

Law versus Democracy: Reputation Costs, Judicial Alliance Networks, and Democratic Erosion in Turkey

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Abstract

Conventional wisdom holds that independent judiciaries protect democracies from backsliding. I instead argue that courts can enable democratic erosion depending on their alignment with voters and networks with elite allies. Whereas existing theories model the judiciary's strategic interaction with the executive and legislature, I add that executive-judicial conflicts occur in front of an influential audience: voters. Adapting the concept of "audience costs" from international relations, I develop a formal model in which executive-judicial conflict is institution-enhancing when judicial sanctions impose a "reputation cost" on politicians but institution-eroding when judicial penalties give politicians a "reputation benefit." Findings from an original dataset of 3,000 decisions issued by Turkey's Constitutional Court suggest that two features of judicial alliance networks pull courts out of alignment with voters and into the institution-eroding equilibrium. First, judicial networks with partisan allies engender a spiral of institution-eroding conflict, in which the judiciary's ties with one party lead to polarization and unpopular judicial decisions. Furthermore, networks with unelected allies, such as indirectly elected heads of state, provide courts with the independence to rule against popular governments. Yet these alliances undermine the judiciary's legitimacy, as courts become less willing to hold unelected allies accountable.

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1 Introduction

In the past two decades, something new has happened: Democratic erosion has occurred in democracies with historically independent and powerful judiciaries. Previously, in the seminal episodes of democratic backsliding during the twentieth century, such as inter-war Germany and Italy, constitutional courts with effective powers of judicial review simply did not exist (Shapiro, 2013, 380).¹ During the 1980s and 1990s, democratic backsliding primarily afflicted countries such as Belarus, Peru, and Russia in which constitutional courts were weakly rooted and easily circumvented (Levitsky and Way, 2010, 359).² Yet in the twenty-first century, illiberal leaders have tested democratic institutions in countries with some of the strongest constitutional courts in the world, such as Brazil, India, Israel, Turkey, and the United States. Why, then, have courts—the quintessential institutional safeguard of a republic—constrained democratic erosion in some cases yet failed to do so or even enabled such erosion in others?

Conventional wisdom holds that independent, powerful courts should serve as guardrails against democratic backsliding. In his seminal work of republican political theory, Alexander Hamilton (1788) argued that judges with security of tenure are an “excellent barrier to the encroachments and oppressions of the representative body” (Hamilton, Jay and Madison, 2001, no. 78). Indeed, Hamilton (1788) famously wrote that of the three branches of government, “the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution” (Hamilton, Jay and Madison, 2001, no. 78). Consistent with Hamilton’s (1788) theory, numerous studies find that independent judicial institutions are a key predictor of resilience against democratic erosion (Gibler and Randazzo, 2011; Reenock, Staton and Radean, 2013; Ginsburg and Huq, 2018*a*; Boese et al., 2021; Laebens and Lührmann, 2021; Staton, Reenock and Holsinger, 2022).

This paper challenges Hamilton’s (1788) thesis by arguing that independent, powerful courts have double-edged effects on democracy. On the one hand, independent judiciaries can defend democracy against illiberal governments. In Brazil between 2019 and 2022, the Supreme Federal Court (STF) vigorously “acted as the primary check on President Jair Bolsonaro’s power” (Nicas and Spigariol, 2022). In Colombia in 2010, the Constitutional Court rejected a referendum that would have allowed President Álvaro Uribe to run for a

¹As Shapiro (2013) observes, “[a]t the time of World War II, three countries had successful constitutional judicial review:” Australia, Canada, and the United States. See Shapiro (2013).

²In their study of 35 countries that were or became competitive authoritarian after the Cold War, Levitsky and Way (2010) argue that “constitutional rules were routinely subverted” and that “constitutional courts were circumvented or trampled upon” in cases such as Belarus, Peru, and Russia. See Levitsky and Way (2010, 359).

third term, even though the referendum had support from the president and both houses of Congress (Ginsburg and Huq, 2018*a*; Gamboa, 2017). In Kenya in 2021, the Supreme Court blocked constitutional amendments proposed by President Uhuru Kenyatta that were “widely perceived as a veiled attempt to consolidate political dynasties” with the candidate Kenyatta endorsed as his successor (Schipani, 2022). In Israel under Prime Minister Benjamin Netanyahu, the embattled high court has been passionately defended for its role serving as one of the country’s few checks and balances, punishing corruption by politicians, and safeguarding the rights of Israel’s Arab minority (Shotter, 2023).

Yet on the other hand, independent judiciaries can defend illiberal elites against democratic governments. In Thailand during the 2000s, an “anti-democratic alliance” (Mérieau, 2016, 445) comprising the Thai monarchy and military collaborated with the judiciary to preserve its dominance over elected governments (Dressel, 2010). In the United States, Bowie (2021, 162) contends that “the Supreme Court today is the ultimate supplier of antidemocracy.” For another example, consider Turkey under the Justice and Development Party, or AKP. For many years after the AKP came to power in 2002, the Turkish Constitutional Court (TCC) was highly willing to strike down government policies. Between 2002 and 2007, the TCC ruled against the government in 64% of appeals filed by opposition parliamentarians.³ Yet as Bâli (2011, 244-45) argues, the court’s independence served not to protect democracy but rather to “block pathways to future political liberalization” and foment “confrontation with the political branches.” What is more, powerful judicial constraints on the executive ultimately failed to halt democratic erosion, and over time, the TCC has lost both independence and power.⁴ Why, in contexts as diverse as Thailand, Turkey, and the United States, have courts seemingly enabled democratic erosion?

The three leading theories of judicial politics struggle to explain why courts—far from serving as *defenders* of democracy—are instead *accomplices* of democratic erosion. The first theory, dating back to Hamilton’s (1788) thought, argues that formal institutional design enables the judiciary to remain independent and thus check democratic erosion (Hamilton, Jay and Madison, 2001; Ginsburg and Huq, 2018*b*). But even in democracies with highly independent judiciaries, such as Turkey during the 2000s, judges have used their independence in profoundly partisan and anti-democratic ways (Belge, 2006; Bâli, 2011). A second set of theories focus on the balance of power among key political actors, especially the elected

³Author’s calculation using original data described in this paper.

⁴Between 2014 and 2023, the court ruled in favor of opposition parliamentarians in just 40% of appeals, according to original data described in Sections 4 and 5. On non-compliance with TCC rulings, see *Turkey: Spectre of a Digital Lockdown* (2022, 22).

government vis-à-vis the opposition (Ferejohn and Weingast, 1992; Ferejohn, Rosenbluth and Shipan, 2009; Chávez, Ferejohn and Weingast, 2011). Yet the balance of power in democracies is often endogenous to decisions that courts make—for instance, when courts prevent a popular president from running for a third term. A third set of theories suggest that the judiciary’s legitimacy and reputation are a source of power (Caldeira, 1987; Garoupa and Ginsburg, 2015; Carpenter, 2010). But such theories beg the question of why judicial pushback against the executive enhances the judiciary’s legitimacy in some cases yet erodes it in others.

In contrast to existing scholarship, I theorize that judicial constraints on the executive depend on the interaction of variables at the mass and elite levels. At the mass level, I develop a formal model—drawing on theories of inter-state conflict from international relations (Fearon, 1994)—in which inter-branch conflicts between the executive and judiciary occur in front of an audience: voters. As elaborated in Section 2, I theorize that when the judiciary is aligned with the electorate, judicial pushback against the executive imposes a “*reputation cost*” on the executive and enhances the reputation of the court. In this equilibrium, which I term “*institution-enhancing conflict*,” the court increases its legitimacy over time and thus becomes more capable of defending its independence from executive aggrandizement. However, when the judiciary is out of step with voters, judicial pushback instead imposes a reputation cost on the court and generates “*institution-eroding conflict*.” Over time, as the court loses legitimacy, executives are increasingly able to discredit the court as partisan or interventionist and mobilize public support for overhauling the courts.

Why, then, do courts sometimes fall into a downward spiral of institution-eroding conflict? I theorize in Section 3 that the judiciary’s alliance networks with elite actors shape whether courts engage in institution-enhancing or institution-eroding behavior. Two features of judicial alliance networks determine which equilibrium emerges. First, I argue that judicial networks with *partisan allies* tend to create institution-eroding conflict and undermine the judiciary’s legitimacy. Indeed, the court itself tends to intensify partisan polarization by creating incentives for the aligned party to seek ideologically extreme policies via the court, instead of appealing to the median voter. A key causal mechanism is the *judicialization* of the allied party’s strategy, such that the party relies heavily on the courts to achieve policy objectives and seeks more ideologically extreme objectives than it could obtain via electoral means. Second, I contend that networks with *unelected allies*—such as indirectly elected heads of state, bureaucracies, and the military—provide courts with the independence and power needed to rule against popular elected governments, even on high-profile issues.

However, relying on unelected allies is a double-edged sword: These undemocratic allies also undermine the court's legitimacy by creating an *accountability gap*, as judges become less willing to hold their allies legally accountable.

I test this theory empirically by constructing an original, quantitative dataset of more than 3,000 decisions issued by Turkey's Constitutional Court between 1983 and 2023. In Section 4, I explain why Turkey is an ideal case for theorizing about judicial independence in cases of democratic erosion and describe my novel dataset. Then, in Section 5, I operationalize my independent and dependent variables by creating empirical measures to identify the effect of judicial alliance networks on judicial independence and decision-making.

