expect some alignment between the preferences of the judicial power and the political power (even if this alignment is lagged due to political cycles). In this case, we observe *ex ante* politicization, in which judges are screened for political criteria. Alternatively, we can have *ex post* politicization through pressure or corruption after the judge is appointed. Our conjecture is that a judicial council aims at controlling both, but councils may have different emphases depending on the institutional problem they face. In stable systems such as the United States, where ex post interference with judicial independence is rare and frowned upon, the screening function may be more important. On the other hand, where norms of judicial autonomy are less developed, the council may play a greater role in preventing ex post politicization.

B. Judicial Incentives

To understand why councils might be effective, we first need to understand the incentive structures of the judicial agents. Judges have preferences and a career structure that generates certain types of incentives. With respect to preferences, we should assume that judges have the same set of preferences as everybody else, as Judge Posner has argued.[41] Obviously judges, like others, care about their income. They may be more risk-averse and may care more

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39. MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION (1988) (administrative law).

40. F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in State Courts*, 33 J. LEGAL STUD. 431, 431-62 (2004).

41. Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing as Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993); Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259 (2005); Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049 (2006). *See also* Frank H. Easterbrook, *What's So Special About Judges?*, 61 U. COL. L. REV. 773 (1990); Mark Cohen, *The Motives for Judges: Empirical Evidence from Antitrust Suits*, 12 INT'L REV. L. & ECON. 13 (1992); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615 (2000); Gordon R. Foxall, *What Judges Maximize: Toward an Economic Psychology of the Judicial Utility Function*, 25 LIVERPOOL L. REV. 177 (2004); Chris Guthrie, Jeffrey J. Rachlinski and Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007). For a different perspective, see Laurence Baum, *What Judges Want: Judges' Goals and Judicial Behavior*, 47 POL. RESEARCH Q. 749 (1994) and LAURENCE BAUM, JUDGES AND THEIR AUDIENCES (2006).

about non-monetary payoffs than the average individual, and hence they select the stable, prestigious judicial career instead of the practice of law. Therefore, we expect judges to be quite sensitive to changes in prestige or social influence (judicial independence is very important here) and to shifts in risk (for example, in promotion or evaluation of performance).

To understand why an intermediate body may be a useful mechanism for controlling agents, we need to consider alternatives that might operate to restrain judicial opportunism. These alternatives include the market and direct external control by the principal. Standard market-oriented mechanisms do not work to constrain judges because judges operate in a highly-subsidized monopoly (the court system), without market discipline. While individuals can opt out of the state-provided system and use alternative dispute resolution mechanisms, such behavior is unlikely to have a significant effect on the welfare of the judiciary. Another possible mechanism is direct control by principals. Generally, however, external enforcement of constraints on judges is weak because external actors typically have trouble verifying whether judges have actually followed the law or not. Furthermore, external enforcement potentially reduces judicial independence and therefore is constrained through structural insulation of the judiciary. For these reasons, we cannot rely on external or market-oriented mechanisms to limit opportunism in the judicial system.

Judicial careers are structured differently in different parts of the world. In civil law countries, judges tend to operate in bureaucratic hierarchies and spend their entire career in the judiciary. Whoever controls advancement in this career hierarchy is thus very important. For example, in Japan, the Secretariat of the Supreme Court plays a very important role in assigning judges to different posts, and thus has a good deal of influence on performance.[42] For "recognition" judges,[43] such as those in common law systems or those appointed to constitutional courts in civil law countries, prestige among the public or with other branches of government is very important, but once selected into the judiciary, these judges have relatively few opportunities for advancement. They may therefore be less sensitive to external pressures and performance evaluations from any source, including judicial councils.[44] We expect that judicial councils

42. J. MARK RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN (2003) (documenting political manipulation of judicial career structures in Japan). *But see* David M. O'Brien & Yasuo Ohkoshi, *Stifling Judicial Independence from Within: The Japanese Judiciary*, *in* JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY, *supra* note 16, at 37 (making the point that Ramseyer and Rasmusen have misunderstood the manipulation of the judiciary in Japan as political by the ruling party when it is merely bureaucratic by the faceless General Secretariat of the court system).

43. *See* text *supra* at note 28.

44. Measuring the performance of judges has been the object of some work but is still quite underdeveloped. Whereas quantitative (workload measures) and qualitative measures (reversal rates in appeal courts) are by now largely developed, complexity is still a problem (even the use of citations is still the object of discussion). *See* Stephen J. Choi & G. Mitu Gulati, *A Tournament of Judges?*, 92 CAL. L. REV. 299 (2004); Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Su-*

in common law countries will focus on appointments rather than promotions, which are relatively rare.

C. Judicial Councils as Monitoring Devices

We believe that judicial councils should be viewed as devices to reduce agency costs in the judiciary, although we do not assert that they are necessary or sufficient bodies to accomplish this task. In this section, we describe the membership and extent to which powers are shared with other branches of government and the Supreme Court.

The council is composed of three possible agents: (i) members of the majority (laymen); (ii) members of the minority (lawyers, politicians, and law professors); and (iii) judges (who are analogous to inside directors in a corporation).[45] It is important to note that in most situations, clearly distinguishing between laymen and politicians is impossible, since they are all usually appointed by other branches of government.[46] Judges on the Council are typically appointed by the Supreme Court or by other courts, while lawyers are appointed by the law society or bar association. The council is theoretically accountable to the public, but different accountability rules will make the council more or less likely to be captured by the judiciary (which might promote professional interests) and/or minority stockholders (who might promote lobbying or minority interests).

We expect that the mechanism of appointment of judicial members in the Council will matter for outcomes. In some cases, all members of the council are appointed by the same body (for example, the Parliament); in other cases, different bodies of government intervene in the appointment process. A more heterogeneous Council will result when different bodies are involved in the appointment of the Council, either by a sequential process of nomination and confirmation (members of the council must appeal to different constituencies) or by a quota system where different bodies of government appoint a pre-defined number of members.

The size, appointment, and type of composition of judicial councils are therefore important. Even when the judges are not a numerical majority in the council, however, they might have a dominant or preponderant role. To start

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preme Court Justice: An Empirical Ranking of Judicial Performance, 78 S. CAL. L. REV. 23 (2004); Florida State University Law Review Symposium Issue on Empirical Measures of Judicial Performance, 32 FLA. ST. U. L. REV. (2005).

45. If the judges are Supreme Court judges, the council may tend to focus on the power struggle between government and Supreme Court and on maintaining a vertical hierarchy within the judiciary. However, if they are lower court judges, we should expect a relatively smaller role for the Supreme Court (which might be welcomed by the government). We have observed an increasing role of judicial associations (unions), which are motivated by the need to coordinate the interests of the junior judges to undermine the traditional vertical hierarchy.

