

## AN INTER-COURT STRUGGLE FOR JUDICIAL SUPREMACY

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*Skirmishes between constitutional courts and supreme courts have occurred not only in established democracies, but also in nascent democracies and semi-authoritarian regimes. Yet this situation has not received enough scholarly attention, despite the widespread conflicts among domestic apex courts. Most literature simply focuses on a single country without systematically and comprehensively spelling out the contributing factors. Employing the analytical framework of the game of chicken, this paper aims to fill this academic lacuna by suggesting that: 1) information asymmetry between apex courts is the key cause of inter-courts conflicts, and 2) constitutional courts, isolated from the judiciary, require an alliance with other actors to win a war of courts. The conflicts between the Constitutional Court and the Supreme Court in Taiwan vividly demonstrate these points. Based on the thesis, this Article argues that an inter-court conflict may reshape the power equilibrium between domestic apex courts, between the judiciary and the elected branches, and may be beneficial to society in some circumstances.*

### Introduction

Since the end of World War II, constitutional courts have mushroomed around the globe,<sup>1</sup> and judicial review has been widely regarded as a panacea to counter the tyranny of the majority that leads

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<sup>1</sup> For arguments that justify the establishment of a constitutional court, see Victor Ferreres Comella, *The Rise of Specialized Constitutional Courts*, in *COMPARATIVE CONSTITUTIONAL LAW* 265, 266-71 (Tom Ginsburg & Rosalind Dixon eds., 2011).

to gross human rights violations.<sup>2</sup> This worldwide expansion of judicial power has been accelerated by the third wave of democratization as most nascent democracies founded during this period have established constitutional courts to tackle politically controversial issues.<sup>3</sup> Scholars maintain that democracy has gradually become “juristocracy”<sup>4</sup> or “a government of judges”<sup>5</sup> in which judges, instead of demos, rule. In this light, the judiciary is no longer the least dangerous branch.<sup>6</sup> It becomes an institution that politicians need to reckon with given that it has garnered the power of judicial review and other ancillary powers of political salience.<sup>7</sup> Although the judiciary possesses neither the sword nor the purse, it has deeply intervened in the political process such that the judicialization of politics has been commonplace all over the world.<sup>8</sup>

Yet the judiciary is not necessarily a monolithic institution in which there is only one apex court that monopolizes all judicial powers.<sup>9</sup> Contrarily, and particularly in civil law countries,<sup>10</sup> there are usually multiple apex courts, including supreme courts, supreme

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<sup>2</sup> Tom Ginsburg, *The Global Spread of Constitutional Review*, in THE OXFORD HANDBOOK OF LAW AND POLITICS 81, 82-87 (Keith E. Whittington et al. eds., 2008); C. Neal Tate & Torbjörn Vallinder, *Judicialization and the Future of Politics and Policy*, in THE GLOBAL EXPANSION OF JUDICIAL POWER 515, 515 (C. Neal Tate & Torbjörn Vallinder eds. 1995).

<sup>3</sup> SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY passim* (1991).

<sup>4</sup> RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 222-23 (2004).

<sup>5</sup> See Michael H. Davis, *A Government By Judges: An Historical Review*, 35 AM. J. COMP. L. 559, 562 (1987).

<sup>6</sup> THE FEDERALIST No. 78 (Alexander Hamilton).

<sup>7</sup> See WEN-CHEN CHANG ET AL., *CONSTITUTIONALISM IN ASIA: CASES AND MATERIALS* 337-41 (2014); Tom Ginsburg, *Beyond Judicial Review: Ancillary Powers of Constitutional Courts*, in INSTITUTIONS AND PUBLIC LAW: COMPARATIVE APPROACHES 225, 230-39 (Tom Ginsburg & Robert A. Kagan eds., 2005); Tom Ginsburg & Zachary Elkins, *Ancillary Powers of Constitutional Courts*, 87 TEX. L. REV. 1431, 1454-57 (2008) (exploring the worldwide spread of ancillary powers).

<sup>8</sup> See, e.g., *THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA* (Rachel Sieder et al., eds. 2005); *THE JUDICIALIZATION OF POLITICS IN ASIA* (Björn Dressel ed., 2012).

<sup>9</sup> See Lech Garlicki, *Constitutional Courts versus Supreme Courts*, 5 INT’L J. CONST. L. 44, 50-63 (2007) (discussing inter-courts conflicts in Germany, Italy, Poland, and France); Nuno Garoupa & Tom Ginsburg, *Building Reputation in Constitutional Courts: Political and Judicial Audiences*, 28 ARIZ. J. INT’L & COMP. L. 539, 543-45 (2011) (arguing that constitutional judges face the dilemma between policy and dispositional preferences when facing ordinary high courts).

<sup>10</sup> See Francisco Ramos Romeu, *The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions*, 2 REV. L. & ECON. 103, 118 (2006) (confirming that “countries within the Anglo-Saxon legal heritage were 80% less likely to set up constitutional courts”).

administrative courts, and constitutional courts. In fact, skirmishes between constitutional courts and other high courts have occurred not only in established democracies, such as France, Germany,<sup>11</sup> Italy,<sup>12</sup> and Belgium, but also in young democracies and semi-authoritarian regimes, including Colombia,<sup>13</sup> the Czech Republic,<sup>14</sup> Poland,<sup>15</sup> Hungary,<sup>16</sup> Spain,<sup>17</sup> Romania,<sup>18</sup> South Korea,<sup>19</sup> Taiwan,<sup>20</sup> Thailand,<sup>21</sup> and Russia.<sup>22</sup> It is therefore plausible to assume that “[s]ystems that divide legal authority between a constitutional court and a supreme court face coordination problems when allocating jurisdiction and

<sup>11</sup> See ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 118-19 (2000) (discussing the case of *Lüth*).

<sup>12</sup> Carlo Guarneri, *Courts Enforcing Political Accountability*, in *CONSEQUENTIAL COURTS* 163, 165-66 (Diana Kapiszewski et al eds., 2013); John Henry Merryman & Vincenzo Vigoriti, *When Courts Collide: Constitution and Cassation in Italy*, 15 *AM. J. COMP. L.* 665, 670-81 (1966-67) (articulating a series of cases that resulted in inter-courts frictions).

<sup>13</sup> See Manuel José Cepeda Espinosa, *The Judicialization of Politics in Colombia*, in *THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA* 67, 89 (Rachel Sieder et al., eds., 2005).

<sup>14</sup> See Zdeněk Kühn, *Making Constitutionalism Horizontal: Three Different Central European Strategies*, in *THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM* 217, 222-25 (András Sajó & Renáta Uitz eds., 2005); RADOŠLAV PROCHÁZKA, *MISSION ACCOMPLISHED ON FOUNDING CONSTITUTIONAL ADJUDICATION IN CENTRAL EUROPE* 159-65 (2002).

<sup>15</sup> Garlicki, *supra* note 9, at 57-61; PROCHÁZKA, *supra* note 14, at 108-13.

<sup>16</sup> See Gabor Halmai, *The Hungarian Approach to Constitutional Review*, in *CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE* 189, 204-07 (Wojciech Sadurski ed., 2002); PROCHÁZKA, *supra* note 14, at 136-39 (in general, the author argues, the Hungarian Constitutional Court is “less inclined to engage in confrontation with ordinary adjudication” than other apex courts in Central and Eastern Europe).

<sup>17</sup> See Victor Ferreres Comella, *The Spanish Constitutional Court*, in *CONSTITUTIONAL COURTS: A COMPARATIVE STUDY* 174, 183-88 (Andrew Harding & Peter Leyland eds., 2009); Mugambi Jouet, *Spain's Expanded Universal Jurisdiction to Prosecute Human Rights Abuses in Latin America, China, and Beyond*, 35 *GA. J. INT'L & COMP. L.* 495, 497 (2007); STONE SWEET, *supra* note 11, at 120-21; Leslie Turano, *Spain: Quis Custodiet Ipsos Custodes?: The struggle for jurisdiction between the Tribunal Constitucional and the Tribunal Supremo*, 4 *INT'L J. CONST. L.* 151, 160-62 (2006).

<sup>18</sup> See Renate Weber, *The Romanian Constitutional Court: In Search of Its Own Identity*, in *CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE* 283, 298-303 (Wojciech Sadurski ed. 2002).

<sup>19</sup> TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 239-42 (2003) (articulating the relationship between Korean Constitutional Court and Korean Supreme Court).

<sup>20</sup> *Id.* at 134-40.

<sup>21</sup> See Bjorn Dressel, *Thailand: Judicialization of Politics or Politicization of the Judiciary*, in *THE JUDICIALIZATION OF POLITICS IN ASIA* 79, 82 (Björn Dressel ed., 2012).

<sup>22</sup> See William Burnham & Alexei Trochev, *Russia's War between the Courts*, 55 *AM. J. COMP. L.* 381, 408-46 (2007) (detailing the intensified conflicts between the constitutional court and ordinary courts); ALEXEI TROCHEV, *JUDGING RUSSIA* 214-20 (2008).

resolving inconsistencies in rulings.”<sup>23</sup> In other words, “the presence of tensions among the highest courts is systemic in nature.”<sup>24</sup>

Despite the widespread conflicts among domestic apex courts, however, this situation has not received enough scholarly attention. Most literature simply focuses on a single country without systematically and comprehensively spelling out the contributing factors. In fact, nuanced differences exist between systems of judicial review in civil law countries, and these institutional variances affect the frequency and degree of judicial conflicts, along with other contextual factors. This paper aims to fill this academic lacuna by suggesting that: 1) information asymmetry between apex courts is the major cause of inter-courts conflicts, and 2) constitutional courts, isolated from the judiciary, require an alliance with other actors to win the war of courts.

Specifically, Section I surveys why disagreements between apex courts occur after the proliferation of constitutional courts, suggesting that institutional design and ideational differences are the two major reasons that lead to disagreements. However, not all disagreements escalate to open conflicts; such intensification thus calls for further explanation. Adopting a basic analytical framework based on the notion of “a game of chicken,” Section II indicates that most inter-courts confrontations take place when both courts choose not to yield because of information asymmetry. Once a war of courts emerges, which court prevails (in the sense that its legal interpretation persists after conflict) is determined not by which court has better legal interpretation but by which court has stronger alliances. Hence, Section III further investigates the alignment between courts and other political actors in these confrontations that may result in the shift of power equilibrium among all three branches. Section IV examines the inter-courts conflicts in Taiwan, endeavoring to demonstrate that information asymmetry does lead to wars of courts. Section V proposes several normative implications, followed by the Conclusion.

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<sup>23</sup> Tom Ginsburg, *Economic Analysis and the Design of Constitutional Courts*, 3 THEORETICAL INQUIRIES IN LAW 49, 59 (2002) (pointing out that judges of ordinary courts were “trained, selected, and promoted under the [authoritarian] regime”).

<sup>24</sup> Garlicki, *supra* note 9, at 63.

## I. Origins of Judicial Disagreements

With the establishment of constitutional courts around the globe in recent decades, inter-courts conflicts have emerged accordingly so much so that “[c]onstitutional court judges lament that their judgments are not enforced because of resistance and sabotage from the rest of the judiciary. But ordinary judges complain that constitutional courts routinely usurp the function of judicial review of legislation and intrude in the traditional domain of the regular judiciary.”<sup>25</sup> Some may argue this is nothing more than a storm in a teacup. Nevertheless, the skirmishes between apex courts are so intense that they have infringed upon human rights and spawned political gridlock. This presents a puzzle: why do judicial disagreements occur so often if there is a “right answer”<sup>26</sup> in most cases as noted by Dworkin? Two factors—institutional design and ideational divergence—may account for the disagreements between apex courts, particularly between a constitutional court and a supreme court.