Sections 6 and 7 present statistical evidence for the theory and its causal mechanisms. Consistent with my thesis that the court's partisan alliances fueled institution-eroding conflict and partisan polarization, I show quantitatively that the TCC was much more likely to strike down government policies after the AKP took power and that the main opposition party sharply increased its use of strategic litigation during the AKP period and often sought extreme policies in court. Furthermore, consistent with my argument that unelected allies can sustain judicial independence and power, I demonstrate that the TCC was more likely to strike down government policies when intra-state allies referred the case and that these referrals targeted controversial, politically salient issues. Troublingly, I also find that the TCC was very likely to rule that it had no jurisdiction to issue rulings on cases involving one of its unelected allies, the military, creating an accountability gap that damaged the court's legitimacy. Section 8 concludes by drawing broader lessons from the Turkish experience for republican theory and other polarized democracies.

2 An Audience Costs Model of Judicial Constraints: How Voters Shape Inter-Branch Conflict

Existing formal models of judicial politics theorize about the judiciary's strategic interaction with the executive and legislature, such that the three branches of government, or the "Big Three," are the key players (Ferejohn and Weingast, 1992; Ferejohn, Rosenbluth and Shipan, 2009; Helmke, 2002, 2005, 2017). I develop a new model of judicial politics by observing that in democracies, inter-branch conflicts occur before a domestic political *audience*: the electorate. In doing so, I borrow the powerful insight from Helmke (2017) that inter-branch conflicts are theoretically analogous to inter-state warfare. Just as Fearon (1994) argues that "audience costs" may affect inter-state conflicts, because leaders in democracies must worry

about their reputation with domestic audiences, I posit that executive-judicial conflicts also play out in front of an influential audience of voters.

To better conceptualize different patterns of judicial constraints on governments, this paper models judicial constraints as an extensive form game (for now, one in which all players have complete and perfect information). Whereas Weingast's (1997) rule-of-law model contains only two players, the government and opposition (Weingast, 1997), the game below contains three players: the government G , the opposition O , and the high court C . Each player's payoffs are defined in terms of maximizing their probability of political survival. I posit that two variables affect a player's prospects for survival: the regime outcome (r) and the player's reputation before a public audience (a). For the regime outcome r , I assume that the government G prefers more illiberal policies (i.e., fewer constraints on the executive), whereas the opposition O and court C prefer more liberal policies (i.e., greater protections for checks and balances). Adapting Fearon's (1994) seminal concept of "audience costs" (Fearon, 1994), I assume that all actors seek to maximize their reputation before a domestic audience a .

In the game below, the government G first decides whether to obey the law or transgress legal limits (e.g., by issuing an executive order that may violate limits on executive power). When the government obeys the law, the game ends with the status quo in place. Following standard practice, the status quo payoffs for the government and court are normalized to $(0, 0)$.

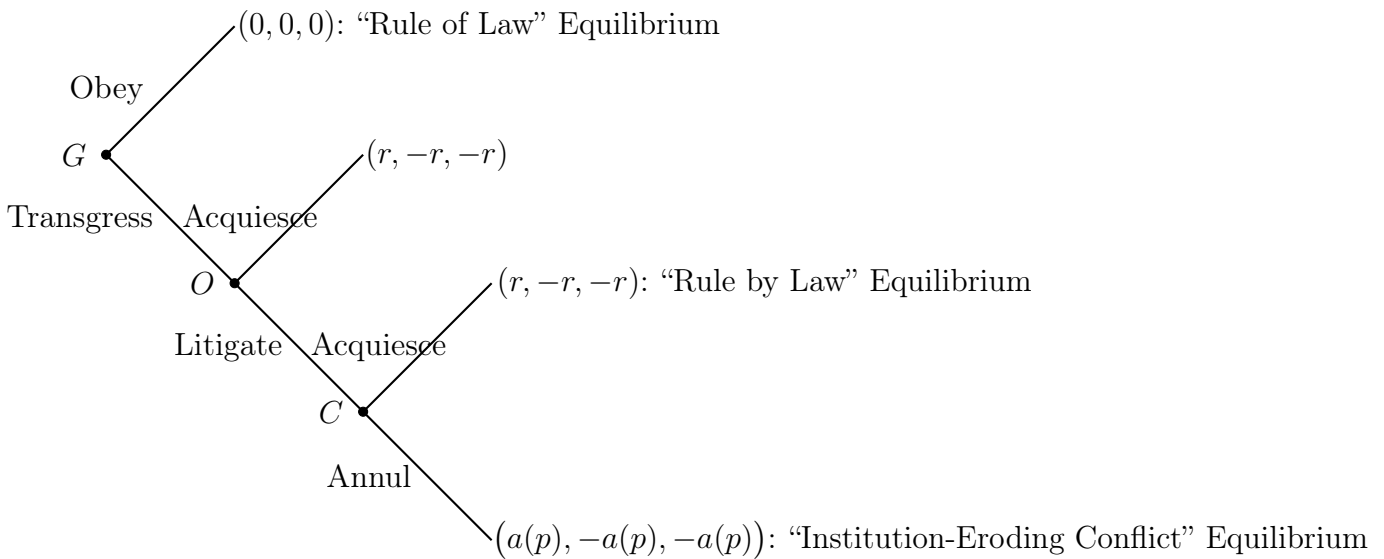
However, if the government transgresses the law, then the opposition O must decide whether to acquiesce or challenge the government's policy through litigation.⁵ If the opposition acquiesces, then the government receives a positive payoff of r , indicating that the regime outcome has shifted in the government's favor, whereas the opposition and court receive a negative payoff of $-r$. Conversely, the opposition may challenge the government's policy in court. In principle, filing a legal challenge entail financial and reputation costs for the opposition: Litigation may be expensive, and voters may perceive opposition parties as overly reliant on the judiciary and even as the "boy who cried wolf" if the opposition litigates against every government policy. For now, however, assume that the cost for the opposition of filing a lawsuit is low relative to the benefits of winning in court and thus that opposition parties will always challenge transgressions.

Next, the high court C must decide whether to acquiesce to the government's policy or annul it. If the court acquiesces, the government receives a positive payoff r , whereas the

⁵These strategic choices of challenging or acquiescing are inspired by Weingast (1997).

court and opposition receive a negative payoff $-r$. However, if the court annuls the policy, then the regime outcome r remains unchanged, but the government and court receive a reputation cost or benefit a from signaling their policy positions to a public audience. Prima facie, one might assume that when a court rules that the government has transgressed the law, this decision imposes a reputation cost $-a$ on the government. Conversely, one might assume that the court will receive a reputation benefit a for demonstrating its independence.

Figure 1: An Audience Costs Model of Judicial Constraints



Crucially, however, I posit that change in reputation may be positive or negative and that the electorate’s response to executive-judicial conflict is a function of the popularity p of the government’s policies, or $a(p)$. When the government’s transgression of the law is unpopular with voters, $a(p)$ is negative, meaning that public audiences will view the government negatively and the court positively if courts annul the government’s policy. However, when the government’s transgression of the law is popular, $a(p)$ becomes positive. Now, if courts strike down the government’s policy, the government bolsters its reputation before public audiences. The government has taken a stand for a popular policy and can vilify the courts as obstructing the popular will. Conversely, when courts strike down a popular policy, they suffer a reputation cost $-a(p)$ and undercut their own legitimacy.

This game has three different equilibrium outcomes. The first equilibrium might be

termed “rule of law,” or “self-sustaining democracy” (Przeworski, 1991; Fearon, 2011). When the government calculates that a court ruling against its policy would create a negative reputation cost with the electorate, the government will choose to obey the law in the first stage and stick to the status quo. Specifically, when $a(p) < 0$, the government calculates that the opposition would litigate against its transgression, that the court would annul the government policy, and that the government would be worse off before public audiences than if it has stuck to the status quo.

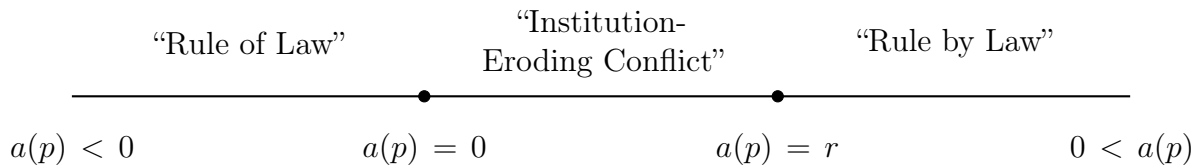
The second equilibrium might be termed “rule by law,” or “autocratic legalism” (Ginsburg and Moustafa, 2008; Corrales, 2015; Scheppele, 2018). When the government’s transgression is extremely popular, the government chooses to transgress the law, the opposition challenges the case in court (because challenging is assumed to be costless), and the court acquiesces to the government’s policy. In particular, when $a(p) > r > 0$, the court strategically acquiesces because it calculates that the reputation cost from standing up to a popular executive $-a(p)$ would exceed the harm that the transgressive policy does to the regime $-r$.

Before discussing the third equilibrium, the model suggests the possibility of an off-equilibrium path, in which the government engages in an unpopular transgression, the judiciary rules against the government, and the government suffer a reputation cost whereas the judiciary earns a reputation benefit. I call this off-equilibrium path *institution-enhancing conflict*, since the judiciary’s pushback against the government enhances the court’s legitimacy and renders the court more powerful in future executive-judicial conflicts. However, this equilibrium only occurs in a game of imperfect information, when the government miscalculates and mistakenly assumes that its policy would be popular with voters or that the courts would not rule against the policy. In episodes of democratic erosion, when it is uncertain how institutions and voters will respond to executive aggrandizement, such off-equilibrium paths may in fact be quite common.

The third and perhaps most interesting equilibrium I call *institution-eroding conflict*. In this equilibrium, governments transgress the law and have their policies struck down as illegal but receive a positive reputation benefit $a(p)$ because their policy is popular with voters. Government can thus strengthen their legitimacy and play the victim of judicial interventionism, whereas the judiciary’s pushback undercuts its own reputation for legitimacy with voters. As this paper will argue, Turkey during the first decade of AKP rule (2002-12) offers a striking example. The government passed popular policies (e.g., enabling Muslim women to wear the headscarf to universities), only for the courts to repeatedly strike these policies down and thereby bolster the government’s legitimacy relative to the courts. This

dynamic of institution-eroding conflict places courts in a lose-lose scenario: Courts choose to annul the government’s policy and incur a reputation cost $-a(p)$, only because this reputation cost is lower than the cost from accepting a change in the regime $-r$. Figure 2 below shows the comparative statics for these three equilibria.