46. In fact, laymen in many types of council are lawyers, law professors or legally educated individuals, hardly the standard example of independent laymen.

with, most members of a judicial council must rely on information provided by the judiciary itself. In addition, a judicial council does not exert direct control over the judiciary (which would hurt the independence of judiciary), but exercises a configuration of powers that mix authority and accountability. This configuration is usually complex and full of uncertainties that call for expertise by judges. Furthermore, as between judicial and non-judicial members of the council, asset specificity is asymmetric, meaning that judges may have particularly strong incentives to represent judicial interests on the council. After their service on the council, judges will return to their professional careers inside the judiciary, whereas non-judges will go back to their careers outside of the judiciary, which may or may not have any relationship with judicial management issues. Perhaps this is why we observe very little correlation between the number of judges on the council and the level of independence.[47]

D. Institutional Setup

The role and importance of the judicial council depend very much on the institutional setup in place. Depending on the preferences and empowerment of the judiciary, the monitoring activity of the council can be more or less extensive. Take performance measurement, for example. First, apart from the technicalities of devising an adequate metric to evaluate judicial performance, judges might have different reactions to measuring performance, depending on whether it is likely to affect their career structure and their risk attitudes, as well as their social influence and role in the community. Second, performance measures could reduce the influence and power of senior judges by limiting their ability and discretion to shape the judiciary for the next generation. They could also create an imbalance of power among the different actors within the council. Finally, the relevance of measuring performance might be understood to varying degrees by the other branches of government and the population in general. Therefore, transplanting particular roles of a judicial council, and ignoring local determinants, might generate unexpected results. Furthermore, certain complex functions, such as performance evaluation, might be subject to very different understandings or interpretations depending on the institutional setup.

At the same time, demand for a judicial council is intrinsically linked to the importance and functioning of the legal system as a whole. The salience of judicial quality will be related to the judges' own powers within a given legal system. The more extensive the judges' powers, the more important it becomes to address any potential conflict between the common good and judicial incentives. The conjunction of judicial attributes, politics, and peer-pressure becomes more important as the institutional setup is more prone to change as a result of judicial

47. Garoupa & Ginsburg, *supra* note 7. *See also* Stefan Voigt, *The Economic Effects of Judicial Accountability: Cross-Country Evidence*, 25 EUR. J.L. ECON. 95 (2008) (arguing that judicial accountability explains differences across per capita income but without specifying the nature of judicial councils).

review.[48] The less important the judiciary is in a given institutional setup, the less need for achieving the appropriate balance between independence and accountability. Thus, we predict that judicial councils will have greater competences but fewer judges when judges have a good deal of power (for example, the power of judicial review of legislation). This is because there will be external demand from the public and other constituencies for monitoring of the relatively powerful judiciary. Where judges have less power, outside actors may be more accepting of a council with a majority of judges, but seek to assign it fewer competences.

IV.
CASE STUDIES

The above hypotheses suggest the need to focus on a more dynamic model of council structure. Clearly the effects are not linear. Rather, there is a complex relationship between council structure and political incentives of the various actors at the time. This section describes the operation of judicial councils in a number of different countries to determine whether our argument withstands scrutiny.

A. United States

Judicial selection in the United States has gone through several waves.[49] In the early years of the nation, legislative appointment systems dominated. In the mid-19th century, however, partisan elections were introduced in many states, in response to concerns of capture. In our framework, this shift reflected the rise of the uninformed majority within the principal, as citizens responded to concerns of capture by the minority. However, partisan elections led to their own set of problems. Rather than truly arising from the people, judicial candidates came to be controlled by party bosses.[50]

In many American states, concern over traditional methods of judicial se-

48. Among others, see INSTITUTIONAL GAMES AND THE U.S. SUPREME COURT (James R. Rogers et al. eds., 2006); Timothy Besley & A. Payne, *Judicial Accountability and Economic Policy Outcomes: Evidence from Employment Discrimination Charges* (Institute for Fiscal Studies, Working Paper W03/11, 2003); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 256 (2005); Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323 (1992); Tom Ginsburg, *Economic Analysis and the Design of Constitutional Courts*, THEORETICAL INQUIRIES IN LAW, 2002 at 3; Jonathan R. Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); Jonathan R. Macey, *Competing Economic Views of the Constitution*, 56 GEO. WASH. L. REV. 50 (1987); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157 (1999).

49. Hanssen, *supra* note 40; Goldschmidt, *supra* note 5.

50. New York faces a similar problem today, leading a judge to bring a lawsuit to allow her to run for a higher court without securing the blessing of party bosses. *See* Mark Hansen, *Questioning Conventional Behavior*, 93 A.B.A. J. 21 (Apr. 2007).

lection (either appointment by politicians or direct election by the public) led to the adoption of "Merit Commissions" to remove partisan politics from judicial appointments and base selection on merit.[51] These emerged as a model in the early 20th century, reflecting the progressive movement's belief in technocratic government. Merit Commissions can be seen as analogous to judicial councils, though their scope of activity may be more limited. Since in common law systems, the judiciary is not a "career judiciary" in the civil law sense, there is less interest in having independent commissions handle discipline, promotions, and reassignments, and thus greater emphasis is placed on initial appointments. Yet the basic institutional design—namely setting up non-partisan mixed bodies to screen and select judicial candidates—is identical to the judicial commission.

Sometimes called the "Missouri Plan" (although some assert that it was first adopted in California) or "Merit Plan," this system features a non-partisan judicial selection commission composed of judges, lawyers, and political appointees.[52] A famous 1906 speech by Roscoe Pound inspired this institution, and it is consistent with early-twentieth-century beliefs in the value of technocracy and administrative insulation from politics.[53] In some states, the Merit Commission is exclusively responsible for nominating judges, while in other states, it sends a set of candidates from which the Governor chooses appointees. Merit Plan judges are typically subject to uncontested retention elections, which judges rarely lose.[54] While American states exhibit a variety of approaches, it is clear that the merit plan has become the dominant model within the United States. As Hanssen put it, "[t]here is today a strong consensus that, of all the procedures, the merit plan best insulates the state judiciary from partisan political pressure."[55] As of 1994, 23 states used Merit Plans for initial appointments to the Supreme Court[56] with most states adopting these institutions in the 1960s and 1970s.[57]

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51. With respect to the federal judiciary, see Charles Gardner Geyh, *Customary Independence*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 9, at 160 (discussing the historical foundations of the norms against court packing, namely the Judiciary Act of 1789, the Midnight Judges Act of 1801 and its repeal in 1802, and the Roosevelt Court-Packing Plan of 1937).

52. In Missouri, the Commission has seven members: the Chief Justice, three lawyers elected by the bar from different appellate districts, and three laypersons appointed by the Governor. For an analysis, see Hanssen, *supra* note 1.

53. Roscoe Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, 20 J. AM. JUD. SOC'Y 178 (1937).

54. Peter D. Webster, *Selection and Retention of Judges: Is There One Best Method?*, 23 FLA. ST. U. L. REV. 1 (1995); Reddick, *supra* note 4, at 10 (noting only 33 judges lost retention elections in the entire United States between 1942 and 1978).

