

***The Role of Constitutional Courts in the Establishment
and Maintenance of Democratic Systems of Government***

Lee Epstein, Washington University in St. Louis

Jack Knight, Washington University in St. Louis

Olga Shvetsova, Washington University in St. Louis

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Please direct all correspondence to Epstein (epstein@artsci.wustl.edu).

Abstract

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What role do courts play in the establishment and maintenance of constitutional democracies? To address this question, we elaborate a model that draws on existing substantive literature and on theories that assume strategic behavior on the part of judges, executives, and legislatures. This model, in turn, leads to several behavioral predictions about the interactions among the relevant political actors. While those predictions could be assessed in many distinct contexts, we focus on Russia. In particular, we provide a demonstration of how the model helps make sense of the behavior of the Constitutional Court (*Konstitucjonnyj sud*) in light of the difficult political situation it confronted. We conclude with some thoughts on the broader implications of our theory for the study of courts throughout Eastern Europe and how it may well illuminate constitutional politics in other parts of the world.

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Before World War II, few European States had constitutional courts, and virtually none exercised any significant judicial review over legislation. After 1945 all that changed. West Germany, Italy, Austria, Cyprus, Turkey, Yugoslavia, Greece, Spain, Portugal and even France...created tribunals with power to annul legislative enactments inconsistent with constitutional requirements. Many of these courts have become significant—even powerful—actors.

—Herman Schwartz (1992, 741)

European constitutional courts have created situations in which legislators feel obliged to enter into constitutional discourse, both an internal discourse and a discourse with the court, to make and to take seriously constitutional arguments, and to cast and recast statutory language in the light of potential constitutional objections.

—Martin Shapiro & Alec Stone (1994b, 417)

[T]here is an expansion of judicial power afoot in the world's political systems.

—C. Neal Tate (1995, 27)

Today, at the end of the twentieth century, it is scarcely possible to recount, much less understand, the major political and social developments in industrial societies without attention to legal norms, courts and judges.

—Sally J. Kenney, William M. Reisinger, & John C. Reitz (1999, 1)

These quotes, from legal academics and social scientists alike, are just the tip of the iceberg. Indeed, for more than a decade now, the community of law and society scholars has acknowledged the “active role” courts are playing “in ensuring the supremacy of constitutional principles” (Henckaerts & Jeught 1998) and in democratization efforts throughout the world but especially in Eastern Europe.

This expansion of judicial power—or what some term the “judicialization of politics”¹ (Tate & Vallinder 1995a) raises whole sets of intriguing questions, and unanswered questions at that. For, despite an acknowledgement of their importance, we “know precious little,” as Gibson, Caldeira, and Baird (1998) recently lamented, “about the judicial and legal systems in countries outside the United States. We understand little or nothing about the degree to which various judiciaries are politicized; how judges make

decisions; how, whether, and to what extent those decisions are implemented; how ordinary citizens influence courts, if at all; or what effect courts have on institutions and cultures.”