Figure 2: Comparative Statics from the Judicial Constraints Game



Crucially, then, in the context of repeated executive-judicial interactions across multiple electoral cycles, government-court interactions may alter electoral outcomes and the judiciary’s reputation over time. In the scenario of *institution-enhancing conflict*, judicial pushback may reduce the incumbent government’s popularity, as in Israel after the Netanyahu government’s failed attempt to overhaul the top court (Reuters, 2023). Conversely, in the scenario of *institution-eroding conflict*, judicial pushback may shift public opinion in favor of the government and enable the executive to chip away at judicial independence. When courts repeatedly strike down popular policies, governments may paint the court as “activist” or “partisan.” Thus, while one might assume that in equilibrium a powerful, independent judiciary should deter governments from breaking the law, the model below shows that in fact, the government may benefit from antagonizing the judiciary and that the judiciary’s use of power may gradually erode its legitimacy.

Empirically, these equilibria should be observable in patterns of judicial decisions. Rule of law, or self-sustaining democracy, is observed when governments generally do not take executive or legislative actions that undermine democracy and courts do not rule against the government. Rule by law, or autocratic legalism, occurs when governments take transgressive actions but do not face judicial constraints. Finally, institution-eroding and institution-enhancing conflict occur when the government takes executive or legislative actions and the courts annul them.

3 A Theory of Judicial Alliance Networks

This paper argues that the structure of elite sociopolitical networks helps explain why courts sometimes deviate significantly from the median voter and fall into a spiral of institution-eroding conflict. Specifically, I theorize that courts derive independence and power from *judicial alliance networks*, defined as the set of actors outside the judiciary who, by virtue of their formal or informal ties with the court, provide support for a powerful court. Far from being isolated or walled off, I underscore that courts are highly networked institutions that routinely interact with civil society organizations, legal professionals, business elites, supra-national courts, the national executive and legislature, bureaucracies, and the media.

The ties that connect courts to these external actors may be formal or informal. The key question for identifying a court's *formal network* is: Which actors have cases before the high court? Formally, the institutional rules that structure who can initiate litigation are a key mechanism that connects courts to allies. For example, in countries such as Colombia, India, and Turkey, individual application procedures enable ordinary citizens and civil society organizations to bring rights violations or public interest litigation before the high court (Merhof, 2015; Oder, 2021; Mate, 2013). This formal institution often creates an alliance network between the high court and civil society, such that civil society works through the court to advance its interests and the court relies upon civil society to strategically initiate litigation and defend the court from political attacks (Moustafa, 2007, 6).

The key question for identifying a court's *informal network* is: From which sociopolitical groups are judges drawn, and with which groups are they in routine contact? Often, a court's network is not specified by any written law, such as when individual judges are tightly networked with one political party or other organization. For example, in the United States, six of the nine sitting Supreme Court Justices are current or former members of the Federalist Society, a conservative legal organization (Feldman and Jean Kott, 2021). No written law connects the U.S. Supreme Court to the organization, yet the Federalist Society has become perhaps “the most influential legal organization in U.S. history” (Feldman and Jean Kott, 2021). As a result, the Supreme Court's decisions have become more aligned with the conservative preferences of the Federalist Society and the U.S. Republican party (Jessee, Malhotra and Sen, 2022)—two actors that, in turn, have a vested interest in protecting the court's power.

In theorizing about how alliance networks shape judicial independence and power, I build upon three foundational lines of scholarship. First, I draw on a rich Turkish scholarship that describes the alliances that connected Turkey's judiciary to other sociopolitical actors.

In her seminal study of Turkey's Constitutional Court, Belge (2006, 653) argues that "the sociopolitical alliances in which high courts and judiciaries participate explain the selective nature of their activism." Examining the TCC's jurisprudence from 1962 to 1982, Belge (2006, 656) finds that the court disproportionately protected actors within the "Republican alliance," including "the military and civilian bureaucracy, the Republican People's Party (RPP), the intelligentsia (universities, professions, the press), and university students." In work on the early years of the AKP, Tezcür (2009, 306-9) argues that the "judicial-military alliance in Turkey" empowered Turkey's high court, since the military and other actors had "strong incentives to sanction or facilitate judicial activism" that was aligned with their ideological preferences.⁶ Although Bâli (2011, 248) does not invoke the concept of judicial alliances, she offers the crucial insight that the judiciary was part of a broader structure of "unelected branches of government" that establishment elites used to impede democratic consolidation. My theory builds upon this research methodologically, by testing the effects of alliances statistically, and theoretically, by linking elite alliances to how domestic audiences react to executive-judicial conflict.

Furthermore, my research draws on a growing literature analyzing how network structures mediate the strength and effect of institutions (see, e.g., Wang (2022)). In his study of Egypt's Supreme Constitutional Court, Moustafa (2007, 6) finds that "judicial support networks," or the synergistic and mutually beneficial interactions between courts and civil society organizations, helped create a surprisingly independent constitutional court within Egypt's authoritarian regime. This paper modifies Moustafa's (2007) theory and terminology in two ways. To begin, Moustafa (2007) conceptualizes support networks as fundamentally good for judicial independence and judicial power. By contrast, my theory argues that there is variation across countries in network structures, such that networks may have pro- or anti-democratic effects. Furthermore, I prefer the term "alliance" rather than "support" network, because the former calls scholarly attention to the fact that courts are frequently taking sides and forming alliances, rather than receiving support from a neutral, apolitical source.

Finally, my theory builds upon classic work on political competition theory and expands its conception of political fragmentation. Because Ferejohn and Weingast's (1992) classic theory of fragmentation was modeled on a highly institutionalized democracy, the United States, the theory focuses only on the executive and legislature as relevant sources

⁶In related work on courts in Iran and Turkey, Tezcür (2007) observes that "courts are more likely to illiberally restrain democratic rights if they are allied with or controlled by other powerful institutions such as the military." See Tezcür (2007, 500).

of fragmentation. However, in democracies throughout the Global South, fragmentation of power may come from a much wider range of actors. These power centers may include an autonomous military, economic interests such as foreign capital or business elites, civil society groups, and subnational elected officials such as mayors or governors.

By theorizing about a broader range of alliance networks that can induce political fragmentation, I aim to build a theory of judicial power that travels across diverse types of political regimes. Whereas existing approaches often theorize separately about judicial politics in democratic versus authoritarian regimes, I argue that the concept of alliance networks applies across this regime divide. What varies across regime types is the nature of the external allies capable of supporting power. For instance, as I discuss below, because civil society and other “extra-state allies” lack control over state resources, they are often too feeble to sustain judicial power during episodes of democratic backsliding. By contrast, “intra-state allies,” such as the military, can compel executives to obey the courts. In the following sub-sections, I develop this theory by specifying two key axes along which judicial alliance networks vary.

3.1 How Partisan Alliances Fuel Institution-Eroding Conflict and Polarization

As my first independent variable, I theorize that *partisan alliances*—the degree to which courts and judges are disproportionately connected to one political party—tend to fuel institution-eroding conflict and aggravate partisan polarization. To be sure, no court or judge stands fully apart from connections with political parties and politicians. Yet there is clear variation, both across countries and within them over time, in the extent to which judicial alliance networks disproportionately favor one party.

The U.S. Supreme Court today exemplifies how judges—even on one of the most independent courts in the world—may be disproportionately networked with one party. One simple indicator of this partisan alliance is the breakdown of judicial appointments: Six of the court’s sitting justices have been appointed by Republican presidents, as compared to three by Democrats. Yet even this measure does not capture the degree to which judges have ongoing informal connections with partisan actors. Justice Clarence Thomas received undisclosed financial benefits from the Republican mega-donor Harlan Crow, who paid for the justice’s vacations on a luxury superyacht and even for the private school tuition of a child Justice Thomas was raising (Kaplan, Elliott and Mierjeski, 2023*a,b*). Justice Thomas’ wife, Ginni Thomas, has also worked actively with conservative advocacy organizations that

are directly involved in bringing controversial cases before the Supreme Court (Mayer, 2022). At the same time that the Supreme Court's composition and networks have shifted, so too has its jurisprudence: A decade of public opinion data show that since 2020, the court has moved from being "quite close to the average American" to being "more conservative than the majority of Americans" (Jessee, Malhotra and Sen, 2022, 1).

I contend that the judiciary's partisan alliances enable democratic erosion through two distinct mechanisms. First, partisan alliances lead to a *judicialization* of the allied political party's strategy, meaning that the party relies heavily on courts, rather than legislation, to achieve policy objectives.⁷ Because courts are biased toward one party, that party has incentives to seek policy change by working through the judiciary, rather than appealing to the median voter and then engaging in legislative compromise. Moreover, when courts have partisan alliances, the allied party tends to seek more ideologically extreme positions. Rather than strategically modify its policy platform to appeal to the average voter, the allied party can instead obtain more extreme policies by working with a biased judiciary. In the model presented in Section 2, the opposition O thus has strong incentives to go to court to seek the annulment of popular government policies.

