Reconsidering Constitutionalism: Context and the Consequences of Judicial Review Pre-Analysis Plan

I. General Information

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II. Introduction

A. Project Summary:

1. I field an online survey experiment on groups of at least 600 adults in Colombia and Chile, South America. The experiment tests whether exposure to a series of decisions by those countries' Constitutional Courts has the deleterious effect on several behavioral outcomes that some scholars expect. I focus on three outcomes: respondents' willingness to engage in democratic politics, to tolerate violations of democratic norms, and the legitimacy respondents award their Constitutional Court. The political roles played by the Colombian and Chilean Courts differ considerably, allowing me to explore the possibility that such contextual factors condition whatever effects judicial activity may have.

B. Aims, rationale, and background:

1. For some time, legal scholars and social scientists that study law have debated the appropriate role for courts in democratic politics. While some have cast modern courts as defenders of democratic norms and minority rights, others see them as pernicious institutions that shield important policy areas from the control of democratic majorities. This latter group has argued that when courts play political roles, constantly making decisions more properly left to the people, citizens begin engaging less in ordinary politics and become more willing to tolerate the violations of democratic norms that populist politicians are known for. Both arguments, at their core, question the legitimacy of the role these courts play in the polities they serve. This project therefore aims to empirically test the arguments that judicial intervention in politics 1) leads citizens to disengage from the political process; 2) leads citizens to tolerate the violation of democratic norms associated with populism; and 3) leads to a decline in judicial legitimacy.

   In the process of testing these arguments, I make two contentions. First, that any empirical account of the effect of courts on the outcomes I list above must consider the hypothesis that what really matters is not judicial

intervention itself, but how often citizens win or lose when courts rule. Second, that before making broad claims about the impact that courts have on democracy, scholars must pay greater attention to cross-national variation in the contexts in which courts operate. In particular, I focus on two sources of variation: the level of access that ordinary citizens have to the judiciary and the "output" of the judiciary itself. This focus leads me to Colombia and Chile as ideal settings for my experiment. In the latter, citizens enjoy very little access to the Constitutional Tribunal, the judicial institution often tasked with making important political decisions, and that Court's role in constitutional review is to restrain the government when its actions violate the Constitution. In the former, on the other hand, citizens enjoy nearly unfettered access to the judiciary, and the Constitutional Court not only restrains government action at times, it also often *forces* the government to act, to deliver the goods and services that Colombians are promised in their Constitution.

These differences are too glaring to assume *ex-ante* that they have no impact on the three outcomes in which I am interested. Less obvious is how this variation might affect those outcomes, given that the arguments I outline above are untested in even the most general sense. While these contextual variables drove my choice of countries in which to field the experiment, based on the study design below any cross-country comparison of results that I make will be largely exploratory, as variables outside of the ones I can control could explain, at least in part, any cross-country differences I observe. While future work should attempt to explain such differences, the point of this project is to take the initial step of establishing if there even are differences. If so, perhaps this is evidence that scholars of judicial politics need to pay more attention to institutional context when arguing about the democratic role of courts. If not, then whatever effects, or lack thereof, that I find may tell us something about the impact that courts *as courts* have on the political behavior of ordinary citizens.

III. Study Design

A. Intervention:

1. *Treatment conditions*: In each country, respondents who are at least 18 years of age will be randomly assigned to one of the following 3 conditions:

    a) Control: after the initial battery of questions answered by all respondents, individuals in this condition will proceed to answer the items measuring each of the dependent variables.

b) Respondents will read 3 brief descriptions of actual cases from their country's Constitutional Court/Tribunal, presented in random order, which illustrate output typical of that Court: Chilean respondents read 3 decisions by their Court which restrain the government, while Colombians read 3 decisions by their Court that force the government to act/deliver goods and services. After each description, subjects will answer a manipulation check question that asks them to select the option describing what the Court did in the ruling they just read about. Finally, subjects will answer the items measuring each of the dependent variables.