### A. Institutional Design

Institutional design of the judiciary affects not only whether, but also how, inter-courts conflicts occur. Three aspects of judicial institutions are particularly crucial: the composition of constitutional courts, their accessibility, and the scope of jurisdiction.

First, the personnel composition of constitutional courts may suggest the relationship between apex courts. Specifically, three major appointment models—representation, cooperation, and single-body appointment—lead to three types of personnel composition of constitutional courts. In the representation model, all three constitutional branches appoint justices to the bench. That is to say, one-third of constitutional judges are appointed by supreme courts and can be seen as their allies or agents in constitutional courts. Hence, inter-courts skirmishes are less likely to materialize, since heterogeneous interests and viewpoints from different courts will be fully discussed and negotiations can be made before a decision is rendered. As a corollary, constitutional decisions tend to be more moderate and a collegial relationship between high courts is more

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<sup>25</sup> TROCHEV, *supra* note 22, at 266.

<sup>26</sup> See RONALD DWORKIN, A MATTER OF PRINCIPLE 119-45 (1985).

likely to be forged.<sup>27</sup> Countries that have adopted this model include Italy,<sup>28</sup> South Korea,<sup>29</sup> and Indonesia.<sup>30</sup> The cooperation model refers to the appointment system whereby the executive nominates all constitutional judges who are then confirmed by the legislature. Both the Czech Republic<sup>31</sup> and Taiwan reflect this model. Without direct participation in the decision-making process, it is difficult for supreme courts to defend their interests and positions during the process of constitutional decision-making. Mutual trust between apex courts can thus be fragile, and inter-courts tension is more likely to emerge. Finally, in the single-body appointment model, constitutional judges are usually appointed exclusively by the legislature without the intervention of other branches. The paradigmatic example is Germany. Theoretically, judges nominated this way are likely to share viewpoints akin to those of their appointers. It will not be surprising that constitutional courts may deviate from, if not run directly counter to, supreme courts in constitutional controversies.

Institutionally, the representation model is most likely to internalize inter-court disagreements by directly including career judges in constitutional courts. By contrast, both the cooperation and single-body appointment models lack the formal inclusion of supreme courts in the appointment process, a design that results in limited mutual understanding between apex courts, which is crucial in avoiding head-on confrontations. Nonetheless, it should be noted that politicians often consult or voluntarily nominate judges from

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<sup>27</sup> See CASS SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 121-24 (2003); CASS SUNSTEIN, *GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE* 8-12 (2009).

<sup>28</sup> Tania Groppi, *The Italian Constitutional Court: Towards a Multilevel System of Constitutional Review?* in *CONSTITUTIONAL COURTS: A COMPARATIVE STUDY* 125, 127 (Andrew Harding & Peter Leyland eds., 2009).

<sup>29</sup> GINSBURG, *supra* note 19, at 220.

<sup>30</sup> Hendrianto, *Institutional Choice and the New Indonesian Constitutional Court*, in *NEW COURTS IN ASIA* 158, 161 (Andrew Harding & Penelope (Pip) Nicholson eds., 2010) (arguing that the “representation model” model was selected partly because then President Megawati tried to consolidate her support by sharing the appointment power with other political parties).

<sup>31</sup> See Jirí Přibáň, *Judicial Power vs. Democratic Representation: The Culture of Constitutionalism and Human Rights in the Czech Legal System*, in *CONSTITUTIONAL JUSTICE EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE* 373, 377-78 (Wojciech Sadurski ed. 2002) (arguing that the Czech framers adopted the American model in this regard).

ordinary courts to the bench for their professional credibility no matter which model is formally adopted.

In addition to personnel composition, inter court clashes are more likely to take place when the constitutional court is more accessible to the judicial community and the public. The French case stands as one good example. The Constitutional Council is rather inaccessible, since only the two supreme courts (the *Cour de cassation* and the *Conseil d'État*) are allowed to petition the Constitutional Council even after the 2008 constitutional reform.<sup>32</sup> Neither citizens nor judges from lower courts are eligible to file petitions for constitutional review.<sup>33</sup> Because cases are filtered by the supreme courts in advance, the Constitutional Council can only access cases with the approval of supreme courts. Accordingly, the number of cases is small, the space for disagreement is procedurally circumscribed, and fierce confrontations are relatively few and far between. Moving along the spectrum of accessibility, constitutional courts in Italy, Korea, and Taiwan are more accessible than their French counterpart. Judges in lower courts may file petitions directly so long as the law in question poses a constitutional issue. This design opens the channel for judges of lower courts to challenge precedents or legal interpretations made by their superiors before constitutional judges, a channel that has led to several disagreements between apex courts. Finally, constitutional complaints result in inter-courts conflicts most directly and frequently. For one thing, allowing citizens to petition constitutional courts inevitably enhances the number of cases and raises the possibilities of inter-court disagreement. For another, cases brought by citizens usually challenge judicial decisions made by supreme courts. By hearing constitutional complaints, constitutional courts pose a direct challenge to supreme courts and essentially position themselves as “super supreme courts” and “judges of the judge.”<sup>34</sup> Citizen access also accounts for why concrete review is more likely to result in inter-courts rivalry than abstract review. In abstract review, apex courts quarrel about the law, not the decision itself. Hence, it is the legislature, not supreme courts, that is directly subject to

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<sup>32</sup> For a detailed introduction to the *Conseil Constitutionnel*, see SOPHIE BOYRON, THE CONSTITUTION OF FRANCE 150-59 (2013).

<sup>33</sup> See Arthur Dyevre, *Filtered Constitutional Review and the Reconfiguration of Inter-Judicial Relations*, 61 AM. J. COMP. L. 729, 743-44 (2013).

<sup>34</sup> See John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1684 (2004).

constitutional scrutiny. On the other hand, concrete review allows constitutional courts to scrutinize judicial decisions. Supreme courts therefore encounter face-to-face inquiry since it is their own decisions that are under review and possibly being overruled.

Last but not least, constitutional courts contradict with supreme courts over the scope of jurisdiction. This is arguably the most pivotal factor that affects inter-courts clashes. In theory, each court has the final say in its own jurisdiction and there should be no conflict.<sup>35</sup> This distinction works in some countries, such as Austria, where “[t]he relationship between the three Supreme Austrian Courts raises no particular problems, since the Federal Constitution precisely determines the different functions of each court.”<sup>36</sup> In other countries, however, the demarcation between constitutional review and legal interpretation is opaque for at least two reasons. First, constitutional courts often determine the constitutionality of law by dictating legal interpretation. Namely, a law is constitutional only if it is interpreted in a certain way.<sup>37</sup> This approach clearly blurs the line between constitutional review and legal interpretation.<sup>38</sup> Second, in human rights cases, the third-party effect of constitutional clauses creates “an objective value system” in which ordinary judges must construe and apply statutes in harmony with constitutions.<sup>39</sup> This provides constitutional courts with more opportunities to intrude in the domain of legal interpretation to make sure that constitutional harmony is maintained.

A related point is the timing of judicial intervention. All things being equal, *ex ante* judicial review creates the least amount of conflicts between apex courts. Adopted by France<sup>40</sup> and Romania,<sup>41</sup>

<sup>35</sup> TROCHEV, *supra* note 22, at 268.

<sup>36</sup> Anna Gamper & Francesco Palermo, *The Constitutional Court of Austria: Modern Profiles of an Archetype of Constitutional Review*, in CONSTITUTIONAL COURTS: A COMPARATIVE STUDY 31, 47 (Andrew Harding & Peter Leyland eds., 2009).

<sup>37</sup> See MARK TUSHNET, ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW 52-53 (2014).

<sup>38</sup> MAARTJE DE VISSER, CONSTITUTIONAL REVIEW IN EUROPE: A COMPARATIVE ANALYSIS 378-79 (2014).

<sup>39</sup> Frank I. Michelman, *The Interplay of Constitutional and Ordinary Jurisdiction*, in COMPARATIVE CONSTITUTIONAL LAW 278, 289 (Tom Ginsburg & Rosalind Dixon eds., 2011).

<sup>40</sup> See John Ferejohn & Pasquale Pasquino, *Constitutional Courts as Deliberative Institutions*, in CONSTITUTIONAL JUSTICE, EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE 21, 32 (Wojciech Sadurski ed. 2002).

<sup>41</sup> Weber, *supra* note 18, at 286-87.



*ex ante* judicial review bites before the promulgation of a law, much earlier than any concrete case could take place. Hence, it is unlikely to result in inter-courts conflicts since the disagreement, if any, exists between the constitutional court and the legislature. In contrast to the French model, *ex post* judicial review occurs after a law takes effect and is usually activated in concrete cases. Naturally, this type of review stimulates more inter-judicial tension when apex courts diverge on legal interpretation.

In sum, inter-courts friction is inherent in the bifurcation of the duty of ordinary courts to apply the law and the monopoly of constitutional courts to interpret the constitution. Since all laws must be consistent with constitutional mandates, in practice whoever has the power of constitutional interpretation has the final word over all legal disputes. Insomuch as there is a disagreement between constitutional courts and supreme courts in terms of legal interpretation, the exercise of constitutional review is often condemned by judges of supreme courts as a usurpation of judicial review.<sup>42</sup>

### B. Ideational difference

Although institutional design is important in explaining the origin of inter-courts disagreements, it is neither necessary nor sufficient for conflicts to take place. Rather, it is merely one condition under which disagreements may materialize. Another pivotal factor is judicial actors themselves. Scholars have pointed out that “the preoccupation of respective judges with their professional stature and their concern to uphold or reinforce the status of the court of which they are a member” contribute to the escalation of inter-judiciary tension.<sup>43</sup> Both constitutional and supreme courts would like to expand their own power at the expense of the other. This tendency of self-aggrandizement results mainly from the ideational differences between judges of different apex courts even though they are all called “judges.” Specifically, three ideational elements—professional background, judicial audience, and the *raison d’être* of constitutional courts—motivate courts to stand up for the fight.

First, judges in constitutional courts and supreme courts usually have distinctive professional backgrounds and perceptions of

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<sup>42</sup> See Kühn, *supra* note 14, at 222-35.

<sup>43</sup> VISSER *supra* note 38, at 377.

themselves. The former tends to be political, active, and individualistic, whereas the latter perceive themselves to be passive, collective, and apolitical appliers of the law. In general, constitutional judges tend to be prominent scholars or lawyers who have close ties with politicians before they serve on the bench. When interpreting constitutions, they usually need to create new laws substantively to flesh out the constitutional norms. By contrast, ordinary judges in civil law countries are expected to be faceless bureaucrats operating in a narrow, technical, and even ossified way.<sup>44</sup> They decide cases by mechanically applying the laws enacted by the legislature. To them, professionalism is equivalent to being apolitical. This ideology is reinforced and reproduced by state examinations, vocational training, and hierarchical control by judges of higher echelons.<sup>45</sup> After entering the system, most ordinary judges are socialized to be conservative and passive, while those who resist such socialization are marginalized, if not disciplined.<sup>46</sup> The Chilean case is a good example in which hierarchal control and apoliticism contribute to the reluctance of the Chilean Supreme Court to be proactive in the protection of human rights even after democratization.<sup>47</sup> This divergence of professional backgrounds inevitably creates tension between apex courts.

Second, the audiences with which the two apex courts seek to engage are somewhat different. This attitudinal distinction has been identified in the past two decades: constitutional courts seem to have a global mindset, whereas supreme courts mostly focus on the domestic legal community.<sup>48</sup> Empirical studies show that, among civil law countries, career judges tend to cite fewer foreign decisions and

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<sup>44</sup> JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE* 34-38 (2007).