Second, and crucially, these partisan alliances enable a dynamic of *institution-eroding conflict*. Because the court is closely aligned with one party, rather than with the median voter, the court is much more likely to strike down policies that the median voter supports, giving the government ammunition to discredit the court as partisan and interventionist. For example, in Turkey in 2008, a super-majority of more than 80 percent of parliament voted to pass constitutional amendments that would permit women to wear headscarves at universities (Bâli, 2011, 253-54). This policy was overwhelmingly popular with Turkey's electorate, yet in the eyes of the Constitutional Court, it violated the Turkish constitution's strict protections for secularism (Bâli, 2011, 253). Precisely because the court and its partisan allies held such a minority position, the court's annulment of these amendments enabled the AKP to bolster its own reputation and chip away at the court's legitimacy. Indeed, just two years later in 2010, the AKP secured 58% support in a national referendum that increased the size of the Constitutional Court and altered the rules for selecting justices in a way that increased government control over appointments (Yeğen, 2018, 56-57).

⁷On the concept of judicialization, see Hirschl (2008)

3.2 How Unelected Allies Support the Judiciary's Independence but Undercut Its Legitimacy

As my second independent variable, I posit that different types of external allies affect the judiciary's independence and legitimacy. I propose a typology of three types of external allies, each of which has distinct effects on judicial independence and legitimacy. I argue that *extra-state allies*—or actors that lack control over state resources—are typically too weak to sustain judicial independence in cases of democratic backsliding, even though they enhance the judiciary's legitimacy. Extra-state allies may be domestic actors—such as civil society organizations, media outlets, and social movements—or international ones—including supra-national courts, international organizations, and transnational civil society networks. These extra-state allies can raise the cost that an illiberal government incurs from breaking the law, as seen when civil society mobilizes protests to defend the rule of law or when international bodies like the European Union punish violations of judicial independence.⁸

Yet precisely because extra-state allies are outside the state, they lack the coercive power to ensure that an illiberal government is forced to comply with judicial rulings. Consider the erosion of judicial power in Turkey under the AKP. Even though civil society organizations have had access to Turkey's Constitutional Court via an individual application procedure since 2010, these groups have been unable to ensure that the government complies with the TCC's decisions in high-profile cases nor that lower courts consistently observe precedents set by the TCC (*Turkey: Spectre of a Digital Lockdown*, 2022, 22). Similarly, although Turkey is a member of the European Court of Human Rights (ECtHR), the government has refused to comply with key adverse rulings, most notably in the cases of civil society activist Osman Kavala and opposition politician Selahattin Demirtaş (Pitel, 2021, 2020). Thus, extra-state allies like civil society are a weak basis for de facto judicial power, even though they may offer courts greater legitimacy.

In contrast, I argue that intra-state allies—actors that control state resources—are often uniquely capable of sustaining judicial power over the government during episodes of democratic erosion. Furthermore, I theorize that intra-state allies have distinct effects on judicial power and legitimacy depending on whether they are elected or unelected. *Elected intra-state allies* include parties or party factions in the legislature, opposition governors and mayors, or other elected state officials (e.g., secretaries of state and state attorneys general in the United States). *Unelected intra-state allies*, by contrast, include indirectly elected

⁸On the role of international pressure and domestic protest in Poland, see Bugarič and Ginsburg (2016); Przybylski (2018).

presidents (e.g., presidents in Italy and Germany), unelected heads of state (e.g., monarchs in Thailand and the United Kingdom), the military, and divisions of the state bureaucracy.

As compared to extra-state allies, intra-state allies offer a stronger basis for judicial power. By virtue of their control over state coercive power, intra-state allies often have the resources to compel illiberal governments to comply with unwanted judicial rulings, even in cases of democratic erosion. For example, in India under Prime Minister Narendra Modi (2014–), even though the Supreme Court has become highly deferential to the executive, subnational opposition officials have provided an ongoing source of judicial power. Notably, subnational officials played a key role in enforcing a 2018 decision in which the Indian Supreme Court flouted the ruling party’s wishes by ordering that women of certain ages could not be prohibited from worshiping in a Hindu temple in the southern state of Kerala (Khaitan, 2020). When the ruling party mobilized protests to prevent the enforcement of the court’s ruling, the opposition state government defended the judiciary’s ruling by “arresting people protesting (and frustrating) the implementation of the Supreme Court’s order” (Khaitan, 2020).

However, as compared to unelected intra-state allies, elected ones are a more unstable basis for judicial power, especially in unitary systems where opposition mayors and governors wield less authority. Consider Hungary under Prime Minister Viktor Orbán (2010–) and Poland under Law and Justice (2015–), where illiberal governments won single-party control of both the executive and legislature. With one election, these governments wiped out the elected intra-state allies who could safeguard the judiciary’s power and independence (Bánkuti, Halmai and Scheppele, 2012; Scheppele, 2018; Fomina and Kucharczyk, 2016; Wiącek, 2021). Thus, although elected intra-state allies can provide courts with both power and democratic legitimacy, these allies can disappear overnight in the landslide elections that often catalyze episodes of democratic erosion.

Thus, I argue that unelected intra-state allies—such as indirectly elected presidents, militaries, and state bureaucracies—offer the strongest basis for judicial power in cases of democratic erosion. Paradoxically, networks with these unelected allies often empower courts vis-à-vis elected governments yet have profoundly anti-democratic effects. Take the example of Thailand under Prime Minister Thaksin Shinawatra (2001–06). In back-to-back elections in 2001 and 2005, Thaksin’s Thai Rak Thai Party won single-party majorities in parliament and even claimed an unprecedented supermajority of more than 75% percent of seats in parliament in 2005. Despite Thaksin’s electoral strength, Thailand’s Constitutional Court ruled against the prime minister by nullifying the results of a snap election in 2006 and

ultimately banning Thaksin's party in 2007 (Dressel, 2010, 680-82). In the Thai case, an alliance of unelected state institutions including the monarchy and military—what scholar Duncan McCargo has termed Thailand's "network monarchy"—empowered the court to rule against Thaksin (McCargo, 2005, 2014). But far from safeguarding democracy, the court's ruling "paved the way" for the 2006 military coup against Thaksin's government (Mérieau, 2016, 449).

Crucially, I argue that reliance on unelected allies has double-edged effects on democracy because it weakens the judiciary's legitimacy with voters. The key mechanism behind this relationship is that relying on unelected allies creates *accountability gaps*, as courts become less willing to subject their unelected allies to the rule of law. Thus, whereas fragmentation theory predicts that dispersion of power across different actors will enable the judiciary to act independently, I argue that in fact, dispersion of power creates a tradeoff: The judiciary is more independent of elected actors, but more dependent on its unelected allies. For example, in Thailand, where the monarchy and military gave the courts independence from the elected government, the military was exempted from legal accountability for killing dozens of protestors in Thailand's May 1992 demonstrations after the king issued a royal pardon (McCargo, 2005, 506). In Turkey, as Bâli (2011, 2013), Belge (2006), and Tezcür (2007, 2009) argue, the upper judiciary acted as a veto player protecting the interests of its allies in the military and state bureaucracy.

Ultimately, I argue that reliance on unelected allies, by undermining the judiciary's legitimacy, aggravates conflict between the executive and judiciary and thus fuels democratic erosion. In Thailand, when the constitutional court nullified Thaksin's victory in the April 2006 elections, Thaksin leveraged the judiciary's association with the monarchy and military to attack the ruling as a "palace coup" (of State, 2006). In Turkey, the judiciary's alliance with unsavory unelected allies enabled the AKP to credibly make the case that overhauling the judiciary's structure was a democratic imperative (Ozbudun, 2006, 223).⁹ Paradoxically, then, judicial reliance on unelected allies strengthened judicial power but weakened accountability and gave elected governments the ammunition needed to discredit the courts with voters.

⁹During the AKP's early years, contemporaries such as esteemed constitutional scholar Ergun Özbudun (2004) argued that "debates on reforming the structure of the Court should not be taken as an attempt to weaken it, but as one intended to increase its democratic legitimacy." See Ozbudun (2006, 223).

4 Empirical Strategy

4.1 Case Selection

Contemporary Turkey provides an ideal setting to examine the determinants of judicial independence and power because there is dramatic variation in both outcomes over time. During the period of this study (1983–2023), the TCC’s independence, as measured by its willingness to rule against the incumbent government, has varied tremendously.¹⁰ Table 1 below provides original evidence of this variation by calculating the rate at which the TCC annulled a government policy in cases in which opposition parliamentarians asked the court to strike down a policy as unconstitutional. In the 1980s and 1990s, the TCC was “both independent and powerful” (Belge, 2006, 654). From December 1983 until the AKP’s election in November 2002, the TCC ruled against the government and in favor of opposition MPs in 69% of cases. Moreover, for many years after the AKP came to power in 2002, the court preserved formidable independence. During the AKP’s first term (2002–07), the TCC ruled against the government in 64% of appeals from opposition parliamentarians. However, since May 2013, as the AKP has become increasingly illiberal, the TCC has ruled against the government and in favor of opposition MPs in just 41% of cases.

Contemporary Turkey is an equally striking case of change in *de facto* judicial power. According to expert surveys conducted by the Varieties of Democracy index, from 1984 to 2015 Turkey’s government “usually” complied with important decisions by the high court even when the government disagreed.¹¹ By 2017, however, the Varieties of Democracy index reported that the government “seldom” complied with important decisions from the high court. Indeed, data collected by the TCC itself confirm that the court lacks the power to ensure that the state apparatus will enforce its decisions. In at least 33 cases, including several in which the TCC has ruled to release prominent journalists from prison, lower courts have resisted or refused to implement the high court’s decision (*Turkey: Spectre of a Digital Lockdown*, 2022, 22).

¹⁰The rate of anti-government rulings is perhaps the most common measure of judicial independence. See Ferejohn, Rosenbluth and Shipan (2009, 745).