55. Hanssen, *supra* note 40, at 452.

56. Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 20 (1994).

57. Hanssen, *supra* note 40.

A general assumption in the literature is that Merit Plan systems serve to expand judicial independence.[58] For example, Hanssen tests the effect of partisan division on appointment and retention systems, assuming that Merit Plan implementation correlates with independence.[59] He finds that, broadly speaking, states using Merit Plans tend to have higher levels of political competition (and hence more presumed demand for judicial independence) than those using partisan elections.[60] Hanssen also finds that states switch to Merit Plans when they have increased party competition and policy differences between parties. This is consistent with literature that emphasizes the role of partisan competition in incentivizing judicial independence.[61]

Nevertheless, we know of no study that has demonstrated an actual improvement in judicial independence or quality after the adoption of a Merit Plan, and the actual impact on judicial quality is debatable.[62] In a comprehensive review of the social-scientific literature, Reddick concludes that there is little support for "proponents' claims that merit selection insulates judicial selection from political forces, makes judges accountable to the public, and identifies judges who are substantially different from judges chosen through other systems."[63]

We view the merit plan as a device to mediate between independence and accountability in accordance with our theory. As a common law country with judges who tend to be appointed relatively late in life, the United States has little need for independent bodies to engage in promotion of judges. Thus, the commissions play a relatively limited role, but one that focuses on the crucial locus of partisan pressure, namely the appointment process. This illustrates the importance of understanding institutional variation in conditioning demand for the judicial council model.

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58. *See, e.g.*, Reddick, *supra* note 4 (reviewing literature).

59. Hanssen, *supra* note 1, at 721.

60. For at least one indicator, both these methods have less political competition on some indicators than the residual category of "other" appointment methods (such as legislative or gubernatorial appointment). *See id.* at 720 ("In 95 percent of partisan election states the same party controlled both houses of the legislature, versus in 87 percent of merit plan states and 81 percent of other states.").

61. J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts*, 23 J. LEG. STUD. 721 (1994). *See also* Tom Ginsburg, JUDICIAL REVIEW IN NEW DEMOCRACIES (2003); Mathew Stephenson, *When the Devil Turns...: The Political Foundations of Independent Judicial Review* 32 J. Leg. Stud. 59 (2003); Lee Epstein, Jack Knight & Olga Shvestova, *Selecting Selection Systems*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 9, at 191 (arguing that selection systems are determined by political uncertainty and risk; empirical evidence seems to confirm that as political uncertainty has decreased, more accountability has expanded as the main goal of judicial selection).

62. Webster, *supra* note 54; Henry R. Glick, *The Promise and Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509 (1978). *See also* Choi, Gulati & Posner, *supra* note 6; *infra* Section VI.A.

63. Reddick, *supra* note 4, at 744.

B. Brazil

The Brazilian judiciary has been traditionally decentralized in a model greatly influenced by the United States.[64] Although decentralization has serious administrative and financial advantages, it has also created serious drawbacks in terms of effective disciplinary action and accountability of court administration (including nepotism in court staff appointments).[65]

Brazil's first judicial council was the National Council of the Magistracy (*Conselho Nacional da Magistratura*, or CNM), which was created through constitutional amendment in 1977[66] and established in 1979. This council had seven judges chosen by the Federal Supreme Court out of its members. The primary function of the council was purely disciplinary, and it had no budget or administrative functions. The constitutional amendment was quite limited in empowering the council. At the time, Brazil was under a military dictatorship, and though it gave some formal powers to judges, the council was likely created to assert greater control over the judiciary.[67] The shift toward the CNM meant that judges had some formal control over their affairs, but in law and in practice this was quite limited. Rather, using the Supreme Court as a proxy, the military was able to restrain lower court judges while preserving nominal judicial autonomy.[68] The CNM served as an intermediate body to facilitate control of agents by the principal.

In 1985, the dictatorship fell. With the passage of the Brazilian Constitution of 1988, the CNM was eliminated, leaving judges self-governing and subject to virtually no oversight. Constitutional guarantees of independence went into effect. In addition, the complexity of the 1988 Constitution delegated many types of controversies to the judiciary, including the so-called "constitutionalization" of private law through recognition of the social functions of property and contracts. While judges had formally enjoyed the power of constitutional review even under the former constitution, the actual exercise of the power was highly constrained. The 1988 Constitution, by constitutionalizing many aspects of public life and maintaining constitutional review, provided an opportunity structure for a major increase in judicial power.[69]

Judges utilized these new opportunities to expand their influence. In time, the combination of little oversight and expanded scope of activity led to increasingly judicialized politics.[70] This naturally produced demands for greater ac-

64. See the discussion by Maria Angela Jardim de Santa Cruz Oliveira in *Reforming the Brazilian Supreme Federal Court: A Comparative Approach*, 5 WASH. U. GLOBAL STUDIES L. REV. 99 (2006).

65. *Id.*

66. Emenda Constitucional N.7, art. 120 (Braz.).

67. *See* Oliveira, *supra* note 64.

68. *Id.*

69. *Id.*

70. Rogério B. Arantes, *Constitutionalism, the Expansion of Justice and the Judicialization of*

countability. Many academics and even judges criticized the politicization of the judiciary in Brazil. There was, however, great controversy over the type of mechanism that should be used to ensure accountability. Some associated the judicial council with the dictatorship; indeed, this was likely the reason for its abolition in 1988.[71]

A 2004 constitutional amendment introduced a new judicial council (*Conselho Nacional de Justiça*) with a very different composition from its predecessor: nine judges, two prosecutors, two lawyers, and two laymen appointed by the legislature.[72] The competences of the new council include not only disciplinary action, as with the previous CNM, but also oversight of the budget and administrative matters (for example, providing statistics about the workload and productivity of the judiciary).[73]

The politics of the adoption are telling. It was initially proposed by a member of the then-opposition in the year 2000. The proposal did not see the light of day, however, until the election of Lula de Silva to the presidency in 2003. Incoming politicians may feel the need to impose greater discipline on the judiciary, particularly if it is seen as being aligned with their opponents; more generally, changes in power can lead to efforts to institutionalize judicial independence so as to provide insurance for those who are likely to lose in future rounds.[74] One can interpret the creation of the Brazilian judicial council from either perspective. The new left coalition may have believed that the unconstrained judiciary was more likely to support their political opponents and thus used the council to discipline the judiciary. Alternatively, the coalition may have wanted to institutionalize an *accountable* independent judiciary to make it more viable for the long term, since a system of alternating parties seemed to be developing.

The Brazilian story illustrates that there is no *necessary* connection between judicial councils and judicial independence. Though formally designed to provide the appearance of independence, the 1977 version of the judicial council did little to constrain potential military interference with the courts. Indeed, judicial independence was in one sense greatest between 1988 and 2004, when judges enjoyed a vastly expanded domain of governance but had little oversight. The recent reforms are a promise of a strong but politically accountable judiciary. It remains to be seen, of course, whether this materializes.