c) Respondents will read 3 brief descriptions of actual cases from their country's Constitutional Court/Tribunal, presented in random order, which illustrate output typical of that Court: Chilean respondents read 3 decisions by their Court which restrain the government, while Colombians read 3 decisions by their Court that force the government to act/deliver goods and services. After each description, subjects will answer a manipulation check question that asks them to select the option describing what the Court did in the ruling they just read about. Then, a question will ask them the extent to which they are willing to accept the Court's decision. A follow-up question will ask them to explain, in an open-ended fashion, what they were thinking when they answered the acceptance item. Finally, subjects will answer the items measuring each of the dependent variables.

B. Hypotheses:

1. As I explain above, this project aims to test expectations culled from existing literature regarding the impact of judicial involvement in politics on the political behavior of ordinary citizens. Reformulated here as formal hypotheses, those expectations are:

a) H1: Respondents in the treatment conditions will exhibit lower willingness to engage in ordinary democratic politics compared to respondents in the control condition.

(1) H1alt: the frequency with which respondents agreed with the Court's decisions, not necessarily their having received the treatment, will significantly predict their willingness to engage.

b) H2: Respondents in the treatment conditions will exhibit greater tolerance for violations of democratic norms compared to respondents in the control condition.

(1) H2alt: the frequency with which respondents agreed with the Court's decisions, not necessarily their having received the treatment, will significantly predict their tolerance for the violation of democratic norms.

c) H3: Respondents in the treatment conditions will award their Court less legitimacy compared to respondents in the control condition.

(1) H3alt: the frequency with which respondents agreed with the Court's decisions, not necessarily their having received the treatment, will significantly predict the level of legitimacy they award the Court.

C. Measurement:

1. *Main variables of interest*:

a) Dependent variables (order randomized in survey):

(1) *Engagement in democratic politics*: Subjects will answer several questions. One asks how likely they would be to vote in an election for Congress if it were held this Sunday, and they can choose one of five responses from a Likert scale. Using the same scale, another question asks how likely the respondent would be to participate in politics by attending a meeting, rally, or speech. A third question asks the extent to which respondents agree that they can make a difference by participating in politics and allows them to choose from among 5 options, ranging from "strongly agree" to "strongly disagree." The final question asks whether the respondent believes the best way to make a difference in politics is by appealing to the president, congress, or the courts.

(2) *Support for the violation of democratic norms*: Here I use existing questions from AmericasBarometer surveys which capture support for populism. All questions ask respondents to choose a number from 1-7 indicating their level of agreement. Subjects are asked their level of agreement with presidents limiting the voice and vote of opposition parties, presidents governing without the legislature, and presidents ignoring the Constitutional Court. Subjects will also indicate if they agree that the dominant class/oligarchy represent the biggest obstacle to the country's progress and that those who don't agree with

the majority represent a threat to the country. A final question asks that respondents use a scale from 1-10 to indicate their approval of the government censoring media that criticizes it.

(3) *Constitutional Court legitimacy*: Here I utilize the standard battery of items from James Gibson and his colleagues. Respondents indicate their level of agreement, on a 5-point scale ranging from "strongly agree" to "strongly disagree," with: Doing away with the Constitutional Court if it were to start making a lot of decisions that the majority of people disagree with; the statement that the Court will inevitably get mixed up in politics, necessitating a stronger means of controlling the Court's actions; the statement that the Court should be made less independent so that it listens a lot more to what the people want; and the statement that judges that consistently make decisions at odds with the will of the majority should be removed from their positions.

(b) Independent variables:

(1) Treatment conditions; demographics, political ideology, political interest, attention to news, and level of trust in the executive and Congress if imbalance is observed on these variables; variable measuring how often respondents read or hear about their country's Constitutional Court, to assess pre-treatment effects; variable measuring how often respondents disagreed with court decisions to test alternate hypotheses.