¹¹The text of the question asked is: “How often would you say the government complies with important decisions of the high court with which it disagrees?” From 1984 to 2015, the posterior prediction on the original ordinal scale approximately corresponds to the finding that the government “usually” complied with the court’s rulings—a value of 3 on an ordinal scale from 0 to 4. See Coppedge, Michael, et al. 2022. “V-Dem Codebook v12,” Varieties of Democracy (V-Dem) Project, p. 172; Coppedge, Michael et al. (2022), “VDem [Country–Year/Country–Date] Dataset v12,” Varieties of Democracy (V-Dem) Project, <https://doi.org/10.23696/vdemds22>.

Table 1: Variation in Judicial Independence in Turkey, 1983-2023

	Number of Cases	Share Annulled
1983-2002: Pre-AKP Period	204	0.69
2002-2007: AKP I	75	0.64
2007-2013: AKP II	165	0.52
2013-2023: AKP III	218	0.41

Examining this variation in judicial independence and power within the same country allows us to hold constant macro-conditions that may vary across countries, such as the constitutional and institutional rules structuring the high court. At the same time, as discussed in Section 5, year fixed effects enable us to control for variables such as regime type and political fragmentation that have varied over time in Turkey and thus to isolate the effect of judicial alliance networks.

4.2 Data

To understand the origins and effects of judicial power, I built an original, comprehensive dataset of 3,163 decisions in which Turkey’s Constitutional Court reviewed the constitutionality of government policies (*norm denetimi kararları*) between 1983 and 2023. By web scraping data from the TCC’s “Decisions Information Vault,” I collected detailed information on each decision (Mahkemesi, N.d.). For each decision, the TCC publishes a table with summary information, including the case’s outcome, the decision date, the applicant that referred the case, and whether the decision included dissenting votes. This rich dataset enables scholars to go beyond existing knowledge about Turkey’s judiciary in two ways.

Temporally, in contrast to previous studies, this dataset covers the full span of Turkey’s Third Republic from 1983 to 2023. As the starting point for the dataset, I chose the first day that a civilian government took office (December 13, 1983) after a period of military rule. The last day for which I collected data was January 1, 2023. Out of a total of 3,165 decisions issued between 1983 and 2023, my dataset is missing only two, due to broken links on the TCC’s website.¹² The data thus enable a uniquely comprehensive analysis of the TCC’s rule review decisions over a 40-year period.

In comparison, existing research on Turkey’s Constitutional Court has been more limited in its timeframe and number of observations. Rather than collecting comprehensive

¹²These decisions are No. 1998/71 and No. 2022/23. These decisions are missing due to broken links on the website of the TCC’s Decisions Information Vault.

data on all TCC decisions, Varol, Pellegrina and Garoupa (2017) study only a randomly selected set of 200 decisions, and their research looks only at the period from 2007 to 2014. Belge’s (2006) study, in turn, analyzes the full set of 671 TCC decisions issued between 1962 and 1982 (Belge, 2006). My dataset extends Belge’s (2006) work by collecting original data on the 1983–2023 period. Closest to my approach, in her research on how judges’ preferences influence the likelihood of anti-government decisions, Aydin-Cakir (2018) builds a comprehensive dataset of 1,028 TCC decisions issued between 1984 and 2010. By extending the timeframe of existing data to include the tumultuous period from 2011 to 2023, my dataset triples the number of observations available for scholarly study. Similarly, Moral and Tokdemir (2017) collect comprehensive data on the TCC’s decisions between 1982 and 2011, but their primary empirical contribution is to explain judges’ voting patterns in cases about the dissolution of political parties, rather than voting patterns in the broader universe of cases.¹³

Perhaps more importantly, my original dataset expands the range of dependent variables that researchers can analyze. For both Belge (2006, 664-67) and Aydin-Cakir (2018, 1109-10), the primary outcome of interest is a binary measure of whether or not the TCC chose to annul a government policy—a measure of judicial constraints that my data also include. Varol, Pellegrina and Garoupa (2017, 201) also examine the frequency of dissenting votes by particular judges. In addition to collecting data on the annulment of government policies and dissenting votes, I incorporate novel dependent variables, such as using TCC decisions that the court lacked jurisdiction on a given topic as a measure of accountability gaps, as well as independent variables, such as which applicant filed a case. In Section 5 below, I detail how I use measures from my dataset to operationalize and test the theory.

5 Data Analysis

5.1 Measuring the Dependent Variable: Judicial Independence

The main dependent variable in this study is the outcome of individual cases decided by Turkey’s Constitutional Court. Crucially, the TCC systematically codes the outcome of each case as belonging to one of four categories. The court can annul part or all of the government’s policy (*Esas-İptal*), uphold the government’s policy (*Esas-Ret*), rule that the court lacks jurisdiction and decline to go into the merits of the case (*İlk-Retvd.*), or issue

¹³For excellent small-*n* studies of political party closure cases decided by the TCC, see Kogacioglu (2003); Özbudun (2010); Celep (2014).

“other” decisions (*Esas-Diğer*).

My first dependent variable measures the court’s willingness to rule against the incumbent government—a key measure for assessing whether courts are biased in favor of certain allies or against certain parties. For this measure, I construct a binary indicator of whether or not the TCC annulled part or all of the government’s policy in each decision (*Esas-İptal*). For each decision i , I code the dependent variable as $Y_i = 1$ if the TCC annulled the government’s policy and as $Y_i = 0$ otherwise.

This measure is useful for theoretical and substantive reasons. Theoretically speaking, because this measure is consistent with existing research on judicial independence, it enables the most faithful and comparable test of rival theories. As Ferejohn, Rosenbluth and Shipan (2009, 745) observe, quantifying the frequency with which high courts rule against the government is a useful measure of judicial independence that can be applied in diverse national contexts. Numerous leading studies of judicial politics—including by Helmke (2005) on Argentina, Peerenboom (2002, 7-8) on China, Belge (2006, 664-65) on Turkey, and Dahl (1957) on the United States—measure judicial behavior in terms of court rulings against the government. Substantively speaking, this measure also enables a direct test of when and why courts have the independence and power necessary to defy and incumbent government and annul legislation.

As for my second dependent variable, I measure whether the court rules that it lacks jurisdiction as an indicator of accountability gaps, as courts become less willing to apply the rule of law in particular areas. Specifically, I construct a binary indicator of whether or not the TCC ruled that it had no jurisdiction and declined to go into the merits of a case (*İlk-Retvd.*). For each decision i , I code the dependent variable as $Y_i = 1$ if the TCC found that it lacked jurisdiction and as $Y_i = 0$ otherwise.

Methodologically, one possible concern for both these measures is that a high court’s discretion over which cases it will hear can bias data on a court’s decisions. For example, in the United States, the Supreme Court accepts only 70 to 80 cases per year, and numerous studies find that judges’ ideological interests affect whether they agree to hear a case (i.e., to grant *certiorari*) (Hall, 2009; Bonica, Chilton and Sen, 2022). In a case of severe democratic backsliding, the high court may simply decline to hear politically sensitive cases. This bias would cause certain types of cases to be underrepresented or even absent in the data. As Bachrach and Baratz (1963) argue, understanding political power requires attention not only to decisions but also to “nondecisions.”

Fortunately, the data generating process behind Turkey’s Constitutional Court miti-

gates this concern because researchers observe “nondecisions,” or cases in which the court dismisses a case without going into the merits. Under Turkish law, rule review cases can be submitted to the TCC through one of two processes.¹⁴ In political (*İptal*) appeals, as stipulated in Article 148 of Turkey’s Constitution, Turkey’s president or a quorum of one-fifth of the members of parliament may apply to the court to claim that a government policy is unconstitutional. In lower court (*İtiraz*) appeals, lower courts within the Turkish judiciary may rule that a government policy raises constitutional questions and bring the case to the TCC. For both types of appeals, even if the TCC rules that it lacks the jurisdiction to hear a case and declines to rule on the merits, the court must still publish a decision.¹⁵ Thus, these nondecisions are included in the data.

However, an unavoidable measurement problem—both in this paper and in all studies of judicial politics—is that of “noncases,” or cases that an applicant could have submitted but did not submit to the courts. In particular, applicants may choose not to bring a case to court if they believe they have little chance of winning, and the bias caused by such noncases may influence my empirical results. For example, unelected allies such as Turkey’s president may choose to submit only winnable cases to preserve their political capital, whereas low-level criminal courts may be less strategic in choosing to file only winnable cases. Whether or not a case is winnable may thus be an omitted variable that creates the impression that certain applicants are statistically more likely to win in court. To mitigate this important concern, in Section 7 I present quantitative evidence demonstrating that cases referred by unelected allies were often controversial and politically salient, rather than easily winnable.

5.2 Measuring the Independent Variables: Partisan and Unelected Allies

A core empirical prediction of my theory is that the judiciary’s decision-making depends on the structure of its alliance networks. To measure the effect of alliance networks on the outcomes of court cases, I construct three novel variables that leverage data on the identity of the applicant and defendant in each case.

First, to assess the effect of TCC’s partisan alliances, I examine whether the TCC was more willing to rule against the government in cases filed during the AKP period (2002–). My hypothesis is that if the TCC was closely allied with parties opposed to the AKP, the

¹⁴Note that separate rules obtain for the submission of individual application (*bireysel başvuru*) cases, as discussed in “Turkey 1982 (Rev. 2017) Constitution,” art. 148.

¹⁵Conversation with Deniz Aktaş, Cambridge, MA, September 30, 2022.

court should be much more likely to annul government policies in cases filed after the AKP took power than in cases filed immediately before. Thus, the variable *Anti-AKP Bias* is a binary indicator coded as $X_i = 1$ if a TCC case was filed in 2003 or later (i.e., after the AKP took power on November 18, 2002), as measured by the case number (*Esas No.*), and as $X_i = 0$ otherwise.