Politics in Brazil, *in* THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 231 (Rachel Sieder et al. eds., 2005).

71. *See* Oliveira, *supra* note 64.

72. Emenda Constitucional N. 45, art. 103B (Braz.).

73. *Id.*

74. GINSBURG, *supra* note 61; Ramseyer, *supra* note 1.

C. Israel

In Israel, judges are appointed by a mixed council established under the Basic Law on the Judiciary, passed in 1984.[75] Under that system, new justices are chosen by a nine-member panel, which includes two government ministers, two members of the Knesset, two Bar Association representatives, and three sitting justices, including the court president.[76] The judges, although a minority, dominate the process in practice, and a new justice has never been chosen over the objection of sitting justices.[77] This is the paradigm of a self-regulating, strong judiciary, even though judges are not the majority on the Council. Professor Ran Hirschl convincingly argues that the creation of the entrenched judiciary, like other steps taken in the 1990s to constitutionalize certain policies, reflected the desire of a powerful but declining "hegemonic" group to ensure that their policies would survive their electoral losses.[78] The inclusion in this set of reforms of a judicial council to enhance independence fits our overall story of councils as tools for increased judicial autonomy.

As our framework suggests, the power of the judiciary has led to calls for greater accountability. Judicial activism by the Supreme Court under recently retired President Aharon Barak has prompted fierce debate over whether the system needs revision.[79] Observers have noted increasing judicialization since the late 1980s.[80] In 2000, Israel created a committee to revisit the system of appointing judges, but it proposed only modest changes, such as making the nominations more transparent.[81] Many believe that the Israeli Supreme Court has been too activist, and if this trend continues, we anticipate renewed calls for structural reforms to rein in the judiciary.[82] Making the council a stronger body,

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75. Basic Law: Judicature §§ 1-24. This replaced the Judges Act (1953) as the primary statute governing judicial appointments.

76. *Id.* at § 4.

77. Levinson, *supra* note 11, at 1306; Eli M. Salzberger, *Judicial Appointments and Promotions in Israel: Constitution, Law and Politics*, *in* APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER, *supra* note 2, at 241, 248. Salzberger believes that the crucial factor is the majority of jurists on the committee and the majority of judges among the jurists.

78. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTION (2004).

79. Salzberger, *supra* note 77 at 242, 249. Salzberger characterizes Barak as shifting the court from a formalist conception of law to a more values-based jurisprudence.

80. Shimon Shetreet, *The Critical Challenge of Judicial Independence in Israel*, *in* JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY, *supra* note 16, at 233 (pointing to changes in the rules of justiciability and standing, judges leading commissions of inquiry into corruption, administration, police acts, oil drilling operations, and the judicial and legal consequences of security considerations).

81. Salzberger, *supra* note 77, at 252-53.

82. Binyamin Blum, *Note: Doctrines Without Borders: The "New" Israeli Exclusionary Rule and the Dangers of Legal Transplantation*, 60 STANFORD L. REV. 2131, 2164 (2008); Amos N. Guiora & Erin M. Page, *Going Toe to Toe: President Barak's and Chief Justice Rehnquist's Theories of Judicial Activism*, 29 HASTINGS INT'L & COMP. L. REV. 51 (2005).

with more autonomy from the judiciary, would be a first step.

D. France

The French approach to the organization of judicial councils has been identified by many as a role model.[83] The French judicial council, *Conseil Superieur de la Magistrature* (CSM), was created after World War II in 1946, when the Fourth Republic Constitution established a council headed by the President of the Republic with the Minister of Justice as its vice-president.[84] The creation of the Fifth Republic reinforced the power of the President.[85] The Constitution, adopted by referendum, led to some reforms in the judicial council, namely in terms of the composition of its members. The President of the Republic and Minister of Justice remained the president and vice-president of the council, respectively, and nine members were to be appointed by the President.[86] Until the 1990s, the powers of the council were basically limited to the nomination of high level magistrates, and the council was influenced by the President of the Republic and by senior judges. The senior judges played a very significant role in determining the careers of junior judges. By the early 1990s, the judicial council was facing serious criticism for being dominated by the interests of the executive and for excluding junior judges.[87]

The Constitutional Reform (*Loi Constitutionelle*) in 1993 and Constitutional Amendment (*Loi Organique*) in 1994 brought changes in terms of membership, method of appointment, powers, and operating procedures of the council. Among the principle changes were the election of magistrate members of the council; the creation of two "formations" or committees, one with jurisdiction over the judges (*siège*)[88] and the other over public prosecutors (*parquet*); the appointment of four members common to both formations by the "high authorities" of the State;[89] the election of the other 12 members (six on each for-

83. *See* Dories Marie Provine & Antoine Garapon, *The Selection of Judges in France: Searching for a New Legitimacy*, *in* APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER, *supra* note 77, at 176. *See also* J. Bell, *Principles and Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757 (1988).

84. Six members were elected by the National Assembly, four magistrates chosen by their peers and two members appointed from the judiciary by the President of the Republic.

85. This is the current republican constitution, which replaced a parliamentary government by a semi-presidential system. In the Fifth Republic, most of the traditional powers of the Minister of Justice were reinstated.

86. These members could be appointed directly by the President of the Republic (two qualified prominent figures), or by nomination of the officers of the *Cour de Cassation,* the French Supreme Court for civil and criminal cases (six members) and the General Assembly of the *Conseil d'État*, the French Supreme Court for administrative justice (a *Conseiller* appointed by the *Conseil d'État*).

87. *See* Doris Marie Provine, *Courts in the Political Process in France*, *in* COURTS, LAW AND POLITICS IN COMPARATIVE PERSPECTIVE 177, 203 (Herbert Jacob et al. eds., 1996).

88. The French Constitution grants the judges a status that guarantees their independence and security of tenure.

89. These are the President of the Republic, the Presidents of the two Parliamentary Chambers

mation) by the judiciary; and the allocation of new competences related to the nomination of Presidents of the *Tribunaux de Grande Instance.* Although the French Constitution refers to the existence of a judicial council and its composition, this body is covered mainly by ordinary legislation.[90]

The reforms in the 1990s were clearly driven by political events that have empowered the judiciary. Generally, the Fifth Republic had maintained the traditional principles of the French judiciary, namely the subordination of the judiciary to the executive and the legislature (the judiciary was not considered a power but a mere authority) and individual and collective judicial self-restraint (characterized by docile compliance with the doctrines of state supremacy and political sovereignty). However, there were some cases of conflict in the late 1960s and 1970s.[91] The consolidation of judicial review by the Constitutional Council in the mid-1970s had a major and enduring impact. The sharp increase in litigation (even administrative), helped by the criminalization of many activities (extending the scope of application of the European Convention of Human Rights), increased the influence of the French judiciary.[92]

Several political scandals gave the judiciary an important influence over politics. France, lacking a history of well-known famous judges, was now faced with a new kind of celebrity.[93] Judges who were motivated and willing to investigate corruption scandals and to confront political pressures became heroes of sorts.[94] It is clear, nevertheless, that many of these affairs were pursued by individual judges, while the French judiciary as a whole remains very self-restrained.[95]

It is possible that the *cohabitations*[96] in France have weakened the execu-

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(the Senate and the National Assembly) and the General Assembly of the *Conseil d'Etat.*

90. According to the French Constitution, there must be ordinary legislation regulating the functioning of the Council. *See* Law No. 94-100 of Feb. 5, 1994, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Feb. 8, 1994, p. 2146; CC Decision No. 93-337 DC, Jan. 27, 1994, J.O. 1776; Decree No. 94-199 of Mar. 9, 1994, J.O., Mar. 10, 1994, p. 3779.