<sup>45</sup> See Neil Chisholm, *The Diffusion of American Judicial Independence Ideology into Taiwan and South Korea*, 5 *HAGUE J. ON THE RULE OF L.* 204, 206 (2013) (arguing that this is one way to secure judicial independence).

<sup>46</sup> LISA HILBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE* 173-74 (2007).

<sup>47</sup> See Javier Couso & Lisa Hilbink, *From Quietism to Incipient Activism: The Institutional and Ideological Roots of Rights Adjudication in Chile*, in *COURTS IN LATIN AMERICA* 99, 101-05 (Gretchen Helmke & Julio Rios-Figueroa eds., 2011); HILBINK, *supra* note 46, at 224-28 (arguing that hierarchal control and apoliticism discouraged judges from defending human rights and rule of law).

<sup>48</sup> See VICKI JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* 71-102 (2013); Cheryl Saunders, *Judicial Engagement with Comparative Law*, in *COMPARATIVE CONSTITUTIONAL DESIGN* 571, 571-75 (Tom Ginsburg & Tosalind Dixon eds., 2011).

international conventions than their constitutional counterparts.<sup>49</sup> This finding is consistent with the educational and professional backgrounds of different courts.<sup>50</sup> Career judges receive training that leads them to deduce “from a written, legislated text as the source of the general law,” and thus reasoning is “formal, legalistic and magisterial in tone.”<sup>51</sup> Judicial dialogue is neither emphasized nor encouraged by conventional legal training. By contrast, “these features of civilian judicial reasoning are less pronounced in constitutional adjudication.”<sup>52</sup> Constitutional judges are asked to illuminate the vagueness of constitutional texts; hence, innovation and flexibility are both necessary virtues in constitutional review. Also it is not uncommon that they were academics or lawyers before being promoted, who are more likely to be open-minded, actively engaging comparable international and foreign experiences in reasoning, and less constrained by domestic judicial precedents.

This attitudinal divergence may intensify inter-courts tensions in two ways. Firstly, the audience the court tries to engage with reflects “[the] court’s position and how it views its role with respect to sociopolitical struggles over the polity’s collective identity.”<sup>53</sup> For example, in Korea, “[w]hile the Supreme Court appears to follow its notoriously conservative Japanese counterpart, the Constitutional Court appears to model itself on its activist counterparts in Germany and the United States.”<sup>54</sup> Secondly, domestic judges are not necessarily bound by foreign case law. It follows that constitutional decisions predicating legal reasoning on foreign case law might be called into question by other courts as ungrounded. For example, the Taiwanese Constitutional Court faced just such a controversy in Interpretation No. 582 in which it referenced a number of

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<sup>49</sup> See Wen-Chen Chang & Jiunn-Rong Yeh, *Judges as Discursive Agent, in THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES* 373, 382-83 (Tania Groppi & Marie-Claire Ponthoreau eds., 2013); Akiko Ejima, *A Gap between the Apparent and Hidden Attitudes of the Supreme Court of Japan towards Foreign Precedents, in THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES* 273, 382-83 (Tania Groppi & Marie-Claire Ponthoreau eds., 2013) (pointing out that “the Supreme Court of Japan is not interested in foreign case law”).

<sup>50</sup> MERRYMAN & PÉREZ-PERDOMO, *supra* note 44, at 35.

<sup>51</sup> Saunders, *supra* note 48, at 578.

<sup>52</sup> *Id.*

<sup>53</sup> RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 22 (2014).

<sup>54</sup> See GINSBURG, *supra* note 19, at 241-42 (arguing that in Korea, judges of ordinary courts, trained domestically, have different vision than their counterparts in constitutional courts).

international treaties, including the ECHR and ICCPR.<sup>55</sup> Citing these international covenants, the Constitutional Court struck down two precedents issued by the Taiwanese Supreme Court, resulting in the most intense contention between the two courts.<sup>56</sup> Ironically, constitutional courts cite international and foreign laws in order to justify their decisions and facilitate dialogue, yet ordinary courts are not able to digest the message and in turn challenge the legitimacy and validity of the decisions. Judicial engagement invites contention rather than pacifying it.

Finally, the establishment of constitutional courts itself is a byproduct of political struggle and compromise. In countries such as Korea, Indonesia, and Thailand,<sup>57</sup> constitutional courts are founded to meet politicians’ needs, be they buying political insurance or lowering the cost of democratic transition. That is to say, from the very beginning, the birth of constitutional courts and the staffing of justices have strong political overtones in addition to protecting human rights and restoring rule of law. Moreover, the trend of judicialization of politics in the past two decades has significantly expanded the power of constitutional courts.<sup>58</sup> It not only shifts the equilibrium between the political and judicial branches but also occurs at the expense of supreme courts. To illustrate, many powers of political salience, such as the powers to dissolve political parties, to impeach the presidents, and to oversee elections are granted to constitutional courts instead of supreme courts.<sup>59</sup> In fact, supreme courts used to monopolize the power of judicial review, yet now the power is shared by, if not completely transferred to, constitutional courts.<sup>60</sup> The power redistribution between the Korean Supreme Court and the Korean Constitutional Court before and after democratization is the best example.<sup>61</sup> In short, the political nature of

<sup>55</sup> J.Y. Interpretation No. 582 (2004), available at [http://www.judicial.gov.tw/constitutionalcourt/en/p03\\_01.asp?expno=582](http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=582).

<sup>56</sup> *Id.*

<sup>57</sup> See Bjorn Dressel, *Thailand: Judicialization of Politics or Politicization of the Judiciary*, in *THE JUDICIALIZATION OF POLITICS IN ASIA* 79, 82 (2014); Andrew Harding & Peter Leyland, *The Constitutional Courts of Thailand and Indonesia*, in *CONSTITUTIONAL COURTS: A COMPARATIVE STUDY* 317, 319-23 (Andrew Harding & Peter Leyland eds., 2009).

<sup>58</sup> C. Neal Tate, *Why the Expansion of Judicial Power?* in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 28-30 (C. Neal Tate & Torbjörn Vallinder eds. 1995).

<sup>59</sup> See CHANG ET AL., *supra* note 7, at 337-41; Ginsburg, *supra* note 7, at 230-39.

<sup>60</sup> See Ginsburg & Elkins, *supra* note 7, at 1434.

<sup>61</sup> See GINSBURG, *supra* note 19, at 208-17.

a constitutional court has strong implications for confrontation with the supreme courts.

As a result, the establishment of constitutional courts has been opposed by supreme courts very early on in some countries,<sup>62</sup> since the *raison d'être* of creating a new constitutional tribunal reflects precisely the distrust towards the original judiciary headed by a supreme court.<sup>63</sup> Most constitutional courts are established after the authoritarian period during which supreme courts are deferential to the political branches and impotent in maintaining rule of law. What is worse, they sometimes serve as the paws and claws of strongmen legitimizing totalitarian reign. This subservient image seriously damages the reputation of supreme courts as an independent and capable institution to eradicate gross human rights violations, check and balance political branches, and protect fundamental rights. Consequently, most constitutional courts enjoy higher reputations than supreme courts during the post-transition period. From this perspective, the hostilities between constitutional courts and supreme courts are inherent in many dual systems that have both apex courts. Constitutional judges see their counterparts in supreme courts as conservative and outdated while supreme courts find constitutional courts overly assertive and intrusive.<sup>64</sup>

### C. Summary

Admittedly, “it is emphatically the province and duty of the judicial department to say what the law is.”<sup>65</sup> In the civil law context, nonetheless, this truism does not tell who exactly has the final say over what the law is in the judicial department. From the previous discussion, both the institutional design of constitutional courts and

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<sup>62</sup> See Andrew Hardin, *The Constitutional Court of Thailand, 1998-2006*, in NEW COURTS IN ASIA 121, 127 (Andrew Hardin & Penelope (Pip) Nicholson eds., 2010).

<sup>63</sup> See Ferejohn & Pasquino, *supra* note 40, at 32; Andrew Hardin et al., *Constitutional Courts: Forms Functions, and Practice in Comparative Perspective*, in CONSTITUTIONAL COURTS: A COMPARATIVE STUDY 1, 11-15 (Andrew Harding & Peter Leyland eds., 2009); HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* 23 (2000). For a somewhat different explanation of the emergence of constitutional adjudication in CEE, see Kasia Lach & Wojciech Sadurski, *Constitutional Courts of Central and Eastern Europe*, in CONSTITUTIONAL COURTS: A COMPARATIVE STUDY 52, 59-61 (Andrew Harding & Peter Leyland eds., 2009); Michelman, *supra* note 39, at 281.

<sup>64</sup> See WOJCIECH SADURSKI, *RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE* 21 (2005).

<sup>65</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

the ideational perception of constitutional judges vary greatly from that of supreme courts and ordinary judges. Institutionally, constitutional courts have carved out distinctive jurisdiction and become accessible and powerful at the expense of supreme courts in the last three decades. Ideationally, constitutional judges are appointed by political branches if not popularly elected and undoubtedly have different and even antithetical views about the law.<sup>66</sup> These structural and ideological divergences have resulted in tensions between apex courts.

However, not all disagreements between apex courts escalate into a war of courts. Any open inter-courts conflict is so costly to both apex courts that they will choose to negotiate and compromise in most scenarios. The question of when disagreements will escalate into head-on conflicts presents itself as a new puzzle that needs to be solved.

### I. When do Open Conflicts Occur

Although disagreements between apex courts are not uncommon, a war of courts does not seem to be an everyday phenomenon. Judges on both sides are rational actors who calculate the costs and benefits before taking any actions and are unlikely to initiate open conflicts actively since confrontation between apex courts is costly.<sup>67</sup> This being the case, either constitutional courts or supreme courts tend to compromise in most scenarios where there is a judicial disagreement. Given this, it is worth exploring why both apex courts sometimes, but not always, insist on confronting with each other at the expense of their own institutional reputations and social order. Consideration of the game of chicken and of cost-benefit analysis suggests that information asymmetry between apex courts may be crucial.<sup>68</sup>

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<sup>66</sup> In Bolivia, for instance, judges of constitutional courts are popularly elected after 2009.

<sup>67</sup> See LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 25-63 (2013); RICHARD POSNER, *HOW JUDGES THINK* 57-77 (2008); *but see* ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 52-59 (2006) (arguing that Posner’s pragmatism focuses too much “on the viewpoint of judges rather than on the overall design of the interpretive system”).

<sup>68</sup> See Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1004-05, 1024-30 (2008) (using similar approaches to explain inter-branch conflicts).

A. *The Game of Chicken*

Through the lens of game theory, constitutional courts and supreme courts are actually playing the game of chicken when competing for supremacy.<sup>69</sup> Suppose a petitioner challenges a legal interpretation issued by a supreme court in front of a constitutional court. When the constitutional court agrees with the petitioner on the merits, both courts have two options: the constitutional court may choose to uphold the decision of the supreme court based on other reasons (i.e., C.C. swerves) or quash it (C.C. does not swerve). Similarly, the supreme court may choose to accept the constitutional interpretation (S.C. swerves) or resist it (S.C. does not swerve).