Second, to measure the effect of unelected allies on judicial decisions, I create a binary variable that measures whether or not Turkey's indirectly elected president brought a case to the TCC to strike down a government policy. My theory predicts that when unelected allies such as Turkey's president appeal to the TCC to annul a government policy, the court should be more likely to do so. By analyzing web-scraped data on the applicant (*başvuran*) who filed a case with the TCC, I code this variable as $X_i = 1$ if the presidency is listed as a petitioner and as $X_i = 0$ otherwise. My dataset contains $n = 34$ cases in which the incumbent president referred a case to the TCC, all of which were filed before the AKP gained control of the presidency in 2007.

As a further measure of how unelected allies impact judicial decisions, I construct a binary measure of whether or not a court case implicates the laws governing the military—a second key ally of the TCC. My theory expects that when cases attempt to subject the judiciary's external allies to legal accountability, the TCC should be more likely to rule that it lacks jurisdiction over the issue, thus creating an accountability gap. Leveraging detailed information on which lower court referred a case to the TCC, I code the variable *Military* as $X_i = 1$ if the case came from a military court and as $X_i = 0$ otherwise. In my dataset, I observe $n = 93$ cases initiated by five different military bodies: ordinary military courts (*Askeri Mahkeme*), the Military Court of Cassation (*Askeri Yargıtay*), the Military High Administrative Court (*Askeri Yüksek İdare Mahkemesi*), the State Security Court (*Devlet Güvenlik Mahkemesi*), and the Martial Law Military Court (*Sıkıyönetim Askeri Mahkemesi*).

Importantly, for both these variables, arguing that courts were more likely to issue certain types of decisions requires a benchmark category for comparison. Thus, I construct binary variables that measure whether decisions deal with other types of law—namely, administrative, criminal, tax, or private law. Administrative law governs the administration and regulation of government agencies. Using data on which lower court referred a case to the TCC, I code the variable *Administrative Law* as $X_i = 1$ if the petitioner is listed as an administrative court (*İdare Mahkemesi*) or the Court of Accounts (*Sayıştay*) and as $X_i = 0$ otherwise. Criminal law, in turn, governs what constitutes a crime and how individuals who commit crimes should be punished. I code the variable *Criminal Law* as $X_i = 1$ if the

petitioner is a criminal court (*Ceza Mahkemesi*) or judge responsible for executing criminal sentences (*İnfaz Hakimliği*) and as $X_i = 0$ otherwise. Tax or revenue law covers the assessment and collection of taxes. I code the variable *Tax Law* as $X_i = 1$ if the petitioner is listed as a taxation court (*Vergi Mahkemesi*) and as $X_i = 0$ otherwise. Whereas administrative, criminal, and tax law involve the state as a legal entity, private law governs the relationships among private individuals or entities (e.g., family law). I code the indicator *Private Law* as $X_i = 1$ if the petitioner is coded as a private law court and as $X_i = 0$ otherwise. These courts include cadastral courts, civil courts, consumption courts, family courts, intellectual and industrial property courts, labor courts, and trade courts. These benchmark categories enable me to test, for example, whether the TCC was more likely to annul government policies in cases referred by Turkey's president than those filed by administrative, criminal, tax, or private law courts.

5.3 Estimation and Control Variables

I estimate the effect of elite allies on a high court's decision-making using a logistic regression model. For purposes of illustration, consider that the outcome of interest is the high court's willingness to rule against the incumbent government. Thus, the dependent variable Y_i is a binary measure coded as $Y_i = 1$ if a given decision i annuls the government's policy and as $Y_i = 0$ otherwise. Each outcome Y_i is assumed to be the result of a Bernoulli trial, in which the set of covariates X_i affects the probability π_i that the court will strike down the government's policy. The logistic regression model allows that there is an element of uncertainty—a stochastic component—in the court's decisions. However, the model also enables researchers to identify patterns in how specific features of a case affect the probability of a decision against the government—a systematic component.

The key assumption behind this model is that for any two decisions i and j , the outcomes Y_i and Y_j are independent *conditional on the set of covariates X* . In the context of judicial behavior, this assumption implies that knowing the outcome of one court case does not provide any new information about whether the court will rule against the government in a second case. In a model without control variables, this assumption is implausible: For example, knowing the outcome of one criminal law case decided in 2020 may well provide information and how the court will rule in another criminal law case from 2020. The two outcomes would thus be dependent events, and the assumption of conditional independence would be violated unless the model controls for year fixed effects and the type of case.

Crucially, including year fixed effects also ensures that the empirical results control

for time-varying confounders. Specifically, controlling for year fixed effects means that the logistic regression only compares the results of TCC decisions *within the same year*, meaning that the level of democracy, the composition of the court, the government in power, and numerous other time-varying factors are effectively held constant. Thus, for example, when modeling the outcome of a court case in 2020, adding a control variable for the Erdoğan presidency is unnecessary, since this information is already contained in the dummy variable for the year 2020.

6 How Partisan Alliances Fueled Institution-Eroding Conflict and Polarization

My theory predicts that the judiciary's partisan alliances should lead the judiciary to be biased against the AKP government, opposition parties to rely more heavily on litigation after the AKP came to power, and the court to take positions that were out of step with public opinion. I provide evidence consistent with my theory in three ways. First, I demonstrate quantitatively that the TCC was biased against the AKP, such that the court became much more likely to strike down government policies after the AKP took power. Second, I find that the main opposition party substantially increased the use of strategic litigation at the Constitutional Court, as compared to the opposition under previous governments. And finally, I present qualitative evidence of institution-eroding conflict by showing that when the AKP adopted popular policies, the court took ideologically extreme positions in striking them down.

To show that the TCC exhibited a partisan bias, I employ an event study design in which the AKP's assumption of power after November 18, 2002 is the event of interest. The dependent variable is a binary measure of whether or not the TCC struck down the government's policy. The independent variable is a binary indicator coded as 1 if a TCC case was filed in 2003 or later (i.e., after the AKP took power) and as 0 if the case was filed in 2002 or before (i.e., before the AKP took power). In Table 2 below, I then subset the data to examine bandwidths of 1 year, 2 years, 3 years, and 4 years around the cutoff of the AKP taking power (Columns 1, 2, 3, and 4, respectively). Thus, Column 1 tests whether the TCC was more likely to rule against the government in 2003 as opposed to 2002 (the 1-year bandwidth), Column 2 compares 2003 and 2004 relative to 2001 and 2002 (the 2-year bandwidth), and so on.

If the TCC shows partisan bias against the AKP, then the TCC should be much

more likely to annul government policies in 2003 compared to the year before. The core assumption of this model is that confounding variables—such as Turkey’s level of democracy, the composition of the TCC, and the structure of judicial institutions—did not change substantially between 2002 and 2003. The key change is that the AKP was in power in 2003, whereas a coalition government led by left-wing prime minister Bülent Ecevit was in office in 2002. Consistent with expectations, Table 2 shows that the coefficient for *Anti-AKP Bias* is positive and significant at the 95% level even for the one-year bandwidth (Column 1). This result indicates that the TCC was much more likely to rule against the government in 2003 than in 2002. For the two-year, three-year, and four-year bandwidths (Columns 2, 3, and 4), the coefficient is positive and significant at the 99% level or above.

Table 2: The TCC Ruled against the AKP More Frequently

Probability of Anti-Government Ruling				
Bandwidth:	1-Year	2-Year	3-Year	4-Year
	(1)	(2)	(3)	(4)
Anti-AKP Bias	0.66* (0.32)	0.87*** (0.21)	0.52** (0.17)	0.39** (0.15)
Constant	-1.15*** (0.23)	-1.42*** (0.15)	-1.11*** (0.12)	-1.06*** (0.11)
Observations	195	490	680	843
Log Likelihood	-118.14	-272.74	-408.13	-510.78
Akaike Inf. Crit.	240.29	549.48	820.26	1,025.56

Note: *p<0.05; **p<0.01; ***p<0.001

This finding is consistent with and expands upon research by Belge (2006), Bâli (2011, 2013), and Shambayati and Kirdiş (2009, 769) on the ideological biases of Turkey’s high courts. In her study of the TCC’s jurisprudence from 1962 to 1999, Belge (2006, 656) presents compelling descriptive evidence showing that the court was “selectively activist.” I build upon Belge’s (2006) seminal work in three ways. Temporally, I extend her findings beyond 1999 to demonstrate that judicial bias persisted into the AKP period. Methodologically, I use a logistic regression and event study design to show that the descriptive findings in Belge’s (2006) study are statistically significant. And theoretically, I expand upon Belge’s

(2006) thesis by arguing that paradoxically, the TCC's close alignment with Turkey's main opposition party enabled the AKP to weaken the opposition and the court through a dynamic of institution-eroding conflict.

In particular, I claim that the TCC's partisan bias weakened the opposition Republican People's Party (CHP) by creating an incentive for the party to "judicialize" its political strategy. Seeking to block the AKP's legislation, the CHP increasingly turned to the Constitutional Court and filed dozens of cases each year arguing that the TCC should strike down government policies. Whereas opposition parliamentarians submitted 79 appeals to the TCC between 1997 and 2002, the CHP submitted 140 between 2003 and 2008—a 77% increase relative to the previous five-year period. A similar result holds for a longer time frame: Opposition MPs filed 141 appeals to the TCC in the decade from 1992 to 2002, but the CHP launched 256 in the decade after 2003, an increase of 81%. The CHP's strategy of judicialization made sense strategically: Given a biased court, the party could enact its ideological preferences by relying with greater frequency on judicial intervention in politics.

Even though this strategy of judicialization allowed the opposition to win in court in the short term, it ultimately backfired by enabling institution-eroding conflict and fueling partisan polarization. Precisely because the high court was biased in the opposition's favor, the opposition did not need to moderate its policy platform to appeal to the median voter. Instead, the opposition could continue to seek more ideologically extreme policies by working through the courts, rather than appealing to the electorate. What is more, the TCC may have undercut its reputation and bolstered the AKP's by striking down popular policies.