91. *See* Vincent Wright, *The Fifth Republic: From the* Droit de l'État *to the* État de droit*?*, W. EUR. POL., Oct. 1999, at 92 (reporting several famous scandals that generated serious clashes between the French government and the judiciary, including the Ben Barka affair, the murder of the Prince of Broglie in 1977, the suicide of the Labor Minister in 1979, and the famous *Canard Enchaîné* affair).

92. ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE (1992) (explaining that the process of empowerment of the French judiciary started in the early 1970s).

93. *See* Provine, *supra* note 87, at 204.

94. *Id.* (comparing famous American and French judges).

95. *See* Provine & Garapon, *supra* note 83, at 205.

96. France was ruled by right-wing administrations for more than 20 years. François Mitterrand became the first elected Socialist President of France in 1981, but after the loss of his party's majority in the French National Assembly in 1986, he had to live in *cohabitation* with the conservative government of Jacques Chirac. In the legislative elections of 1993, due to economic recession, consecutive scandals, and divisions on the left, Edouard Balladur became Prime-Minister. This gave rise to the second *cohabitation* of Mitterrand's presidency. Jacques Chirac became President in 1995

tive, as the powers of the Minister of Justice have been reduced in relation to the judiciary and the Council's powers have increased.[97] French politicians, however, retain a good deal of influence over the judiciary, especially compared to their counterparts in Spain and Italy.[98] On several occasions, different Ministers of Justice have come into conflict with the judiciary "when they have tried to hush up 'affairs' linked to their respective parties."[99] As the political system became more competitive in the 1980s and early 1990s, pressure built for judicial reforms that assured more independence. Nevertheless, the involvement of high profile politicians in scandals and the increasing prominence of judges and judicial review have initiated a debate about the lack of external accountability of the judiciary. According to Valéry Turcey, a member of the CSM, the increasingly prominent role of the judiciary in French society was reflected in large debates about the role of the CSM in particular.[100] The long French historical tradition of hostility to an independent and powerful judicial branch no doubt played a role in keeping France from shifting to full judicialization of public policies, and hence led to increased control over judicial behavior.[101]

E. Italy

Although it had been approved after World War II and envisaged in the Italian Constitution of 1948,[102] the *Consiglio Superiore della Magistratura* (CSM) was not officially created until 1958 and fully operational until 1959.[103] The Constitution defines the existence, composition, and tasks of the CSM, but it also states that rules governing the judiciary and the judges are laid out by ordinary law.[104] According to the Italian Constitution, the Council is in charge of

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and replaced Balladur with Alain Juppé. The third *cohabitation* started in 1997, when the President dissolved the Assembly and Lionel Jospin became Prime-Minister, constraining Chirac's political influence.

97. Thomas, *supra* note 14.

98. *See* Véronique Pujas & Martin Rhodes, *Party Finance and Political Scandals in Italy, Spain and France*, W. EUR. POL., July 1999, at 41 (explaining political corruption in Italy, Spain and France and the role of the judiciary; in the French case, looking at the accumulated and distributed kickbacks during the Gaullism and the Socialist governments).

99. *See id.* at 59.

100. Valéry Turcey, *Le Conseil Superieur de la Magistrature Français: Bilan et Perspectives*, 75 REVISTA DEL PODER JUDICIAL 539 (2004).

101. The French antipathy for a powerful and activist judiciary is discussed by Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 67 N.Y.U. L. REV. 363 (1982); Michael H. Davis, *The Law/Politics Distinction, the French Conseil Constitutionnel and the U.S. Supreme Court*, 34 AM. J. COMP. L. 45 (1986); STONE, *supra* note 92.

102. The Italian Constitution came into force in January 1948.

103. Law No. 195 of Mar. 24, 1958, Gazz. Uff., Mar. 27, 1958. *See generally* Mary L. Volcansek, *Judicial Selection in Italy: A Civil Service Model with Partisan Results*, *in* APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER, *supra* note 77, at 159.

104. Law No. 195 of Mar. 24, 1958, reformed by Law No. 44 of Mar. 28, 2002, Gazz. Uff., Mar. 29, 2002, sets the composition and functioning of the CSM.

the employment, assignment, transfer, promotion and disciplining of judges.[105] The Constitution pays special attention to the autonomy and independence of the judiciary, in reaction to executive dominance during the fascist period. The Italian judicial system is notable for its near-absolute independence, in which the CSM controls virtually all aspects of judicial appointment and the conditions of the judicial career.[106] The balance of power within the CSM is clearly in the hands of the judiciary, and as we explain below, because the internal hierarchy of the judiciary has largely been undermined, all decisions on the status of magistrates are made by the CSM.

The Italian story is one in which judges gradually dismantled the classical hierarchical structure of the civil law judiciary. Beginning in the 1960s, judges formed unions, demanding better conditions and freedom from constraints imposed by higher levels of the judiciary. This gradually led to a removal of hierarchical controls. Although in theory the CSM was set up to ensure a certain level of consistency within the judiciary, the quality of judges varied widely. Apparently, the CSM's professional evaluations of the judges were of little significance because they were always positive, and promotions almost never depended on vacancies.[107] The dismantling of the traditional hierarchy was reinforced by several reforms that took place between 1963 and 1979.[108] Between 1979 and 1992, the role of the CSM was consolidated, with the unions assuming an increasingly important role.[109] Judicial investigations into several scandals involving businessmen, politicians, and bureaucrats marked the period from 1992 to 1997, raising questions about the accountability of judicial powers.[110]

Public debates began to grow, centered on the appointment of judges and the organization of the judiciary, with the aim of preventing runaway judges from conducting over-zealous prosecutions. As a result, the composition of the Council was altered in 2002. The total number of members was reduced to 24

105. Since administrative jurisdiction is assigned to bodies separated from the ordinary courts, there is also a council for administrative judges, the *Consiglio di Presidenza della Magistratura Amministrativa.*

106. *See* Thomas, *supra* note 14; Levinson, *supra* note 11 (stating that the Italian system exhibits a maximalist notion of judicial independence).