*Table 1: The Game of Chicken between Apex Courts*<sup>70</sup>

Payoff of (CC, SC)	S.C. swerves	S.C. does not swerve
C.C. swerves	(1) (status quo) (0, 0)	(2) (loss of public support, institutional prestige et. al) (-25, 50)
C.C. does not swerve	(3) (institutional prestige et. al, loss of jurisdiction) (50, -25)	(4) (loss of public support & judicial chaos for both courts) (-50, -50)

Although each court has two options, they do not choose strategies randomly but do so partly in response to the other’s strategy. To begin with, the constitutional court would not “swerve” when it believes the supreme court will choose to succumb (Cell (3)) because the constitutional court wins two major benefits in this circumstance: institutional prestige and public approval. When the constitutional court strikes down supreme court decisions, its status as the guardian of the constitution is further entrenched. This is particularly

<sup>69</sup> For an introduction of the game of chicken, see, for example, ERIC RASMUSEN, GAMES AND INFORMATION 70-71 (2007).

<sup>70</sup> This figure is adapted from MAXWELL L. STEARNS & TODD J. ZYWICKI PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW (2009).

important in new democracies where the constitutional court needs to establish its authority. Moreover, public approval is another good which constitutional judges long for.<sup>71</sup> For one thing, constitutional judges are often political appointees whose recognition hinges in part on public support, which is particularly crucial in accumulating political capital. The more popular a court, the more effectively it may implement its decisions, check coordinate branches, and most importantly, expand its power. In sum, given the potential benefits the constitutional court may garner if it wins a battle of courts, it has strong incentives to stand firm when it knows the supreme court would swerve.

Conversely, the constitutional court is likely to compromise when the supreme court insists on and is determined to defend its legal interpretation (Cell (2)). Supreme courts do have strong incentives to defend their legal interpretations in order to sustain legal stability and strengthen their authority in the domains of civil and criminal law. Even though the doctrine of *stare decisis* is not formally recognized in civil law countries, precedents made by supreme courts are equivalent to *de facto* law. In other words, supreme courts maintain their supremacy in the realm of civil and criminal law by wielding the power to issue precedents and thus have strong incentives to push back when legal interpretations are challenged by constitutional courts. Also, change of widely accepted precedents affects current practice by lower courts since numerous cases on trial have to adjust. This adds the burden to supreme courts, and increases their willingness to resist constitutional courts. In circumstances where such determination is firm and observable, constitutional courts are likely to give in since the two major benefits mentioned above—institutional prestige and public approval—are uncertain if supreme courts refuse to collaborate.

Cells (2) and (3) are Nash equilibria in the game of chicken between apex courts: one court goes straight and the other swerves to prevent the worst scenario (Cell (4)). The analysis implies that inter-courts conflicts might be completely avoided if each court were to have perfect information of the other's strategy. If constitutional courts know in advance that supreme courts will definitely reject their interpretations, they are unlikely to be overly assertive and will soften their positions, since resistance from supreme courts certainly raise

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<sup>71</sup> *Id.* at 59.



the cost of constitutional decisions. Likewise, if supreme courts know beforehand that their decisions will not survive the gauntlet of constitutional review, they may take this into account and revise their opinions accordingly. This explanation is also consistent with the inference discussed in representation model—since constitutional courts include representatives from supreme courts, the two courts are more likely to share mutual understandings and less likely to cross lines.

In the real world, however, the information is almost always asymmetric. Both courts may miscalculate the potential costs to them and shy away from confrontation. In Cell (1), both courts choose to compromise rather than fight. Constitutional courts may conditionally uphold a decision even though they find it constitutionally dubious and supreme courts have little reason to revolt since their decision is maintained. In this scenario, neither the constitutional court nor the supreme court receives any benefit.

On the other hand, mutual miscalculation could lead to more disastrous situations when both courts wrongly assume that the other will swerve. Cell (4) refers to the scenario in which constitutional courts quash supreme courts' decisions and the latter decides to resist publicly. This is the worst scenario because both apex courts gain no benefit and bear costs, at least in the short term. For the constitutional court, the costs include the non-compliance of supreme courts and, more importantly, the loss of public approval. Compliance with decisions is always a serious concern of the judiciary due to its lack of the sword and the purse. Lacking mechanisms for sanctioning and monitoring, constitutional courts face greater challenge to ensuring adherence than do supreme courts, which may exercise hierarchical control over lower courts. Ordinary judges who disagree with constitutional courts can easily abuse their discretion to delay implementation, or even blatantly ignore them. Even the U.S. Supreme Court has to rely on other branches for implementation;<sup>72</sup> to say nothing of other constitutional courts that face both external political obstacles and internal judicial barriers. When decisions are repeatedly disobeyed, the authority of constitutional courts wanes. The disobedience of the political branches further discourages lower courts from conforming, and a vicious cycle that is detrimental to compliance with constitutional decisions thus emerges. From this

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<sup>72</sup> GERALD ROSENBERG, *THE HOLLOW HOPE* 88-91 (2008) (articulating the resistance of state courts in the American context during the civil rights movement).

perspective, non-compliance affects, and at the same time reflects, the authority of constitutional courts.

Inter-court conflicts not only damage the authority of both constitutional and supreme courts but also result in the ebb of public approval for several reasons. First, inter-courts frictions usually render the judiciary chaotic and lead to rights infringement. This is particularly evident in the domain of criminal law because human rights violations are particularly gross in this field during authoritarian periods and these violations are legitimized by supreme courts that are submissive to dictators. It is therefore understandable why constitutional courts would target criminal law, and why resistance from supreme courts is rampant in this regard. As both sides have interests at stake, disagreement (or the following confrontation) is likely to aggravate rights violations. Second, inter-courts conflicts reveal the fact that there is no single correct answer to every legal question, and judges are essentially legislating rather than adjudicating under these circumstances. It follows that, more fundamentally, judges can be as political as politicians that prioritize personal ideologies, interests, and preferences. This can be detrimental to both courts, since judicial authority and supremacy is built upon the façade of judicial neutrality and disinterestedness.<sup>73</sup> That is, inter-court frictions manifest the fact that judges can sometimes be politicians in robes. In a word, inter-courts confrontation serves no good to either party. Given that both courts are presumed to be rational, it is plausible to argue that such open conflict only takes place when both courts underestimate the other’s determination to defend its own stance.

Some may argue that inter-courts conflicts are not necessarily the worst scenario that both courts would try to avoid. Both sides might still attack each other even if they know the other party would not yield, and thus lack of mutual understanding is not the key link between disagreement and open conflict. For example, a “constitutional showdown” may provide long-term benefits by setting precedents and reducing decision and transaction costs in the future.<sup>74</sup> That is, the cost-benefit analysis mentioned above is too narrow and considers only institutional benefits but not social welfare

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<sup>73</sup> See JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS* 7-10 (2009) (explaining the idea of positivity bias).

<sup>74</sup> See Posner & Vermeule, *supra* note 68, at 1010-11 (discussing-branch conflicts).

as a whole. It is reasonable to assume that the long-term interests will outweigh the short-term costs led by such conflicts.

Furthermore, it could also be argued that the above game-of-chicken analysis does not take into account judges' personal stakes, which may incentivize them to disregard institutional interests. That is, a constitutional court is a "they," not an "it" and faces collective action problems.<sup>75</sup> As a corollary, "even if some particular approach to constitutional judging is best for all judges, it does not follow that it would be best for any given judge."<sup>76</sup> For example, constitutional judges in most civil law countries do not enjoy life tenure,<sup>77</sup> which is guaranteed only to career judges in ordinary courts. In other words, constitutional judges need to find a job after stepping down.<sup>78</sup> The argument goes that constitutional court judges are likely to pursue personal reputations or dispositional preferences<sup>79</sup> rather than institutional interests and are willing to wage a war even if this leads to the worst-case scenario that harms the institution.<sup>80</sup> By contrast, with life tenure, judges of supreme courts may value collegial friendship more and be less assertive than their counterparts in constitutional courts.<sup>81</sup>

These critiques are reasonable, but it is unclear to what extent, if any, judges of apex courts prioritize, or at least consider, social welfare before making any decisions.<sup>82</sup> Also, unlike politicians who are accountable to the electorate, "[b]ecause judges gain nothing for themselves by advancing good policy as they perceive it, their incentives to pursue this goal are not overwhelming."<sup>83</sup> To be sure, the long-term benefits of inter-courts conflicts may outweigh its short-term costs from the perspective of the whole society—an issue that will be covered later. What this paper suggests here, however, is

<sup>75</sup> See, e.g., Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 246-48 (1992); Adrian Vermeule, *The Judiciary is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 554-63 (2005).

<sup>76</sup> ADRIAN VERMEULE, *THE SYSTEM OF THE CONSTITUTION* 134 (2011).

<sup>77</sup> Austria and Belgium are two notable exceptions.

<sup>78</sup> See MARY L. VOLCANSEK, *CONSTITUTIONAL POLITICS IN ITALY* 24 (2000) (arguing that "career choices after one's service is completed introduces a measure of self-interest") (emphasis omitted).

<sup>79</sup> Garoupa & Ginsburg, *supra* note 9, at 544.

<sup>80</sup> Of course, given that many constitutional courts require a supermajority of vote to issue decisions, whether, or how often, this strategy will succeed is another intriguing issue.

<sup>81</sup> LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES* 42-43 (2013) (arguing that judges try to avoid the ill will of one's colleagues by refraining from dissenting).

<sup>82</sup> See Posner & Vermeule, *supra* note 68, at 1025.

<sup>83</sup> LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES* 50 (2006).

not whether inter-courts conflicts should be encouraged normatively, but when inter-courts conflicts will emerge in practice. Moreover, compared to inter-branch constitutional showdowns, the scale and impact of inter-court frictions are usually more moderate. It follows that the long-term benefits caused by such conflicts are more uncertain.

As to the self-interest problem, it has been ameliorated or at least lessened, through institutional design. For one, some constitutional courts adopt a consensual approach during the process of decision-making and prohibit personal opinions, preserving the prestige and undergirding the authority of their decisions.<sup>84</sup> For another, constitutional courts usually require a majority of votes to deliver any decisions. The threshold may effectively render the stance of the moderate (usually the median or swing justice) more likely to prevail.<sup>85</sup> Therefore, the drive of personal interests may not change the fundamental logic of the game of chicken between the two courts.

### *B. Factors that Facilitate Prediction*

Given that inter-court conflicts result from miscalculation, it is necessary to understand how a court predicts the other’s strategy as to prevent head-on clashes under normal circumstances. Several factors may help both courts better estimate the strategy of their counterpart: the composition of constitutional courts, legal stability, the type of disagreements, and social ties.

First, the composition of constitutional courts is the most effective way constitutional judges may predict the reaction of their counterparts in supreme courts. As mentioned earlier, there are three main appointment systems of constitutional courts. In the representation model, one-third of constitutional judges are appointed by supreme courts without the intervention of other branches. These former supreme court judges serve as reference points that allows other constitutional judges to be able to predict the stance of supreme courts. Of course, a supreme court is also a “they” not an “it,” and the opinions of some of its former members certainly do not represent

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<sup>84</sup> See VOLCANSEK, *supra* note 78, at 26-27.

<sup>85</sup> See THOMAS H. HAMMOND ET AL., STRATEGIC BEHAVIOR AND POLICY CHOICE ON THE U.S. SUPREME COURT 95-138 (2005).

the court as a whole. But they do at least provide some information. Note this does not imply constitutional courts that adopt different appointment models are unable to predict the behavior of their counterparts. No matter which model is formally adopted, there are usually some seats substantively reserved for career judges, and the appointers will consult supreme courts before nominating. The more diversified the composition of a constitutional court, the more easily it may predict the action of different actors.