Qualitative evidence from the 140 appeals that the CHP filed with the TCC between 2003 and 2008 strongly suggest that the CHP leveraged the courts to seek polarizing and often unpopular outcomes. Most notably, when the AKP sought to elect Abdullah Gül as president in 2007, the CHP chose to boycott the voting in parliament and appealed to the Constitutional Court to nullify Gül's election (Bâli, 2011, 286-87). The party claimed that Gül's election was unconstitutional because the parliament had lacked the necessary quorum—even though no such super quorum rule had previously been recognized in Turkish constitutional law (Bâli, 2011, 287). Even though the CHP's tactics were highly polarizing, on May 1, 2007 the TCC ruled in favor of the opposition's legal appeal and annulled the parliamentary vote on Gül's candidacy (Bâli, 2011, 288). Thus, the partisan bias of the TCC allowed the CHP to succeed (temporarily) in achieving polarizing victories, but the party ultimately proved out of step with Turkish voters. In snap elections called in July 2007, the AKP increased its vote share dramatically by 12 percentage points relative to its 2002

election victory.

Of equal importance, even after the CHP suffered electoral defeat in 2007, the partisan bias of Turkey's Constitutional Court inhibited the party from adapting and moderating its policy platform. In particular, after the AKP's resounding victory in the 2007 elections, a super-majority of more than 80 percent of parliament voted to pass constitutional amendments that would permit women to wear headscarves at universities (Bâli, 2011, 253-54). Despite overwhelming support in parliament for the amendments, the CHP argued that the changes were unconstitutional and filed an appeal with the TCC to annul them.¹⁶ Remarkably, even though Turkey's 1982 Constitution "clearly restricts judicial review of constitutional amendments to procedural grounds," the court then "reversed the properly ratified amendments on the substantive grounds that they violated constitutional provisions on secularism" (Bâli, 2011, 253-54). Thus, even after the AKP had won an electoral mandate in 2007, the partisan bias of the TCC gave the CHP every incentive to continue to seek divisive, often unpopular policies in court. This partisan polarization, Aydın-Düzgit (2019, 32-34) and Somer (2019, 2022) argue, fueled a vicious cycle of democratic erosion and institutional degradation.

7 How Unelected Allies Gave the Judiciary Independence but Not Legitimacy

7.1 Unelected Allies as a Source of Judicial Independence

Three strands of quantitative evidence demonstrate that unelected allies were critical in empowering Turkey's Constitutional Court to rule against the AKP during its initial years in office. First, I show statistically that when Turkey's unelected president asked the TCC to strike down a government policy, the court was much likely to rule against the government than when other courts questioned a government policy. Second, I find that presidential referrals targeted controversial, politically salient issues on which it would ordinarily be difficult for the TCC to rule against the government. Finally, I demonstrate that presidential referrals to the TCC increased substantially during the AKP's first term (2002–07).

Both descriptive and statistical results show that Turkey's unelected president was a key ally that empowered the TCC to strike down government policies. As preliminary evidence for my theory, I first present simple descriptive statistics showing that the TCC was

¹⁶Anayasa Mahkemesi, Esas No: 2008/16, Karar No: 2008/116, Karar Tarihi: 05/06/2008, <https://normkararlarbilgibankasi.anayasa.gov.tr/ND/2008/116>.

Table 3: The TCC’s Intra-State Allies Win More Often in Court

	Number of Cases	Share Annulled
Presidential Referral	34	0.79
High Court Referral	297	0.46
Military Referral	93	0.34
Administrative Law	520	0.31
Tax Law	102	0.22
Private Law	626	0.19
Criminal Law	856	0.10

much more likely to annul government policies when the case was referred by the president, as opposed to lower courts dealing with private law, criminal law, tax law, or administrative law. In Table 3 below, I calculate the number of cases n and the rate at which the TCC annuls government policies for referrals coming from Turkey’s president, as compared to other actors.

Strikingly, support from Turkey’s presidency led the TCC to rule against the government in 79% of cases—far more than for any other type of referral. By contrast, when lower courts questioned the constitutionality of a government policy, the TCC ruled against the government at much lower rates: 10% for criminal courts, 19% for private law courts, 22% for tax courts, and 31% for administrative courts. Remarkably, the rate at which the TCC annulled the government’s policy is more than 30 percentage points higher for presidential referrals, as compared to when Turkey’s other high courts—the Council of State and Court of Cassation—referred the case. In the 34 court cases that Turkey’s presidents referred to the TCC between 1985 and 2007, presidential backing gave courts the muscle needed to rule against the elected government.

Multiple statistical tests demonstrate that presidential referrals are associated with an increased probability of the TCC striking down government policies—a relationship that is significant at the 99% confidence level across four regressions. Consistent with my theory, I find that the TCC was significantly more likely to rule against the government when the president referred the case, as compared to lower courts governing criminal law, private law, tax law, or administrative law. In Table 4 below, the dependent variable is a binary measure of whether or not the TCC annulled the government’s policy in a given court case. Since my dependent variable is binary, I use a logistic regression model and include year fixed effects to control for omitted variables. The independent variable is a binary measure of whether or not Turkey’s unelected president referred the case to the TCC. In Table 4, the coefficient

for *Presidential Referral* measures the TCC is more likely to rule against the government when the referral comes from Turkey’s president, as compared to criminal courts (Column 1), private law courts (Column 2), tax courts (Column 3), or administrative courts (Column 4).

Table 4: The Effect of Presidential Referrals on Anti-Government Rulings, 1983-2023

Probability of Anti-Government Ruling				
Benchmark:	Criminal Law	Private Law	Tax Law	Admin Law
	(1)	(2)	(3)	(4)
Presidential Referral	3.91*** (0.57)	2.86*** (0.53)	2.26** (0.77)	2.09*** (0.51)
Constant	-17.57 (2,284.10)	-16.57 (2,399.54)	16.31 (6,522.64)	13.47 (1,455.40)
Observations	890	660	136	554
Log Likelihood	-269.55	-294.01	-54.78	-314.41
Akaike Inf. Crit.	619.10	670.02	179.56	706.81

Note:

*p<0.05; **p<0.01; ***p<0.001

As theorized, the coefficient for *Presidential Referral* is positive and significant at the 99% confidence level for all four benchmark categories. Crucially, including year fixed effects ensures that these regressions control for time-varying confounders, such as changes in Turkey’s level of democracy, the composition of the TCC, the government in power, and whether a case occurred after Gezi (2013–), during the Erdoğan presidency (2014–), or during the state of emergency (2016–18). In substantive terms, controlling for year fixed effects means that the regressions only compare the results of TCC decisions *within the same year*, meaning that the level of democracy, the composition of the court, the government in power, and numerous other factors are effectively held constant.

Second, and of equal importance, I demonstrate that presidential referrals involved controversial, politically salient legal cases on which it would ordinarily be difficult for the TCC to rule against the government. In terms of their content, presidential appeals often involve politically important topics such as laws governing elections and the organization of state institutions.¹⁷ Furthermore, to measure quantitatively whether or not a case is

¹⁷Examples of TCC cases involving election law include: Karar No. 1987/12, Karar No. 1987/13, Karar

controversial, I construct a novel, binary indicator of whether or not the court's decisions included one or more dissenting vote (*karşı oy*). The logic of this measure is that contentious, high-profile cases are more likely to feature dissenting votes, as exemplified by the fierce dissents written by TCC justices in the 2008 case that invalidated a constitutional amendment permitting women to wear headscarves at universities¹⁸ and the 2020 verdict upholding the imprisonment of civil society activist Osman Kavala.¹⁹ Conversely, I expect that routine, low-profile cases are less likely to attract dissenting votes.

Again, both descriptive and statistical results suggest that presidential referrals were more controversial and high-profile than referrals from lower courts. Descriptively speaking, a remarkable 65% of presidential referrals resulted in dissenting votes on the TCC, suggesting that these cases very frequently invoked contentious issues that divided the justice. By contrast, in the full dataset of 3,163 legal decisions issued by the TCC from 1983 to 2023, just 36% featured dissenting votes.

The association between presidential referrals and dissenting votes is positive and statistically significant at the 95% level in three of the four specifications. In Table 5 below, the dependent variable is my novel measure of whether or not the TCC's decision included one or more dissenting votes. Since this variable is binary, I again use a logistic regression model and include year fixed effects to control for confounders that may vary over time. The independent variable, as in Table 4, measures whether or not Turkey's president referred the case to the TCC. The regressions below assess whether presidential referrals are statistically more likely to be controversial than cases referred by criminal courts (Column 1), private law courts (Column 2), tax courts (Column 3), or administrative courts (Column 4).

Table 5 shows that even after controlling for year fixed effects, presidential referrals are more likely to invoke controversial topics than other types of referrals. When presidential referrals are compared to cases brought by criminal and private law courts (Columns 1 and 2, respectively), the coefficient is positive and significant at the 99.9% confidence level. As compared to administrative court referrals, the coefficient is significant at the 95% level. When compared to tax court referrals, the coefficient is positive but no longer significant, due to the smaller number of observations ($n = 136$). These results suggest that on contentious, high-profile issues facing Turkey's Constitutional Court, the president was more likely to

No. 1992/30, and Karar No. 1995/60.

¹⁸Anayasa Mahkemesi, Esas No. 2008/16, Karar No. 2008/116, Karar Tarihi: 05/06/2008, <https://normkararlarbilgibankasi.anayasa.gov.tr/ND/2008/116>.

¹⁹Anayasa Mahkemesi, MEHMET OSMAN KAVALA BAŞVURUSU (2), Başvuru Numarası: 2020/13893, Karar Tarihi: 29/12/2020, <https://kararlarbilgibankasi.anayasa.gov.tr/BB/2020/13893>.