107. Guarnieri, *supra* note 16, at 116-17.

108. *Id.*

109. *Id.* If we refer to the role of the judicial associations, there are four that are crucial in elections to the CSM. Since 1990, no judicial representatives to the CSM have been elected without the backing of one of the following groups (from left to right on the political spectrum): *Magistratura democratica*; *Movimento per la giustizia*; *Unita per la Constitutzione*; *Magistratura indipendente.* There is also another association, *Articolo 3-I Ghibellini*, but it has less influence. These five associations comprise the *Associazione Nazionale Magistrati* (ANM).

110. Patrizia Pederzoli, *The Reform of the Judiciary, in* ITALIAN POLITICS: QUO VADIS? 153 (Carlo Guarnieri & James L. Newell eds., 2005); David Nelken, *The Judges and Political Corruption in Italy, in* THE CORRUPTION OF POLITICS AND THE POLITICS OF CORRUPTION 95-112 (Michael Levi & David Nelken eds., 1996).

from 33. In addition to 16 ordinary judges and prosecutors chosen from various levels in the hierarchy, eight university law professors and lawyers with a minimum of 15 years experience in the legal profession were appointed by the Italian Parliament.[111]

The Italian case is similar to the French case, although the Italian Council is more dependent on the executive, with narrower competences, and reflects relatively slower decline of the influence of judicial hierarchy. Both fit well into our dynamic model, which first predicts excessive politicization as a result of granting extensive independence to the judicial power and next predicts that serious accountability issues will be raised once judicialization of party politics becomes notable (in both Italy and France, due mostly to political scandals). New judges with media attention (Garzon in Spain, Jean-Pierre in France, and Di Pietro in Italy) have pushed judicialization of politics as never seen before in these countries.[112] Thus, in the immediate future, the problem will be the extent to which the judicial agenda is sustainable once it does not coincide with the media agenda.[113]

F. The Netherlands

The Netherlands' model has differed from that of France and Italy. The government has recently introduced important reforms to ensure more transparency and accountability, but these did not result from high profile political scandals. Historically, the Dutch judiciary has been very restrained; judicial review doctrines in the Netherlands were similar to the British principle of Parliamentary sovereignty. The 1956 constitutional reform paved the way for more judicial activism. The purpose of this reform was to accommodate the developments in European Economic Community law at the time, and the consequences were far-reaching. As a result, the main source of judicial activism has been the enforcement of the European Convention on Human Rights.[114]

The selection of judges in the Netherlands combines the appointment system typical of common and civil law: half of the judges are young university graduates and the other half experienced members of the legal profession.[115] The Ministry of Justice shares the power of selecting the members of the judicial selection boards with both the judiciary and the legislature.[116]

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111. Guarnieri, *supra* note 16, at 116-117.

112. *See id.* at 126.

113. *See id.* at 110.

114. *See* TIM KOOPMANS, COURTS AND POLITICAL INSTITUTIONS: A COMPARATIVE VIEW 76-84 (2003) (describing the growth in power of the Dutch judiciary).

115. Thomas, *supra* note 14.

116. Also note that the existence of the Dutch Association of the Judiciary, *Nederlandse Vereniging voor Rechtspraak.* It defines itself as "the independent trade association and union of judges and public prosecutors." The NVvR advises the Ministry of Justice and participates in international organizations, and at the end of 2004, it had 3244 members.

The judicial system in the Netherlands was substantially reformed in January 2002. A significant change was the creation of the Council for the Judiciary (*Raad voor de Rechtspraak*),[117] a committee primarily responsible for organizing and financing the Dutch Judiciary. However, these roles of the Council are limited by the Dutch Supreme Court (*Hoge Raad*) and the Administrative Jurisdiction Division of the Council of State (*Afdeling Bestuursrechtspraak Raad van State*). And while the Council has only five members, it maintains an office to assist it in its activities that employs around 135 people.[118] The acts of the Council are not subject to any control. The Council was granted certain administrative powers previously in the hands of the Ministry of Justice, in an effort to reinforce the independence of judiciary authority with respect to the legislature, the Parliament, and the Government.[119]

The Dutch case is a good example of a judicial system in which no serious concerns about excessive politicization have arisen, and yet, certain reforms have sought to introduce more accountability and better allocation of resources.

G. The United Kingdom

In the United Kingdom, the Act of Settlement 1701[120] confirmed the independence of the judiciary, and since then, strong norms of judicial immunity have made the removal of judges quite difficult. However, appointments remained in the hands of the Lord Chancellor.[121] The traditional view was that the Lord Chancellor represented the judiciary in the government and the government in the judiciary, and hence was a unique office well placed to represent the view of each side.[122] Gradually, though, the Lord Chancellor's position became an exclusively political office. The emphasis in judicial selection was increasingly on professional experience; few judges appointed to English higher courts had any political experience.[123] Although the independence of the English judi-

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117. The creation of the Council for the Judiciary followed the Leemhuis Commission's advice to the Minister of Justice in the 1998 report *Updating the Administration of Justice*.

118. Three members come from the judiciary and two from senior positions at a government department.

119. *See* MINISTRY OF THE INTERIOR AND KINGDOM RELATIONS, THE STATE OF OUR DEMOCRACY (2006).

120. Act of Settlement, 12 & 13 W. & M. 3, c. 2. (1700) (Eng.).

121. For example, Robert Stevens in his book mentions several important episodes of political interference with the judiciary (including the right of the Crown not to reappoint judges on the change of a monarch) but notes the declining role of the judiciary until the 1960s. He argues that the development of high formalism that protected the English judiciary from possible political interference made the judiciary increasingly irrelevant. *See* ROBERT STEVENS, THE ENGLISH JUDGES: THEIR ROLE IN THE CHANGING CONSTITUTION 1-29 (2005).

122. *See* Johan Steyn, *The Case for a Supreme Court*, 118 LAW Q. REV. 382 (2002) (finding unconvincing the argument in favor of maintaining this office simply because, in practice, the Lord Chancellor delegates judicial business to the Law Lords).

123. *See* Herbert M. Kritzer, *Courts, Justice and Politics in England*, *in* COURTS, LAW AND POLITICS IN COMPARATIVE PERSPECTIVE, *supra* note 87, at 81, 90-91. Less than 13% had parlia-

ciary was not perceived to be significantly affected by this arrangement, some Lord Chancellors have been seriously criticized in the press for having policies that were too politically oriented.[124] At the same time, infrequently but in important legislative discussions, the senior judiciary sitting at the House of Lords participated in lawmaking, and so the roles of legislator and judge were combined.[125]

The English Judiciary was never perceived to be a separate branch of government in the American sense.[126] Furthermore, a system dependent on the Lord Chancellor created a unified and hierarchical judiciary. Such structure did not promote diversity of opinions, since someone who did not conform to the views of the establishment was not likely to be chosen by the Lord Chancellor.[127]

The English judiciary's increasing importance reflected changes in the political environment after the 1960s, including the expansion of the welfare state, the Labor governments,[128] the creation of the Industrial Relations Court by Ed-

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mentary experience in the 80s; between 1832 and 1906, it was 58%.