Second, the potential impact of a decision on legal stability is also an indicator which constitutional courts may use to predict how supreme courts might react. As mentioned earlier, legal stability is particularly important to supreme courts, which have the final say over all civil, criminal, and administrative controversies. Any attack against precedent not only destabilizes legal order but also challenges the authority of supreme courts in these domains. Nonetheless, not all precedents are treated alike. Inter-court frictions are more likely to emerge when a precedent declared unconstitutional and void has remained valid for a longer period of time. From a normative perspective, supreme courts would reasonably expect that a well-established precedent should be more constitutionally sustainable. From a pragmatic angle, change of a widely accepted precedent increases the burden on supreme courts since it affects numerous cases currently on trial in ordinary courts. Therefore, constitutional courts should be more cautious when they quash a precedent that has long been in effect.

Moreover, the type of disagreement also influences how supreme courts will react. Theoretically, supreme courts will react more strongly when it is their decisions, rather than statutes, that are overruled. This explains why concrete review is more provocative than abstract review in the eyes of supreme courts. In abstract review, technically it is the statute that is questioned, not the judicial decision itself, even though there are disagreements about how the law should be interpreted. In other words, it is the legislature, instead of supreme courts, that is directly at war with constitutional courts. By contrast, in concrete review, constitutional courts directly challenge, and actually diminish, the authority of supreme courts when striking down their decisions. Unsurprisingly, this will lead to head-on collisions more easily.

Last but not least, judges of both courts, however professionally trained, are still part of society and will inevitably be

susceptible to the social climate.<sup>86</sup> This common background may render them more able to know what the other would rule under certain circumstances. In a conservative society, for instance, it would be inconceivable for constitutional courts to strike down judicial precedents that prohibit gay marriage. The judiciary, albeit not popularly elected, is majoritarian more often than not.

### C. Summary

Section I identifies a plethora of elements that may result in judicial disagreement, but these factors cannot explain why inter-court conflicts occur in some countries but not in others that share similar institutional and ideational characteristics. They also fail to elucidate when skirmishes will emerge. To further clarify these conundrums, this section applies a basic model of the game of chicken, suggesting that open confrontations take place when both apex courts wrongly believe the other would succumb and choose to go charge ahead. Once an inter-court conflict emerges, the next question becomes what strategies courts will choose. Anecdotal evidence has shown that constitutional courts have often prevailed in a war of courts. Given that they are established outside the judiciary, constitutional courts may forge coalitions with other political actors when asserting jurisdiction.<sup>87</sup> This is usually followed by escalated tension between apex courts.

## II. Alliances with other Actors

Although inter-court conflicts do not happen frequently, they usually become the focal point in the political arena since a war between high courts can hardly be a pure judicial issue. Such contentions very often result from the materialization of frictions and the re-alignment of major political agents. In a forward-looking fashion, the redistribution of judicial power has impact on different government organs, political parties, and other potential actors. This is because change in the judiciary reshapes the framework in which power struggles take place, particularly in an era of global

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<sup>86</sup> See ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 293 (2014).

<sup>87</sup> See John Ferejohn, *Judicial Power: Getting it and Keeping it*, in *CONSEQUENTIAL COURT* 349, 360 (Diana Kapiszewski et al. eds., 2013).

judicialization of politics where most political conflicts are eventually solved in courtrooms.<sup>88</sup> Hence, it is crucial to investigate the alignment among courts, other political institutions, and key stakeholders in order to understand the new political dynamics that have emerged from inter-court conflicts.

Moreover, once a clash takes place, which court will prevail does not usually depend on whose legal interpretation is better but rather on who can successfully forge an alliance with other actors. Therefore, constitutional courts and supreme courts are respectively incentivized to ally with different political actors such as citizens, lower courts, and politicians. From the perspective of the constitutional court, both institutional disadvantage and legitimacy crises strongly motivate it to ally with all three actors. Structurally, constitutional courts are dependent on other institutions to initiate constitutional review and implement their decisions since constitutional courts lack control of both the lower courts as well as the political branches.<sup>89</sup> Also, since constitutional courts are created outside the conventional judicial system, their legitimacy is built more on recognition from their audience, particularly the general public. Compared to supreme courts, therefore, constitutional courts are more likely to rule in line with mainstream doctrines and ally themselves with citizens (or public opinion leaders in some cases). In a word, constitutional courts may ally with politicians, lower courts, or citizens, depending on the context. As for supreme courts, the alliance is often with politicians. In Poland, for example, the new Constitution of 1997 provides more textual munitions for the Polish Supreme Court to defy the Constitutional Court.<sup>90</sup> On a conceptual level, supreme courts are unlikely to ally with the public in a war of courts since there would be no case to start with if a supreme court agrees with citizens.

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<sup>88</sup> See Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93, 99-112 (2008) (introducing several illustrative cases of judicialization of politics); Ran Hirschl, *Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend*, 15 CAN. J.L. & JURIS. 191, 191-211 (2002).

<sup>89</sup> But see SADURSKI, *supra* note 64, at 8-9 (pointing out that constitutional courts can act *sua sponte* in Albania, Hungary, Montenegro, Poland before 1997, Russia before 1994, and Serbia).

<sup>90</sup> PROCHÁZKA, *supra* note 14, at 110-11.

### A. Alliance with Citizens

The phenomenon of alliances between constitutional courts and citizens is widely observed when the former clashes with supreme courts. Specifically, three major channels facilitate such alignment.

First, in some Eastern European states, citizens may “initiate abstract review regardless of whether they have specific legal interests in the case in question”<sup>91</sup> through an institution called *actio popularis*.<sup>92</sup> In Hungary, where even non-citizens can lodge such suit, this approach has been widely used to invalidate the death penalty and protect free speech.<sup>93</sup> Since citizens may directly challenge the constitutionality of a law without a concrete controversy, the conflict between apex courts is least likely to happen through this channel. Second, citizens may petition constitutional courts when their constitutional rights are infringed after exhausting all available judicial remedies. In countries like Taiwan and Poland, it is statutes, rather than judicial decisions, that are subject to constitutional review. This is usually categorized as abstract review, a compromised version of constitutional complaint situated between the first and third types. Although judicial decisions are not directly challenged in this scenario, inter-court confrontations sometimes take place when apex courts disagree with how statutes should be interpreted. Finally, the last category comprises a form of constitutional complaint in which constitutional courts may scrutinize the decisions of ordinary courts, an institution adopted in countries like the Czech Republic, Germany, and Russia. Since it is the constitutionality of judicial decisions that is questioned and overruled, the conflicts between apex courts are most acute. Essentially, constitutional courts function as special “appellate courts” for supreme courts, or in the words of many ordinary judges, “super supreme courts.” Despite some institutional variances, the three channels share one crucial characteristic: it is the citizens that challenge the constitutionality of a law or the legal interpretation of supreme courts before constitutional courts. As a corollary, when constitutional courts rule in favor of petitioners, the

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<sup>91</sup> SADURSKI, *supra* note 64, at 6.

<sup>92</sup> SCHWARTZ, *supra* note 63, at 35. This institution has been repealed, however.

<sup>93</sup> *Id.* at 81-82.



triad is broken down into two against one,<sup>94</sup> and the alliance between constitutional courts and citizens is thus forged.

Admittedly, some may argue that only in the German-style constitutional complaint can we find judicial decisions being the target of constitutional scrutiny.<sup>95</sup> In other jurisdictions, it is the constitutionality of statutes that is challenged. Hence, the alliance between constitutional courts and citizens emerges only in the third category. This claim is technically correct but analytically misleading. Inter-court clashes are possible in all three categories when constitutional courts rule in favor of citizens, even when constitutional courts do not review concrete decisions. By striking down the statute from which supreme courts derive legal interpretation, constitutional courts practically compel supreme courts to change their original ruling. The interaction between the Italian Constitutional Court and the Court of Cassation in 1965 shall demonstrate this point. The Italian Court of Cassation rendered a decision on procedural issues related to “summary investigation” in 1958, ruling that some fair-trial guarantees are not fully required in this type of proceeding. In February 1965, the Constitutional Court was asked to review the constitutionality of provisions concerning this issue, and required the Court of Cassation to revise its 1958 jurisprudence.<sup>96</sup> The Court of Cassation refused to do so; in response, the Constitutional Court simply struck down the contested provision, forcing the Court of Cassation to alter its original interpretation.

Simply put, striking down statutes in abstract review is sometimes functionally equivalent to striking down decisions in the context of inter-courts conflicts. In both circumstances, constitutional courts disregard the authority of supreme courts in legal interpretation and adjudication. This analysis is also consistent with empirical findings, since a plethora of harsh inter-court conflicts have taken place in countries without concrete review.

In addition, constitutional courts can further consolidate the alliance by ruling in favor of (the majority of) citizens. In fact, judicial accessibility usually triggers a self-empowering circle: the more accessible a constitutional court is, the more opportunities it has to rule in favor of the public; the more popular it is, the more

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<sup>94</sup> See MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 2 (1981).

<sup>95</sup> See Donald P. Kommers & Russell A. Miller, *Das Bundesverfassungsgericht*, in *CONSTITUTIONAL COURTS: A COMPARATIVE STUDY* 102, 112-13 (Andrew Hardin & Peter Leyland eds., 2009).

<sup>96</sup> Merryman & Vigoriti, *supra* note 12, at 670-75. Garlicki, *supra* note 9, at 55

authoritative it becomes in rendering its mandates.<sup>97</sup> This is because “[t]aking a majoritarian approach . . . ensures the greatest likelihood of compliance.”<sup>98</sup> When the decisions are generally obeyed, more people will go to constitutional courts for help, and the process repeats itself, so on and so forth. Scholars have pointed out that “[t]here is a clear correlation between the existence of an activist, powerful constitutional court and the availability to citizens of a direct constitutional complaint procedure.”<sup>99</sup> This may explain in part why most constitutional courts in civil law countries are the most trustworthy branch among the three. It is plausible to assume that whoever stands by the public will win a war of courts.

For example, in a high profile case involving Jehovah’s Witnesses in the Czech Republic, “the Supreme Court judges refused to accept the ruling . . . of the Constitutional Court and virtually put the system of justice into a deadlock.”<sup>100</sup> Well exposed and criticized by the press, the Supreme Court seemed to have lost popular support, and “the case may be perceived as a symbolic breaking point in the ‘war of the courts’ badly damaging both the public and expert reputation of the Supreme Court.” This extra-legal pressure made the Supreme Court eventually yield to the Constitutional Court, and “consequently led to the acceptance of the constitutional principle of a generally binding character of the Constitutional Court’s decision in the human rights jurisdiction.”<sup>101</sup> This example vividly presents the new political dynamics emerging from the constitutional court-citizen alignment that shapes the power relation between the two high courts. It may also explain why the constitutional court is deemed as the most trustworthy of the three branches in many post-authoritarian countries.<sup>102</sup>

To be sure, insofar as citizens are composed of individuals with heterogeneous interests, preferences, and ideologies, both apex courts may claim public approval to some extent. Nonetheless, the

<sup>97</sup> See GINSBURG, *supra* note 19, at 73-74 (calling this configuration the high equilibrium of judicial review).

<sup>98</sup> See Tom Ginsburg, *The Politics of Courts in Democratization*, in CONSEQUENTIAL COURTS 45, 47 (Diana Kapiszewski et al., eds. 2013).

<sup>99</sup> SADURSKI, *supra* note 64, at 8.

<sup>100</sup> Juri Priban, *Judicial Power vs. Democratic Representation: the Culture of Constitutionalism and Human Rights in Czech Legal System*, in CONSTITUTIONAL JUSTICE EAST AND WEST 373, 381 (Wojciech Sadurski ed., 2002).

<sup>101</sup> *Id.* at 381.