Certainly no single research endeavor can fill all the voids Gibson and his colleagues identify. What we do instead is tackle one question, albeit one that is of core concern to the Gibson team, as well as to many others laboring in this field: What role do constitutional courts play in the establishment and maintenance of democracies? For judicial specialists, this question is of obvious significance, having served as a focal point for studies on the U.S. Supreme Court for over four decades (Casper 1976; Dahl 1957; Gates 1992; Rosenberg 1991). But there are at least two other groups for which our question might resonate. Because it has a vested interest in learning more about how courts establish and maintain legitimacy in emerging democracies, one is the policy-making community. We think here of the World Bank, which has commissioned various reports and put together study groups for the purpose of exploring the role courts play in the democratization process.² Such a concerted effort on the part of the Bank and other decision-making organizations reflects a recognition that “Without judicial independence, there is no rule of law, and without rule of law the conditions are not in place for the efficient operation of an open economy, so as to ensure conditions of legal and political security and foreseeability” (Jarquín & Carrillo 1998, vii). This is, of course, the same sort of sentiment Mikhail Gorbachev (1987) expressed over a decade ago, when he argued that *perestroika* required commitment to *pravovoe gosudarstvo* (a state based on the rule of law).³ The other group we hope to interest consists of scholars, especially comparativists, who focus their attention on the political, social, and economic conditions in countries elsewhere but tend to ignore courts. For them, our question provides a mechanism for integrating courts into the larger governmental process—the importance of which we cannot stress enough. As many in the law community have speculated (Jacob et al. 1996; Shapiro & Stone 1994a), at least some of the persistent neglect of courts by comparativists may reflect a belief that judiciaries are separate from or “above” ordinary political processes and, as such, must be studied as independent entities.⁴ By incorporating courts into the larger governmental process, just as scholars have done fruitfully in the U.S. context (Eskridge 1991a, 1991b; Ferejohn & Weingast 1992a; Spiller & Gely 1992), not only do we wish to dispel this notion but we also hope to make a compelling case

for our belief—shared by virtually all legal scholars (e.g., Cappelletti 1989; Jacob et al. 1996)—that explanations of politics are incomplete unless they incorporate courts.

To address the primary research question, we proceed in five steps. We begin in Section 1 with some preliminaries regarding constitutional courts and existing characterizations of them. Section 2 uses these preliminary considerations to elaborate a model that locates courts within their governmental systems. That model, which also draws on existing substantive literature and on theories that assume strategic behavior on the part of political actors, in turn, enables us to construct behavioral predictions about the interactions among courts, executives, and legislatures. While those predictions, which we lay out in Section 3, could be assessed in many distinct contexts we focus on Russia. In particular, Section 4 provides a demonstration of how the model helps make sense of the behavior of the Constitutional Court of the Russian Federation (*Konstitucjonnyj sud*) in light of the difficult political situation it confronted. We conclude, in Section 5, with some thoughts on the broader implications of our theory for the study of courts throughout Eastern Europe and how it may well illuminate constitutional politics in other parts of the world.

I Preliminary Considerations

Although research programs on constitutional courts are growing in importance and visibility, it is probably true, as Jacob (1996) claims, that “many students remain unaware that the American legal system is an exception to what prevails in most of the rest of the world.” Accordingly, in Section 1.1 we highlight the key differences between the United States and “the rest of the world.” This discussion also enables us to present a preliminary justification for a claim we make with some force later; namely, a focus on the Russian case enables us to generalize to, at the very least, other Eastern European systems. The material in Section 1.2, which considers existing literature bearing on our question, is equally important: It provides the primitives necessary to begin the model-building process.

1.1 Constitutional Courts: The Basics

When nations go about the task of designing constitutional courts, as Jacob (1996) implies, they do not always or even often merely mimic the United States. Rather, they generally adapt one of two *basic* models,

the American or European.⁵ Table 1 denotes the essential differences between the two, but it is by assembling these differences that the more useful juxtaposition emerges.

[Table 1 about here]

To see this, consider how a constitutional case might proceed in the United States (and other countries that pattern their courts on the American system) and in Russia (and other countries that invoke a similar version of the European model [see note 5]). Assume that the U.S. Congress passes a piece of legislation outlawing, say, the burning of the American flag, and that the Russian parliament enacts a similar law. Further assume that individuals in both countries desire to challenge their respective laws on constitutional grounds. In America, the individual would have to present a real case or controversy, one in which she would have a personal and real stake in the outcome. To create such a dispute, she might violate the law by burning an American flag, having herself arrested, and, ultimately, facing trial in a federal district court. If she lost there, she might appeal to a U.S. Court of Appeals; finally, assuming that the circuit court affirmed the trial judge's decision, she could attempt to attain review in the U.S. Supreme Court, though her chances of convincing the justices to grant certiorari border on the trivial (or roughly 1%). In Russia, our hypothetical litigant (who may be an ordinary citizen or a part of the government, including a member of the Parliament that passed the law or even the President) needs not violate the law to mount a challenge to it, nor would he begin his case in a lower "ordinary" court. Because he is alleging that the act violates Russia's constitution, because the ordinary courts do not decide constitutional cases, and because the only court that does decide constitutional cases—Russia's Constitutional Court—does not require concrete controversies to render decisions, our litigant could take his case directly to that court. The only similarity of note between his plight and that of his American counterpart lies in his chances of review: The Russian Constitutional Court is even more discretionary than the U.S. Supreme Court, deciding in recent years less than .3% of the petitions it receives for review.⁶