Table 5: The Association between Presidential Referrals and Dissenting Votes, 1983-2023

Probability of Dissenting Votes				
Benchmark:	Criminal Law	Private Law	Tax Law	Admin Law
	(1)	(2)	(3)	(4)
Presidential Referral	1.73*** (0.42)	1.70*** (0.44)	0.63 (0.72)	1.05* (0.46)
Constant	0.69 (1.22)	16.57 (2,399.54)	16.93 (3,956.18)	15.51 (2,399.54)
Observations	890	660	136	554
Log Likelihood	-429.38	-330.79	-67.59	-299.58
Akaike Inf. Crit.	938.76	743.57	205.19	677.15

Note:

*p<0.05; **p<0.01; ***p<0.001

become involved and back the court in striking down government policies.

Finally, the dataset reveals that Turkey’s president served as a crucial source of power for the TCC during the first term of the AKP (2002–07). Remarkably, in the five years between 2002 and 2007, President Ahmet Necdet Sezer—himself a former president of the TCC—referred more cases to the TCC than presidents had referred in the nearly two decades from 1983 to 2001 (19 vs. 15). In effect, during the AKP’s first five years, President Sezer filed a case roughly every three months, repeatedly calling on the TCC to strike down AKP legislation.

After AKP leader Abdullah Gül won control of the presidency in 2007, the TCC lost an intra-state ally that had been crucial to its power. Since 2007, the Turkish president has not referred any cases to the TCC asking the judiciary to annul government legislation. Thus, Turkey’s indirectly elected presidency was until 2007 a key intra-state ally that empowered the judiciary vis-à-vis the government. Yet as I show in the following section, the court’s reliance on an unelected intra-state actor also weakened the judiciary by creating an accountability gap.

7.2 How Unelected Allies Weakened Accountability and Judicial Legitimacy

However, relying on unelected allies is dangerous source of power for judges: Even though unelected allies sustained the judiciary's power, they created an accountability gap that undermined the judiciary's legitimacy. I substantiate this argument by looking at the TCC's decisions in cases involving the military, namely those referred to the TCC by military courts. Troublingly, I find that the TCC was very likely to rule that it had "no jurisdiction" to go into the merits of cases related to the military, effectively turning a blind eye to matters involving a key intra-state ally. This gap in accountability arguably tarnished the court's legitimacy and created an opportunity for the AKP to push for judicial reform.

While unelected allies such as the president and military empowered the judiciary to rule against the elected government, I find that judges lacked the power to rule against their unelected backers. Specifically, I argue that the TCC's reliance on unelected allies created an *accountability gap*, such that allies like the military were not subject to the same accountability mechanisms as other institutions. As a measure of this accountability gap, I construct a binary indicator of whether or not the TCC ruled in a given case that it lacked jurisdiction on a legal issue. These "no jurisdiction" rulings indicate that the TCC was under-utilizing its power by claiming that it could not evaluate a particular topic on the merits.

The data reveal that before the AKP came to power, the TCC largely shielded the Turkish military from accountability. Strikingly, between 1983 and 2002, the TCC ruled that it lacked jurisdiction in 43% of cases referred by military courts. By comparison, for the full sample of decisions issued between 1983 and 2002, the TCC ruled that it had no jurisdiction in 34% of cases. This finding provides quantitative support for Tezcür's (2009) argument that Turkey's "high judiciary... internalized militarist ideology and [was] strongly allied with the military" (Tezcür, 2009, 328).

This accountability gap arguably undermined the legitimacy of the TCC and enabled the AKP to garner support by strengthening oversight of the military. Under the AKP, the rate of "no jurisdiction" rulings on military-related cases fell sharply, from 43% in the 1983–2002 period to just 14% between 2003 and 2023. To be clear, this paper does not recapitulate the excellent scholarship demonstrating how the AKP leveraged a platform of democratization to enhance its popular appeal. Instead, I present novel evidence demonstrating that the AKP closed an accountability gap that existed for the TCC's unelected allies.

Specifically, I find that after the AKP came to power in November 2002, the TCC

became much less likely to rule that it lacked jurisdiction on military issues, relative to cases involving criminal, private, tax, and administrative law. In Table 6 below, the dependent variable is a binary measure of whether or not the TCC issued a “no jurisdiction” ruling in a given case. Looking specifically at data from the AKP period (2002–), my independent variable, *textitPost-AKP Military Referral*, measures whether or not the court case was referred by a military court and thus implicates laws governing the military. Similar to previous regressions, I assess whether the court is more likely to issue “no jurisdiction rulings” in cases referred by military courts as compared to criminal courts (Column 1), private law courts (Column 2), tax courts (Column 3), and administrative courts (Column 4). I use a logistic regression model and include year fixed effects to account for time-varying omitted variables.

Table 6: The Effect of Military Referrals on No Jurisdiction Rulings, 1983-2023

Probability of No Jurisdiction Ruling				
Benchmark:	Criminal Law	Private Law	Tax Law	Admin Law
	(1)	(2)	(3)	(4)
Post-AKP Military Referral	-1.35** (0.42)	-1.42*** (0.42)	0.39 (0.71)	-0.97* (0.38)
Pre-AKP Military Referral	0.08 (0.49)	-0.84 (0.53)	-0.11 (1.50)	0.36 (0.50)
Constant	14.57 (509.65)	-16.57 (2,399.54)	19.67 (10,754.01)	17.20 (3,956.18)
Observations	949	719	195	613
Log Likelihood	-504.43	-399.27	-53.49	-307.31
Akaike Inf. Crit.	1,090.86	882.54	178.98	694.63

Note:

* $p < 0.05$; ** $p < 0.01$; *** $p < 0.001$

Consistent with my thesis that the AKP closed an accountability gap, I find that during the AKP period, the TCC was less likely to rule that it lacked jurisdiction on military issues as compared to three of the four benchmark categories. Specifically, the coefficient for *textitPost-AKP Military Referral* is negative and significant at the 99% level for criminal courts (Column 1), the 99.9% level for private law courts (Column 2), and the 95% level

for administrative courts (Column 4). When compared to tax courts, the coefficient is not significant, likely due to the lower number of observations ($n = 195$).

In sum, these results suggest the source of the TCC's power was paradoxically a source of its undoing. Unelected allies such as the presidency strongly empowered the court to rule against the government of the day, especially on contentious, high-profile issues. Yet the TCC's reliance on unelected allies also created an accountability gap, and the court was very likely to rule it lacked jurisdiction to oversee military affairs. The AKP government capitalized on this accountability deficit by increasing scrutiny of the military and used the court's alliance with the military as means to justify changes to the judiciary. Thus, the court's undemocratic allies were a double-edged sword: They made the court powerful yet also facilitated the elected government's attacks.

8 Conclusion

The turbulent experience of Turkey's Constitutional Court offers fresh insight into centuries-old questions from republican political thought: When and why do rule-of-law institutions have the power to safeguard democracy? In turning scholarly attention to the puzzle of why courts are capable of sustaining their independence over time, this paper revisits and revises a classic thesis in republican thought. Foundational work on republicanism grappled head-on with the thorny problem that courts, by themselves, lack a clear basis for exercising power. Montesquieu (1748), the Enlightenment philosopher who was the progenitor of separation-of-powers theory, wrote that of the three branches of government, "the judiciary is next to nothing" (quoted in Hamilton, Jay and Madison (2001, no. 78)). Hamilton (1788), a key architect of the U.S. Constitution, thought that "from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced by its coordinate branches" (Hamilton, Jay and Madison, 2001).

Poignantly, Hamilton (1788) voiced particular concern for how courts could ensure that executives would comply with their rulings. The judiciary, he wrote, "has no influence over either the sword or the purse. . . . It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments" (Hamilton, Jay and Madison, 2001, no. 78). Hamilton's (1788) work thus raises an enduring and timely question: When courts rule that a powerful executive such as Jair Bolsonaro, Donald Trump, or Recep Tayyip Erdoğan has broken the law, when and why are these illiberal leaders forced to listen?

This paper answers Hamilton's (1788) question by arguing that courts derive their independence and power both from their ability to impose reputation costs on politicians in the court of public opinion and from their networks with elite allies. At the mass level, the judiciary's alignment with voters ensures that governments will face a reputation or audience cost from engaging in conflict with the court. At the elite level, external allies co-construct judicial power by submitting cases that call upon the judiciary to intervene in politics, as evidenced by how Turkey's president and main opposition party filed increased numbers of cases to the TCC in the 2000s.

However, it is not only *whether* courts wield power but *how* that matters. As the Turkish experience reveals, networks with partisan allies endanger democracy by creating incentives for the allied party to seek ideologically extreme policies via the courts, thus fueling institution-eroding conflict and partisan polarization. What is more, judicial networks with unelected allies, such as indirectly elected presidents and militaries, may provide courts with the power needed to rule even against popular governments. But unelected allies are a double-edged sword for democracy, as courts become less willing to hold these allies accountable and thus create gaps in the rule of law. By contrast, networks with extra-state allies, such as civil society or supra-national courts, tend to support a more independent, pro-democratic judiciary, even if these allies are a weaker basis for judicial power.

Today, as polities from the United States to Turkey grapple with how to restructure political institutions after episodes of democratic erosion, the Turkish experience offers invaluable lessons. As Hamilton (1788) wrote, discoveries made by the "science of politics...are means, and powerful means, by which the excellencies of republican government may be retained, and its imperfections lessened or avoided" (Hamilton, Jay and Madison, 2001, no. 78). This paper has argued that in order to build self-sustaining democracy, scholars and practitioners must think not only about formal, constitutional rules but also about the informal networks that sustain the independence and power of guardrail institutions. By strengthening judicial networks with extra-state allies, such as civil society, and with elected allies, such as mayors and governors, institutional reformers can construct courts that are independent, powerful, and protective of democracy.

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