D. Data collection:

1. In both Colombia and Chile, my survey experiment will be administered by Netquest, a well-established organization that maintains large online panels of individuals in many Latin American countries. Netquest has communicated that it should take no more than 3 days to complete data collection. I intend to stagger the surveys so that both are not initiated at the same time, which means that at most data collection across the two countries will take a total of 6 days. Currently, I anticipate that the surveys will be fielded in January 2019.

The survey itself is programmed using Qualtrics, and any randomization procedures utilize Qualtrics' built-in randomizer. Of course, the survey is administered in Spanish.

IV. Analysis

A. Statistical procedures:

1. In the absence of imbalance on observable characteristics, I will perform ANOVAs to test H1, H2, and H3. Regression may be utilized in the case of imbalance.

2. Questions mixed in with the introductory items on the survey will allow me to ascertain subjects' opinions on the substantive issues on which the Court rules in the treatment conditions. Using these questions, I will calculate how many times a subject agreed/disagreed with the Court's decisions. With this variable alongside a variable indicating whether or not the respondent was in the treatment group(s), I will estimate regression models to test H1alt, H2alt, and H3alt, interacting the treatment variable and agree/disagree variable.

3. The two treatment groups detailed above contain the same information, but one includes the additional step of asking subjects to respond to the Court's decisions directly. If there are no statistically significant differences in the dependent variables between these groups, I will pool the groups and analyze them as a single treatment group.

4. To investigate the possibility of pre-treatment effects, I will estimate regression models testing each hypothesis in which I include a control variable measuring how often subjects read or hear about their Constitutional Court. If the results do not differ, they will likely appear in an appendix in any published work.

5. The 4 questions measuring the first dependent variable, *engagement in democratic politics*, will be subjected to factor analysis, and I will obtain a Chronbach's alpha to judge the extent to which it is feasible to combine the items into a single measure. If doing so is not permissible according to conventional statistical standards, the items will be analyzed separately.

For the second dependent variable, *support for the violation of democratic norms*, existing literature indicates that I should be able to combine the three questions about the president into a single measure and the remaining questions into a second measure. I will verify this with factor analysis and by examining the Chronbach's alpha for these items before doing so. The final question regarding censoring the media will be analyzed separately.

The items measuring the final dependent variable, *Constitutional Court legitimacy*, are entirely conventional and are always combined into a single measure in existing literature. Before doing so, however, I will subject the items to factor analysis and obtain a Chronbach's alpha.

V. Final considerations

A. Exploratory analysis:

1. One treatment group asks individuals to respond directly to each of the Court's rulings they read about, first by indicating their willingness to accept the Court's ruling and then by explaining their answer in an open-ended fashion. In the study of the political psychology of individuals' reactions to the U.S. Supreme Court, scholars distinguish between diffuse support for the Court, or the Court's legitimacy, and specific support. In the U.S., specific support for the Court is closely tied to satisfaction with the Court's actual rulings, much more so than diffuse support, though scholars acknowledge that the two are related.

The item I use to measure acceptance of the Court's decisions is from an existing battery of questions that measures specific support for the Court in the United States. This item, along with the open-ended follow up question that asks subjects to explain their answer, will allow me to explore several things: the relationship between specific support and legitimacy in this treatment group; the emotions that respondents list as explanations for their willingness to accept a decision or not; the extent to which respondents mention anything approaching judicial legitimacy as a reason for accepting a decision; and changes in the willingness of respondents to accept a decision after multiple "wins" or "losses" at the hands of the Court.

Responses to the open-ended item will be coded for the criteria listed above as well as for any other criteria that emerge as "common themes" when I read through the responses. Obviously, any findings from this portion of the analysis should be treated as entirely preliminary and exploratory.

B. Multiple publications:

1. This study forms the basis of my dissertation and any subsequent book project based on that dissertation. Portions of the findings from this experiment may be published separately in article format. If that occurs, I will always explicitly reference the fact that findings were part of an experiment that tested several dependent variables, and I will point readers to this pre-analysis plan to ensure transparency about the source of the results.