<sup>102</sup> SCHWARTZ, *supra* note 63, at 237; Cepeda Espinosa, *supra* note 13, at 99-100.

degree of support for different courts not only differs but also matters in the context of inter-court conflicts. Usually only the court with higher popular support may successfully forge an alliance with the public that helps it prevail in a war of courts. In many new democracies, such as South Korea and Taiwan, constitutional courts are more popular than supreme courts partly because of the performance and images of the supreme courts during the authoritarian periods. It may not be surprising that the constitutional courts in both countries have won critical battles against the supreme courts. In a nutshell, since public approval is pivotal to the implementation of judicial decisions, *ceteris paribus*, the court with higher public support is more likely to forge an alliance with the people and thus prevail in an inter-court conflict.

Finally, legal experts, serving as both opinion leaders and mobilizers, are crucial in forging the alliance between courts and citizens and facilitating the empowering cycle. On the one hand, in countries like France, the Czech Republic, and Taiwan, the discourse of legal experts actually suggests the outcomes of inter-court conflicts: whoever wins support from scholars has the upper hand in the debate. This may result from the authority that scholars in civil law countries enjoy in legal interpretation: legal scholars' opinions are highly respected by judges, politicians, and other legal practitioners.<sup>103</sup> Consequently, the court that is supported by scholars tends to be more legitimate and authoritative, prevailing the inter-court struggle. By contrast, battles stretch out into a prolonged war when the opinion of scholars is divided. On the other hand, legal scholars and activist lawyers also play a leading role in public-interest litigation,<sup>104</sup> organizing petitioners, and designing strategies to bring cases to constitutional courts. In this sense, lawyers not only strengthen the linkage between citizens and constitutional courts, but also consolidate the power of constitutional courts.<sup>105</sup>

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<sup>103</sup> See MERRYMAN & PÉREZ-PERDOMO, *supra* note 44, at 60.

<sup>104</sup> Terence C. Halliday et al., *Introduction: The Legal Complex in Struggling for Political Liberalism*, in FIGHTING FOR POLITICAL FREEDOM 1, 2 (Halliday, Karpik & Feeley eds., 2007).

<sup>105</sup> See Terence C. Halliday, *Why the Legal Complex is Integral to Theories of Consequential Court*, in CONSEQUENTIAL COURT 337, 343-44 (Diana Kapiszewski et al. eds., 2013); see also CHARLES EPP, THE RIGHTS REVOLUTION 11-25 (1998).

### *B. Alliance with Lower Courts*

Lower courts have been on both sides of the divide: alignment between constitutional courts and lower courts is commonly observed, while alignment between supreme courts and lower courts is also present with strong institutional justification. As the frontline adjudicator that takes up the most cases, lower courts manifest an attitude that seems to signal the power dynamics within the judiciary when they choose to conform to the will or preferences of one high court rather than the other.

Judges from lower courts have ample reason to stand by supreme courts when apex courts clash, as supreme courts are institutionally advantaged to influence lower courts through the precedent<sup>106</sup> and personnel policy. First, lower court judges are bound by precedents made by their superiors in practice even though the doctrine of *stare decisis* is not formally binding in civil law systems. Judgments inconsistent with precedents are most likely to be reversed or dismissed. This leads to the second channel through which supreme courts exert clout over lower courts: personnel policy. Lower court judges are evaluated for several aspects, one of which is their reversal rate. Since conforming to precedent substantially reduces the possibility of being reversed, lower court judges are incentivized to follow their superiors. Second, as career judges, lower court judges are under the hierarchical control of a system of discipline and promotion. That is to say, judges in supreme courts also oversee the sanction and promotion of judges in lower courts. All the formal constraints give supreme courts an institutional advantage to push lower courts for support. In addition, informal pressure resulting from seniority and “face-saving” is also a common reason for junior judges to conform to senior judges in supreme courts, since they share the same social and professional backgrounds. Simply put, supreme courts have disproportionate influence upon lower courts both formally and informally.

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<sup>106</sup> Unlike precedent in a common law sense, this form of precedent is abstract legal reasoning articulating and regulating application of formal laws, especially when a legal element needs clarification in trial practice. The purpose of precedents is to unify different legal opinions among different divisions in the Supreme Court in order to provide unified standard application for lower court judges. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 44, at 36, 46-47 (arguing that the doctrine of *stare decisis* is formally rejected, but precedents are still influential in practice).

On the other hand, lower court judges can also form a strong alliance with constitutional courts for different reasons. First, from the perspective of institutional design, there has been a trend that endows lower court judges the power to file direct petitions to constitutional courts without the screening of supreme courts.<sup>107</sup> This new mechanism opens up a channel for lower court judges to seek assistance from constitutional courts when they need to fight for internal judicial independence. Second, ideational affinity may also account for why lower court judges are willing to ally with constitutional courts in inter-court conflicts, a state of affairs that seems to be fairly prominent in many post-transition jurisdictions. Specifically, supreme court judges in the third-wave democracies usually enter the judicial hierarchy during the authoritarian era and are promoted to move up the ladder because of their compliance and deference. Conversely, judges in lower courts are usually fresh graduates who have just left law schools and the training institute. Though they have been taught to follow conventional doctrine and to respect seniority, the fact that they have more exposure to the thinking of liberal democracy and that they are not yet fully socialized into the hierarchy differentiates them from senior judges. In this regard, they may be ideologically closer to constitutional judges, who are usually academics and attorneys with foreign education background before being appointed, and are generally more liberal than their counterparts in supreme courts. It is thus plausible that constitutional courts and lower court judges share a perception of the role of law in a democratic society, as opposed to the judges of supreme courts who emphasize the legalistic view of law and hierarchical authority.

In fact, many precedents overruled by constitutional courts are the result of petitions by lower court judges when they find the precedents constitutionally problematic. Also, lower courts judges may challenge the rulings of supreme courts on behalf of citizens that have not exhausted all available remedies in some countries. When they do so, an alignment between lower courts and constitutional courts is thus forged, indicating a redistribution of power within the judiciary.

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<sup>107</sup> Dyevre, *supra* note 33, at 743. This power is plainly stipulated in some states, such as Italy, and granted by constitutional courts in others, such as Taiwan.

### C. Alliance with Politicians

The notion of an alliance between courts and politicians seems counterintuitive at first glance, as conventional wisdom has long held that the judiciary exists to check and balance the political powers.<sup>108</sup> Nonetheless the relationship between the judiciary and political branches is in reality actually more symbiotic. On the one hand, it is in the interests of politicians to invite the judiciary to “interpose its friendly hand”<sup>109</sup> when they need to legitimize policy choices, overcome political gridlock, and shift blame.<sup>110</sup> On the other hand, courts need political support to implement decisions effectively. However persuasive their reasoning, judicial decisions are unlikely to penetrate to the ground without the support of political power.<sup>111</sup> Namely, both sides have strong incentives to forge an alliance.

In cases surveyed, politicians often side with constitutional courts, rather than supreme courts, in the context of inter-court conflicts. This phenomenon can be analyzed both politically and institutionally. First, in a transitional context, the creation of constitutional courts itself is reflective of politicians’ distrust toward supreme courts in many countries. As mentioned above, judges of ordinary courts are usually labeled the vestiges of old regimes, whereas constitutional courts are regarded as guardians of constitutions in new democracies. This political reality may render politicians in power more willing to support constitutional courts rather than supreme courts whenever conflicts occur. Second, in addition to human rights protections, constitutional courts are established precisely because they can be of great help for politicians.<sup>112</sup> This may also explain why politicians, be they presidents or congressional minorities, usually have special standing

<sup>108</sup> See Ferejohn, *supra* note 87, at 349-52.

<sup>109</sup> See Keith E. Whittington, *Interpose Your Friendly Hand: Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 586-93 (2005).

<sup>110</sup> GEORGE I. LOVELL, LEGISLATIVE DEFERRALS 7-13 (2003); KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 105-60 (2007); Stefan Voigt & Eli M. Salzberger, *Choosing not to Choose: When Politicians Choose to Delegate Powers*, 55 KYKLOS 289, 293-98 (2002).

<sup>111</sup> See ROSENBERG, *supra* note 72, at 94-106 (using the developments of civil rights movement in the post-1964 United States as an example).

<sup>112</sup> See GINSBURG, *supra* note 19, at 22-33 (proposing an insurance theory); RAN HIRSCHL, TOWARDS JURISTOCRACY 38-49 (2004) (advancing an explanation centered on hegemonic preservation).

to petition constitutional courts directly in many countries. Third, the appointment procedure of constitutional courts already suggests personal relationships, shared ideology, or interests in common between judges and politicians. By contrast, supreme court judges are promoted based on their seniority. This suggests that constitutional courts have closer affinity with politicians in power. The *Conseil Constitutionnel* in France, for example, “is dominated by political allies of the appointing authorities.”<sup>113</sup> So are the German<sup>114</sup> and Italian Constitutional Courts.<sup>115</sup> Not to mention that former presidents of the French Republic are members of the *Conseil* for life. Hence, the alliance between constitutional courts and politicians should not be surprising. It also explains why many Kelsenian constitutional courts have been politicized to a considerable extent.<sup>116</sup>

Compared with the former two types of alliances, the alliance with politicians implies more drastic change in power relations. From the view of constitutional courts, politicians are strong allies that ensure decision compliance, offer protection from political retaliation, and lessen the resistance and intervention from ordinary courts. Again, the alignment between the French *Conseil Constitutionnel* and the legislature is one good example. After the 2008 constitutional reform, lower courts may seek advice from the *Conseil Constitutionnel* whenever they encounter constitutional questions through either the *Cour de cassation* (equivalent to a supreme court) or the *Conseil d'État* (supreme administrative court). The *Cour de cassation* was once reluctant to send referrals to the *Conseil*, endeavoring to downplay its influence and intervention. This irritated not only constitutional law scholars but also legislators, who made it more difficult for judges of the *Cour de cassation* to filter referrals.<sup>117</sup> Another good example is Colombia. The Colombian Constitutional Court has frequently issued *tutela*<sup>118</sup> to protect fundamental rights against state actions, including rulings of the Colombian Supreme

<sup>113</sup> Ferejohn & Pasquino, *supra* note 34, at 33; Nuno Garoupa, *The Politicization of the Kelsenian Constitutional Courts*, in *EMPIRICALLY STUDIES OF JUDICIAL SYSTEMS* 149, 168 (Kuo-Chang Huang ed., 2008).

<sup>114</sup> See Garoupa, *supra* note 113, at 163.

<sup>115</sup> See VOLCANSEK, *supra* note 78, at 23; *id.* at 172.

<sup>116</sup> See Garoupa, *supra* note 113, at 162-83 (articulating the politicization of constitutional courts in Germany, France, Italy, Spain, and Portugal).

<sup>117</sup> See Dyevre, *supra* note 33, at 750-53.

<sup>118</sup> In a word, *tutela* is a broader version of the writ of *habeas corpus*. For detailed introduction of this institution, see Martha I. Morgan, *Taking Machismo to Court: The Gender Jurisprudence of the Colombian Constitutional Court*, 30 U. MIAMI INTER-AMERICAN L. REV. 253, 276-77 (1999).