124. STEVENS, *supra* note 121, at 30-61, 100-194, discusses the relationship of particular Lord Chancellors to politicization, arguing that Lord Kilmuir (1954-1962) represented the first important shift (he was a man of the traditionalist right of the Tories who opposed the abolishment of the death penalty); that Lord Gardiner (Lord Chancellor with Wilson's Labor governments from 1964 to 1970) served as the greatest reformist by advancing the Labor's agenda; and that Lord Hailsham (Lord Chancellor with Edward Heath from 1970 to 1974 and with Mrs. Thatcher's government from 1979 to 1987) marked the second important shift in politicization (in part through his controversial appointments to the bench), followed actively by Lord Mackay (Lord Chancellor with Mrs. Thatcher's government from 1987 to 1992 and with Major's government until 1997), Lord Irvine (Lord Chancellor with Blair's government from 1997 to 2003), and Lord Falconer (Lord Chancellor with Blair's government from 2003 to 2007). Stevens' accounting leaves the impression of an increasing politicization of the role of Lord Chancellor. A similar thesis is presented by Steyn, *supra* note 122, who argues that the vast increase in the nature and extent of the Lord Chancellor's executive responsibilities has increasingly politicized the office.

125. For example, senior judiciary members voted against the Irish Treaty (1922), criminal sentencing reforms (in the 1940s and 1950s), divorce law reforms (in the 1970s), trade union and labor relations bill (1975), police and criminal evidence bill (1984), courts and legal services bill (1989), human rights bill (1995), legislation concerning hunting (2001) and constitutional reform (2004). Occasionally, a Law Lord has introduced a bill (for example, in 1987, Lord Templeman introduced a bill on land registration). The convention that active and retired Law Lords are not supposed to discuss political matters is controversial.

126. *See* J.A.G. GRIFFITH, THE POLITICS OF THE JUDICIARY 281-343 (5th ed. 1997) (arguing that the myth of neutrality has undermined the building-up of a strong judiciary). Griffith defends a political role of the judiciary in areas such as law and order or social issues. *See also* STEVENS, *supra* note 121, at 76-99; ROBERT J. MARTINEAU, APPELLATE JUSTICES IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS (1990).

127. *See* Andrew Le Sueur, *The Conception of the UK's New Supreme Court*, *in* BUILDING THE UK'S NEW SUPREME COURT, *supra* note 27, at 3 (observing lack of sufficient transparency in such a system); Kate Malleson, *Selecting Judges in the Era of Devolution and Human Rights*, *in* BUILDING THE UK'S NEW SUPREME COURT, *supra* note 27, at 295 (noting that a career judiciary in the UK could attract less reputation but more transparency).

128. *See* GRIFFITH, *supra* note 126, at 65-102.

ward Heath, and the arrival of Mrs. Thatcher and her legal reforms.[129] Public law was profoundly transformed after the 1960s. Europe also played an important role. European integration in 1973 and the development of EU law have progressively empowered the English judiciary to review legislation in the light of EU directives or regulations, sometimes against the will of the government (in particular, Mrs. Thatcher's government from 1979 to 1992). That has very much contributed to a bolder judiciary confronted with the enlargement of the scope of judicial review.[130] Senior judges challenged the doctrine of Parliamentary sovereignty.[131] Furthermore, the new role of the judiciary in the face of the domestic and international challenges of the late 1970s and 1980s raised concerns about the extent to which the English judiciary was up to the tasks expected of it.[132] This reflected gradually increasing demands for accountability of a self-regulating, independent judiciary.

Sentencing policy is a particularly sensitive issue, which has come under scrutiny in the aftermath of the Human Rights Act 1998.[133] The Pinochet case in 1999 raised serious questions about the wisdom of having the most senior judiciary sitting in the House of Lords.[134] Finally, the case of *McGonnell v. UK*[135] in the European Court of Human Rights, regarding the Bailiff of the island of Guernsey, gave impetus to movements to reform the judicial structure. In that case, the Court decided that a judge who also plays an administrative role violates Article 6 of the European Convention of Human Rights (although in fact, in England and Wales, the Lord Chancellor has traditionally avoided sitting on cases where there might be a conflict of interest).[136]

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129. *Id.*

130. *See* Lord Woolf, *Judicial Review – The Tensions between the Executive and the Judiciary*, 114 LAW Q. REV. 579 (1998) (recognizing that slowly, executive-friendly judicial review has been replaced by a more intense review with higher standards of scrutiny and willingness to intervene, albeit in the absence of other constitutional safeguards). Lord Woolf was a Master of the Rolls, the senior civil judge in the Court of Appeal of England and Wales, from 1996 to 2000.

131. *See* J.A.G. Griffith, *The Common Law and the Political Constitution*, 117 LAW. Q. REV. 42 (2001) (making the argument that there are two sovereignties, those of Parliament and of the courts).

132. See a personal account by Lord Denning, a Law Lord and Master of the Rolls from 1962 to 1982, in LORD DENNING: THE DISCIPLINE OF LAW (1975). A controversial judge, Lord Denning defended that the principles of common law as laid down by the judges were not suited for the late 20th century. His most relevant personal contributions were on contract laws and negligence standards. For example, his defense of the rule of law doctrine in fundamental breach in 1978 (then Master of the Rolls) was overturned by Lord Wilberforce (then a Law Lord) in favor of the rule of construction doctrine.

133. *See* STEVENS, *supra* note 121.

134. The contradictory decisions taken by different panels of three Law Lords were not easily understood by the public. For a detailed account, see STEVENS, *supra* note 121, at 100-118. *See also* Robert Stevens, *Judicial Independence in England: A Loss of Innocence*, *in* JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY, *supra* note 16, at 155.