Court.<sup>119</sup> This has unsurprisingly infuriated the Supreme Court, which has fiercely denounced the institution of *tutela* and proposed to weaken it. Eventually, the Constitutional Court prevailed in the war of courts with the support of the congress by rejecting the proposal.<sup>120</sup>

#### D. Alliance with Regional Courts

Although constitutional courts are more likely to form alliances with other actors and thus prevail in a war of courts due to their political ties and sensitivity, this does not mean that supreme courts are always fighting alone. Occasionally, ordinary courts will successfully convince politicians to support them. The existence of regional courts, such as the European Court of Justice or Inter-American Court of Human Rights, further complicates the interaction between supreme courts and constitutional courts in these regions. Although the decisions of regional courts are not necessarily binding, their legal interpretation undoubtedly provides additional ammunition for the judicial arsenal. In fact, the existence of a regional court provides domestic courts another chance to extend the battle. Even though domestic constitutional courts have the final say over constitutions, their decisions will inevitably be affected by international and regional covenants interpreted by international and regional courts in the era of globalization.<sup>121</sup> That is, domestic ordinary courts may turn the tables with the support of regional courts.

The conflict between the German Federal Constitutional Court and German Federal Labor Court is the best example here. Since the late 1950s, the two courts had disagreed on the validity and scope of the German Basic Law.<sup>122</sup> The German Federal Labor Court contended that the Basic Law has direct effect (or horizontal effect), at least in the domain of employment law. By contrast, the Constitutional Court tends to interpret the Basic Law narrowly, arguing it has only indirect effect. Normally, the Constitutional Court

<sup>119</sup> See Maria Paula Saffon, *Can Constitutional Courts be Counterhegemonic Powers vis-à-vis Neoliberalism? The Case of the Colombian Constitutional Court*, 5 SEATTLE J. SOC. JUST. 533, 541-42 (2007).

<sup>120</sup> See Morgan, *supra* note 118, at 319-23.

<sup>121</sup> See Nancy Maveety, *Comparative Judicial Studies*, in EXPLORING JUDICIAL POLITICS 294, 301-02 (Mark C. Miller ed., 2009).

<sup>122</sup> See Alec Stone Sweet & Kathleen Stranz, *Rights Adjudication and Constitutional Pluralism in Germany and Europe*, 19 J. EUR. PUB. POL'Y 92, 97-100 (2012).



should prevail since it has the exclusive power of constitutional review, but the decisions promulgated by the European Court of Justice tipped the balance between the Constitutional Court and the Labor Court in favor of the latter.<sup>123</sup> The German Constitutional Court succumbed and changed its interpretation accordingly.<sup>124</sup>

### *E. Summary*

Institutionally, constitutional courts should be weaker than supreme courts in a war of courts because they have no power to discipline lower courts and ensure decision adherence. Politically, however, constitutional courts have closer ties with political elites and are more sensitive to public opinion. Both political ties and public opinion are valuable resources in an inter-court conflict. In fact, the institutional disadvantage will instead motivate constitutional courts to ally with other actors more actively to strengthen their power vis-à-vis supreme courts. With the intervention of exogenous forces, the original power equilibrium between apex courts will unavoidably change to some extent after inter-court conflicts. This dynamic has occurred in many jurisdictions, such as Taiwan, which will be discussed at length below.

## **III. Case Analysis: Wars of Courts in Taiwan**

Similar to other civil law jurisdictions, multiple apex courts in Taiwan enjoy supremacy in their own domains:<sup>125</sup> the Constitutional Court, the Supreme Court, the Supreme Administrative Court, and a special commission for civil servants. Major disputes did also arise between the Constitutional Court and the Supreme Court.

Unlike other constitutional courts established in the third wave of democratization, the Taiwanese Constitutional Court was founded during the authoritarian period in 1947, while the Nationalist

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<sup>123</sup> *Id.* at 99.

<sup>124</sup> *Id.* at 100.

<sup>125</sup> For a clear illustration of the judicial structure in Taiwan, see Wen-Chen Chang, *Courts and Judicial Reform in Taiwan: Gradual Transformations Towards the Guardian of Constitutionalism and Rule of Law*, in *ASIAN COURTS IN CONTEXT* 143, 147 (Jiunn-rong Yeh & Wen-Chen Chang eds., 2014); Chang-fa Lo, *Taiwan: External Influences Mixed with Traditional Elements to Form Its Unique Legal System*, in *LAW AND LEGAL INSTITUTIONS OF ASIA: TRADITIONS, ADAPTATIONS AND INNOVATIONS* 91, 103-07 (E Ann Black & Gary F. Bell eds., 2011).

government was still in Mainland China. At that time, it was deferential to the strongmen and similarly bore the stigma of being a rubberstamp, if not the claws, of dictators. What renders it more peculiar is that the judicial system was originally modeled on the U.S. system in that the Judicial Yuan was to function as the final resort for all controversies, including constitutional, civil, criminal, and administrative issues. Due to the resistance of ordinary judges at the founding era, however, the original idea was never implemented and the current system in Taiwan basically reflects the German style.<sup>126</sup> This history has planted the seed for future inter-court conflicts.

Granted by the constitution, the Constitutional Court has the power of abstract judicial review, yet the scope of judicial review is not detailed in the constitution. Whether judicial precedents (*Pan-Li*)<sup>127</sup> issued by the Supreme Court can be scrutinized remained nebulous for a long time. During the authoritarian period, the Constitutional Court had expanded the scope of judicial review by self-aggrandizement, which resulted in tension between the two courts. First, it rendered a series of decisions to establish its authority and legitimacy to review precedents from the two supreme courts—the Supreme Court as the final court of appeal for civil and criminal cases, and the Supreme Administrative Court as the final resort of administrative cases. In Interpretation No. 154, the petitioner came to the Constitutional Court, arguing that the Administrative Court’s precedent was unconstitutional because it denied him access to the court.<sup>128</sup> The Constitutional Court created the power to scrutinize precedents but upheld the constitutionality of the precedent to prevent possible confrontation or disobedience,<sup>129</sup> a “*Marbury* moment” in Taiwan.<sup>130</sup> After four years, the Constitutional Court used this power again to nullify a precedent made by the Supreme Court in Interpretation No. 177.<sup>131</sup> In the following years, the Constitutional

<sup>126</sup> See Chien-Liang Lee (李建良), *Dafaguan de Zhidu Biange yu Sifayuan de Xianfa Dingwei* (大法官的制度變革與司法院的憲法定位), 27 NTU L.J. 217, 237 (1998).

<sup>127</sup> For a brief introduction of *Pan-Li* system, see Chang, *supra* note 125, at 164.

<sup>128</sup> J.Y. Interpretation No. 154 (1978) (Taiwan), available at [http://www.judicial.gov.tw/constitutionalcourt/EN/p03\\_01.asp?expno=154](http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=154) [hereinafter Interpretation No. 154].

<sup>129</sup> GINSBURG, *supra* note 19, at 135-36.

<sup>130</sup> Ferejohn, *supra* note 87, at 354-57.

<sup>131</sup> J.Y. Interpretation No. 177 (1982) (Taiwan), available at [http://www.judicial.gov.tw/constitutionalcourt/EN/p03\\_01.asp?expno=177](http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=177) [hereinafter Interpretation No. 177].

Court continued to review the constitutionality of precedents in a series of cases.<sup>132</sup> Although disagreements between the two apex courts were inevitable, they did not escalate to open conflicts.

Open conflict between the Constitutional Court and the Supreme Court did not occur until Interpretations No. 530<sup>133</sup> and No. 582.<sup>134</sup> The controversy in the former decision revolved around whether the judicial system should follow the American model (where there is one single apex court), favored by the framers, or the German model (where there are one Supreme Court and one Constitutional Court), which has been in practice for more than five decades. The importance of this reform project cannot be overstated since it will fundamentally alter the structure of the judiciary and affect the power of the Supreme Court over lower courts and legal interpretation if successfully implemented.<sup>135</sup> Although the Constitutional Court ruled clearly in favor of the American model, the Supreme Court vehemently resisted,<sup>136</sup> and the decision has never been implemented. It also seems unlikely to be implemented in the near future.

The latter case, Interpretation No. 582, was arguably the most serious clash between the two courts. The Constitutional Court voided two precedents concerning whether or not a co-defendant's statement can be used against the other co-defendant without cross-examination.<sup>137</sup> The two precedents held that the statement of a co-defendant is equivalent to a confession; thus, it shall be admitted to trial automatically.<sup>138</sup> By contrast, the Constitutional Court treated a co-defendant as an independent witness, and maintained that he or she shall be orally examined by the other co-defendant's counsel at trial.<sup>139</sup> Hence, the two precedents were quashed as they violated the

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<sup>132</sup> These decisions include but not limited to J.Y. Interpretations No. 185, 187, 201, 213, 220, 243, 256, 266, 269, 271, 275, and 306.

<sup>133</sup> J.Y. Interpretation No. 530 (2001) (Taiwan), *available at* [http://www.judicial.gov.tw/constitutionalcourt/en/p03\\_01.asp?expno=530](http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=530) [hereinafter Interpretation No. 530].

<sup>134</sup> J.Y. Interpretation No. 582 (2004) (Taiwan), *available at* [http://www.judicial.gov.tw/constitutionalcourt/en/p03\\_01.asp?expno=582](http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=582) [hereinafter Interpretation No. 582].

<sup>135</sup> See Jau-Yuan Hwang (黃昭元), *Sifa Weixian Shencha de Zhidu Xuanze yu Sifa Yuan Dingwei* (司法違憲審口的制度選擇與司法院定位), 32 NTU L.J. 55, 65-70 (2003); Lee, *supra* note 126, at 239-45.

<sup>136</sup> Chang, *supra* note 125, at 146.

<sup>137</sup> *Supra* note 134.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

due process guaranteed in the Constitution.<sup>140</sup> Although this case was seen as a great stride toward protecting criminal procedural rights, the Supreme Court was greatly irritated. Soon it held a press conference and openly expressed strong disagreement by maintaining that ordinary courts would continue applying the said precedents.<sup>141</sup> The Supreme Court further criticized that the Constitutional Court distorted the two voided precedents, hampered criminal law practice, and encroached upon its jurisdiction. This momentous clash eventuated in a second Constitutional Court decision, Interpretation No. 592,<sup>142</sup> which reiterated and clarified the scope and effect of Interpretation No. 582. The Supreme Court was not fully satisfied, but did not issue any comments or act further in public.

The two inter-court confrontations in Taiwan demonstrate how disagreement escalated into conflicts because of information asymmetry, and that power dynamics shift in a war of courts, as the Constitutional Court received support from external allies. Both courts thought the other would swerve, and the mutual misunderstanding resulted in the head-on clashes.

Specifically, from the perspective of the Constitutional Court, half of constitutional judges at that time were judges of the Supreme Court or the Supreme Administrative Court before being appointed when delivering the two Interpretations. Given their background serving as career judges and personal connections with former colleagues on both supreme courts, they should have knowledge about whether the two Interpretations would trigger resistance, and would have acted to soften the position of the Constitutional Court when necessary. Moreover, these constitutional judges could have easily vetoed any decision they deemed improper or too provocative, since a supermajority of votes is required to pass any constitutional decision. In the case of Interpretation No. 530, such behavior did not take place. Not only did the Constitutional Court issue the decision, but moreover none of the former Supreme Court judges issued any dissenting opinion.<sup>143</sup> As for the case of Interpretation No. 582,

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<sup>140</sup> *Id.*

<sup>141</sup> See Pi-Hu Hsu, *On the Application of Sec. II Art. V, Constitutional Interpretation Procedure Act* 222 TAIWAN L. REV. 133, 137 (2013).

<sup>142</sup> J.Y. Interpretation No. 592 (2005) (Taiwan), available at [http://www.judicial.gov.tw/constitutionalcourt/en/p03\\_01.asp?expno=592](http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=592).

<sup>143</sup> The only dissenting opinion came from a justice with a scholarly background, who studied in Austria. J.Y. Interpretation No. 530 (2001) (Taiwan), available at [http://www.judicial.gov.tw/constitutionalcourt/en/p03\\_01.asp?expno=530](http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=530).

former judges of other apex courts including one specializing in criminal procedure, also agreed with the majority to strike down the precedents at issue.<sup>144</sup> Given the controversy surrounding this decision, judges from supreme courts should have vetoed it, or at least issued dissenting opinions if they found it intolerable. Nonetheless, only one justice from the Supreme Administrative Court issued a dissenting opinion. Since most judges had consented, at least ostensibly, the Constitutional Court was not aware of the severe resistance from the Supreme Court.

In addition, two years before Interpretation No. 530, the Judicial Yuan held the National Judicial Reform Convention to discuss the organizational framework of the judiciary in Taiwan.<sup>145</sup> The American model was widely supported by most participants (99 out of 121), including legal scholars, lawyers, judges, and representatives from NGOs.<sup>146</sup> In Interpretation No. 530, it seems reasonable for constitutional judges to assume limited resistance from the Supreme Court since they simply reconfirmed what had already been discussed in the convention.<sup>147</sup> A similar situation occurred in Interpretation No. 582 as well.<sup>148</sup> As discussed earlier, it was not the first time the Constitutional Court struck down judicial precedents. The Constitutional Court would not have expected to encounter unprecedented pushback.

From the perspective of the Supreme Court, on the other hand, the two constitutional decisions were equally surprising and beyond what it could tolerate. In Interpretation No. 530, the Constitution Court tried in vain to fundamentally renovate the judicial system.<sup>149</sup> Given that the current German model has been in practice for about six decades and functioned properly, the decision was simply incomprehensible in the eyes of the Supreme Court. Likewise, the two precedents that were struck down in Interpretation No. 582 had been invoked repeatedly for more than four and six decades respectively.<sup>150</sup> Given this legal stability, it is conceivable that the Supreme Court would not expect these two precedents to be nullified

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<sup>144</sup> It should be noted that four constitutional judges appointed from ordinary courts recused themselves in this decision.

<sup>145</sup> See Hwang, *supra* note 135.

<sup>146</sup> *Id.* at 65; but see Tzung-Jen Tsai (蔡宗珍), *Woguo Xianfa Shenpan Zhidu zhi Jiantao* (我國憲法審判制度之檢討), 98 TAIWAN L. REV. 49 (2003).

<sup>147</sup> *Supra* note 133.

<sup>148</sup> Interpretation No. 582.

<sup>149</sup> *Supra* note 133.

<sup>150</sup> Interpretation No. 582.

and voided. It turned out that both apex courts misjudged, leading to wars of courts.

In regard to the power dynamics emerging from the two serious collisions, the availability of alliances indicates the destiny of the two cases. Interpretation No. 530 has never been implemented, while Interpretation No. 582 has been gradually accepted despite the resistance of the Supreme Court at the beginning. A crucial ally was present in the latter case, but absent in the former one: legal academia. In Interpretation No. 530, although some consensus had been reached beforehand in the judicial reform convention, scholarly opinion was highly divided.<sup>151</sup> Scholars who studied in the United States supported the decision, while scholars who studied in Germany, preferring the European model, generally opposed it and stood in favor of the status quo.<sup>152</sup> Interpretation No. 582, by contrast, received overwhelming if not unanimous support among criminal law scholars and NGOs.<sup>153</sup> Given this pressure, it would be difficult for the Supreme Court to resist for a long time.

Another key ally, politicians, might have also contributed to success or failure in the two cases. Interpretation No. 530 was an institutional reform that required political cooperation and coordination. Therefore, the presence of political allies is especially crucial. Unfortunately, the interpretation did not garner enough support from politicians in power because of political gridlock at the time.<sup>154</sup> The lack of political alignment is a major factor behind the impasse. In contrast, Interpretation No. 582 did not require active government involvement. Consequently, its implementation is more feasible so long as the public led by opinion leaders clearly stands by the Constitutional Court instead of the Supreme Court.

#### IV. Normative Implications

Analyses in this paper bring forth normative implications on three fronts: public interest, power dynamics, and institutional design.

First, an inter-court skirmish may advance the public interest in the long run for society as a whole, although it may generate no

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<sup>151</sup> See Hwang, *supra* note 135.

<sup>152</sup> See Lee, *supra* note 126, at 243 n.43.

<sup>153</sup> See Judicial Reform Foundation, Announcement on Interpretation No. 582, [http://www.jrf.org.tw/newjrf/index\\_new2014.asp?id=469](http://www.jrf.org.tw/newjrf/index_new2014.asp?id=469) (last revisited April 10, 2016).

<sup>154</sup> See Hwang, *supra* note 135, at 67 n.26.

institutional good for either apex court. In this sense, such conflict shall be encouraged. Public interest advanced in this context includes precedent setting, authority clarification, and human rights protection. Specifically, in many Latin American, Eastern European, and Asian young democracies (most of which are civil law countries with multiple apex courts), governments have enacted amnesty law to grant immunity to former high-rank officers in exchange for bloodless political transition. After democratization, nonetheless, victims of past human rights violations usually try to repeal the relevant law in the pursuit of justice. Facing this moral predicament, supreme courts tend to recognize amnesty law since they are generally legalistic and conservative,<sup>155</sup> while constitutional courts tend to focus more on human rights protection and substantive justice. Inter-court conflicts arising in this context actually serve the public interest by clarifying the legal character of transitional justice. That is, a society will be better off in the long run if the thorny issues of restorative justice can be solved as clearly (and perhaps early) as possible. Another good example is the debate over the death penalty. Capital punishment, whose character is both criminal and constitutional, has often resulted in a split between the supreme court and the constitutional court in European countries. Being an extremely divisive issue that repeatedly sparks controversy, this is an issue that needs to be fully debated and properly tackled. An inter-court conflict at an early stage may spur in-depth deliberation and help reach a precedent that stabilizes the system in the long-term despite its short-term costs. Note that the benefit of precedent-setting may be particularly enduring in the judicial sphere not only because the doctrine of *stare decisis* is in effect prevalent in every judicial system, but also because of the nature of constitutional interpretation: the constitution is what constitutional judges say it is to paraphrase Chief Justice Hughes of the U.S. Supreme Court.<sup>156</sup> Admittedly, without enough information, a premature conflict may simply establish unnecessary or even problematic precedents.<sup>157</sup> Whether this is the case, however, is case-specific and beyond the scope of this paper. The point here is that an inter-court clash may be positive to society, advancing public good in the long run.

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<sup>155</sup> HILBINK, *supra* note 46, at 189-202.

<sup>156</sup> Columbia 250, Charles Evans Hughes,

[http://c250.columbia.edu/c250\\_celebrates/remarkable\\_columbians/charles\\_hughes.html](http://c250.columbia.edu/c250_celebrates/remarkable_columbians/charles_hughes.html).

<sup>157</sup> See Posner & Vermeule, *supra* note 68, at 1038-40.

Second, in terms of shifting power equilibrium, an inter-court conflict may lead to new dynamics between apex courts. Supreme courts seem to have gradually lost their supremacy in the domain of civil, criminal, and administrative laws. By contrast, constitutional courts would essentially become the “appellate court” of supreme courts if ambitious enough. To be sure, this depends on how constitutional courts exercise their judicial review power against supreme courts. One crucial constraint is the size of the docket, as constitutional courts review much fewer petitions and cases than supreme courts. Nevertheless, to be a “super supreme court,” a constitutional court need not overrule many decisions issued by a supreme court, but rather only the critical ones. As long as a supreme court is overshadowed by the risk of “being reversed,” however small the likelihood of this is, the pressure becomes real. Moreover, another type of power dynamic, the “boomerang effect” or “ping-pong effect,”<sup>158</sup> has emerged between constitutional courts and supreme courts. Petitioners frustrated by supreme courts may bring their cases to constitutional courts, and once they win in constitutional courts, they usually can go back to supreme courts and ask for another review.

Third, a war of courts may also reshape the power dynamics between the judiciary and the political branches, as well as between different political parties. As suggested in the previous analysis, support from external actors, particularly the political branches, is pivotal in a war of courts. This collision and alignment actually has a reinforcing effect on the relationship between law and politics. Issues over which courts fight publicly are usually of paramount political salience, since doing so entails great costs for both apex courts. Once the debate takes place at the judicial arena, it attracts public attention and puts the issues into the political agenda, thus creating incentives for politicians to be involved in the war of courts. Political parties with divergent views might align with different courts in the hope of increasing popular support. Various approaches are available to popularity-seeking politicians, such as revising related statutes or even constitutional provisions, or openly supporting or refusing future implementation of the court’s decision.

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<sup>158</sup> See Kathryn Sikkink, *The Transnational Dimension of the Judicialization of Politics in Latin America*, in *THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA*, *supra* note 8 at 263, 267; Kathrin Zippel, *Transnational Advocacy Networks and Policy Cycles in the European Union: The Case of Sexual Harassment*, 11 *SOC. POL.* 57, 66-68 (2004).



These political moves may result in more political turmoil or expand the power of a court at the expense of the other, such as the case in France and Poland. In short, the dynamic interaction between politicians and courts demonstrates how inter-court conflict may translate into power struggle, not only in the judiciary, but the political sphere.

Finally, from the perspective of constitutional stability, the representation model may be the best mechanism to appoint constitutional judges since it reduces inter-court conflicts most effectively by guaranteeing that constitutional courts include some former judges of supreme courts. Namely, all things being equal, the representation model best diversifies the composition of constitutional courts both in terms of ideology and personnel. This not only makes their opinions more moderate, but also renders constitutional courts better able to predict the reaction of the other three branches—a design that may contribute to constitutional stability. Of course, benefits brought by inter-court (or even inter-branch) conflicts may be prevented as well, such as with the aforementioned function of authority clarification. Future framers need to reckon with the issue of how to strike a middle ground that spurs interest-enhancing confrontations and discourages those that result only in judicial chaos.

## V. Conclusion

Judicial disagreements result from a variety of reasons, but it is information asymmetry between apex courts that explains why some disagreements escalate to open conflicts but not others. In essence, a head-on collision takes place when both apex courts miscalculate the other's strategy since a confrontation may entail great institutional costs to both courts, including the loss of public support and judicial power. Once a war of courts occurs, which court prevails does not necessarily depend on whose legal interpretation is better but rather hinges on who can successfully forge an alliance with other actors, such as lower courts, the academia, or politicians in power. The case of Taiwan, along with Colombia, France, Poland, and many other countries, vividly demonstrates this point: whoever secured external support won the war of courts. Despite some short-term costs, a judicial showdown between apex courts can generate public good. In certain contexts, a public confrontation that spawns

judicial chaos may even lead to greater constitutional stability in the long run.

Furthermore, this paper concentrates on the interaction between constitutional courts and supreme courts. Obviously, there are other types of inter-court conflicts, such as the wars between administrative courts and constitutional courts, between secular courts and religious courts,<sup>159</sup> and between regional courts and domestic courts.<sup>160</sup> What motivates these conflicts and what these conflicts may bring about remain largely unclear. It is plausible that studies on these inter-judiciary conflicts may shed new light on current theories of separation of powers, separation of church and state, and the domestic, regional, and global judicialization of politics.

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<sup>159</sup> See, e.g., Ran Hirschl, *Constitutional Courts as Bulwarks of Secularism*, in CONSEQUENTIAL COURT, *supra* note 12, at 321-27.

<sup>160</sup> See generally, e.g., Stone Sweet & Stranz, *supra* note 122 (discussing conflicts between European Court of Justice and German Federal Constitution Court).