135. McGonnell v. United Kingdom, 30 Eur. Ct. H.R. 289 (2000).

136. *Id.*

More generally, judges' extrajudicial activities, including leading commissions and inquiries and producing reports, have been the source of controversy. In many important cases, the appointed judges encountered politically sensitive issues. Judicially-led commissions included those on the Profumo affair in 1963,[137] industrial relations in Northern Ireland in the 1970s,[138] the Nolan committee on standards in public life in the aftermath of sleaze scandals (1994-1995), the Scott inquiry on exports of military equipment to Iran and Iraq (1995-1996), and the Hutton inquiry on the death of an employee of the Ministry of Defense and the weapons of mass destruction in Iraq (2003-2004).[139]

In 2003, Prime Minister Tony Blair's Government announced its intention to alter the system for appointing judges in England and Wales.[140] Two goals justified the reform: improving judicial independence and enhancing accountability and public confidence in judicial offices.[141] In fact, Lord Falconer, Secretary of State for Constitutional Affairs, declared that it was no longer acceptable for the executive branch to control judicial appointments. Accordingly, he revealed the intention to establish an independent Judicial Appointments Commission (JAC) responsible for recommending candidates for judicial appointments on a more transparent basis and based solely on merit.[142]

The Constitutional Reform Act 2005[143] introduced several substantive changes in the English and Welsh judiciaries, including a statutory duty on government members to not influence judicial decisions. Two reforms were especially far-reaching. First, the Act abolished the position of Lord Chancellor, the most senior judge in England and Wales, and transferred his judicial functions to the President of the Courts of England and Wales (formerly known as Lord Chief Justice of England and Wales).[144] Second, it created a new Supreme Court, consisting of 12 judges independent of and removed from the House of Lords, with their own independent appointment system.[145]

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137. Headed by Lord Denning. Griffith, *supra* note 131. Profumo was a Minister of Defense who shared a lover with a Russian military aide. This created a well-known scandal in the UK. *See* Wikipedia, http://en.wikipedia.org/wiki/Profumo_affair (last visited Oct. 23, 2008).

138. Headed by Lord Wilberforce and Lord Widgery respectively. Griffith, *supra* note 131.

139. *See* GRIFFITH, *supra* note 126, at 14-29.

140. In the case of Scotland, judicial appointments were under review since September 1999 and an independent Judicial Appointments Board was established in June 2002.

141. *See* Diana Woodhouse, *The Constitutional Reform Act 2005: Defending Judicial Independence the English Way*, 5 INT'l J. CONST. L. 153 (2007).

142. *See id.*

143. *See id.*

144. The President of the Courts of England and Wales sits in the Court of Appeal, the High Court and the Crown Court, among others, is responsible for expressing the views of the judiciary and for welfare, training and guidance of the English judiciary. He is not the President of the Supreme Court.

145. The new Supreme Court is to be launched in 2009 with the current twelve Law Lords (the Lords of Appeal in Ordinary). There will be a Supreme Court *ad hoc* selection committee presided by the President of the Supreme Court for future appointments. The remaining Lords of Appeal who

Alongside the Judicial Appointments Commission (JAC),[146] the Constitutional Reform Act 2005 established two new bodies: the Judicial Appointments and Conduct Ombudsman (JACO)[147] and the Directorate of Judicial Offices for England and Wales (DJO). The JAC is composed of 15 commissioners drawn from the judiciary, the legal profession (one barrister and one solicitor), the lay magistracy, and the lay public. The Chairman of the Commission is required to be a lay member.

It seems to us the most important issue in the discussion in the United Kingdom has been enhancing accountability. As predicted by our model, the growth of judicial review and the perception that judicial interference has significantly increased has raised concerns about accountability.[148] One important concern is the lack of minorities and women in the bench, which suggests a sense of gender and racial bias in the appointments mechanism.[149] Also, there has been a general feeling that a small clique from Oxford and Cambridge dominates the appointments.[150] Furthermore, there have been indications of personal and corporate bias in judicial profiles.[151]

Our model predicts that reforms aimed at improving accountability might sacrifice independence. Not surprisingly, in the UK, the extent to which current reforms actually improve judicial independence seems to be a matter of debate.[152] In fact, it is unclear how the current reforms will conform with the traditional notion of the English judiciary as a separate branch of government.[153]

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are members of the House of Lords and eligible to hear and decide judicial business under the Appellate Jurisdiction Act 1876 will not be moved to the Supreme Court (in January 2007 there were thirteen of them including three former Lord Chancellors).

146. The JAC started selecting judges in April 2006. KATE MALLESON, THE LEGAL SYSTEM 245-46 (2005), argues that the JAC is effectively dominated by the judiciary. The fact that the council is chaired by a non-lawyer does not seem to counter a strong judicial membership. The traditional role of the Lord Chancellor in judicial appointments was the object of a study by Anthony Bradney, *The Judicial Activity of the Lord Chancellor 1946-1987: A Pellet*, 16 J.L. & SOC'Y 360 (1989).

147. The JACO is responsible for investigating and making recommendations concerning complaints about the judicial appointments process and the handling of judicial conduct complaints and discipline. It is completely independent of the government and of the judiciary.

148. *See, e.g.*, Robert Stevens, *A Loss of Innocence? Judicial Independence and the Separation of Powers*, 19 OXFORD J. LEG. STUD. 365 (1999); Matthew Flinders, *Mechanisms of Judicial Accountability in British Central Government*, 54 PARLIAMENTARY AFF. 54 (2001).

149. There is only one woman as Lord of Appeal in Ordinary (Baroness Hale).

150. For an empirical analysis, see Jordi Blanes & Clare Leaver, *An Economic Analysis of Judicial Diversity Part I: Judicial Promotions* (Oxford Univ. Working Paper, April 2006), *available at* http://www.economics.ox.ac.uk/members/clare.leaver/Judicial_promotions.pdf. *See also* GRIFFITH, *supra* note 126, at 18-21; Kritzer, *supra* note 129, at 92.

151. *See* GRIFFITH, *supra* note 126, at 63-259.

152. Concerns about the extent to which the present reform enhances judicial independence have been echoed by Sue Prince, *The Law and Politics: Upsetting the Judicial Apple-Cart*, 57 PARLIAMENTARY AFF. 288 (2004).

153. *See* Robert Stevens, *The Independence of the Judiciary: The Case of England*, 72 S. CAL. L. REV. 597 (1999) (making the point that the office of the Lord Chancellor makes it impossible to

V.
CONCLUSION

Judicial councils are an important new phenomenon that have spread all over the world and become a global best practice, yet we know little about them and their consequences. The conventional wisdom is that they enhance judicial independence, but we are skeptical of this claim. From an economic perspective, councils are designed to resolve principal-agent problems. As an intermediate body between the principal (the public) and an agent (judges), the judicial council aims to reduce agency costs due to the possible capture by a minority that may distort the judicial process for its own purposes. From this point of view, a judicial council is an expert monitor designed to ensure *accountability* rather than independence.

We recognize that the diversity in council structures across countries reflects local conditions. We have canvassed institutional designs in both common-law judicial appointment commissions, including the Merit Plans in the United States and the Canadian and British experiences, and civil-law high judicial councils, including the French-Italian model. We have argued that the different designs aim at achieving the appropriate balance between independence and accountability in the face of two recurrent phenomena, the politicization of the judiciary and the judicialization of politics that are reflected in different degrees around the world.

These findings have important implications for the ongoing debate on judicial appointments in the United States. Rather than assume that merit commissions, the American counterpart to judicial councils, always enhance independence, scholars should conduct more thorough empirical research to understand the precise determinants of independence. Our case studies suggest that these determinants are highly context-specific, and not susceptible to one-size-fits-all solutions.

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have a concept of separate branches of government, but no political party will give judges the right to simply strike legislation).