Our use of Russia in this example is no accident. Though many scholars associate the European model with Austria (where it was first adopted), Italy, Spain, and other states in Western Europe, for many reasons (see, e.g., Henckaerts & Jeught 1998; Ludwikowski 1996; Sheive 1995; Utter & Lundsgaard 1994) the vast majority of newly-emerging democracies in Eastern European countries, including Russia, opted

for it as well (Ludwikowski 1996; Smith 1996; Thomas 1995). In fact, the centralized constitutional courts in these regions are so close in design that Wishensky (1993) has suggested that the nations apparently patterned some of their specific institutional features “on that of Russia, and the fate of one of them may give some indication of what could happen to such institutions in Russia and elsewhere.”⁷ This last clause may reflect the fact that these courts are not only linked by structure but by purpose as well. The various provisions and laws establishing them express the general aim of “safeguarding the foundations of the Constitutional system,” as Russia’s 1994 law on the Constitutional Court states or of “providing equilibrium between the separated powers,” as an Armenian justice (Harutiunian 1996, 3) declares—an aim at least some courts have not been hesitant to attain by invoking the power of judicial review to strike down acts of government (e.g., Ahdieh 1997; Hausmaninger 1995; Reid 1995; Schwartz 1998; Sheive 1995).

1.2 Characterizations of European-Type Constitutional Courts

In contemplating the sorts of institutional features of European constitutional courts we detail in Table 1, along with other aspects of their political and legal contexts, scholars have offered two decidedly different characterizations of the role these tribunals play in their systems of government. Some argue that they are relatively *unconstrained* actors (e.g., Blankenburg 1996; Provine 1996; Stone 1994, 1995; Utter & Lundsgaard 1994), able to have “last licks” on matters that receive their attention. Others suggest that, even though these courts issue decisions that are final and formally binding, they are hardly untethered; they are rather *constrained* actors, those who must be attentive to preferences and likely actions of other relevant players in their systems of government, as well as the institutional context in which they work if they wish to issue efficacious decisions—decisions that the other players will respect and with which they will comply (e.g., Smithey 1999; Vanberg 1999). Since these characterizations present competing answers to our research question, let us consider both in some detail

1.2.1 European-Type Courts as Unconstrained Actors

Most existing studies of European constitutional courts advance—sometimes explicitly (e.g., Vanberg 1998a), sometimes implicitly (e.g., Provine 1996; Stone 1994, 1995)—a distinct sequence of policy making, and it runs along the lines of our Russian hypothetical above: (1) the Government (*i.e.*, an executive and legislature) acts;⁸ (2) a Party (who may be a member[s] of the Government) challenges the

constitutionality of the governmental action, and (3) the Constitutional Court (a) decides whether to hear the dispute⁹ and, if so, (b) issues a decision, which includes a holding on the constitutionality of the Government's action. Because decisions of the Court are final and formally binding, the Court is a parametric actor in this sequence to the extent that it need not hinge its decisions on its beliefs about the preferences and likely actions of the Government; it can place policy wherever it sees fit. The other branches of government, however, must be attentive to the Court if they wish to see their preferred positions become the law of the land. In other words, given a sequence in which the Government moves first and the Court last, the justices may constrain the legislature and executive but the legislature and executive do not constrain the justices.

To see why, consider Figure 1 below in which we depict a hypothetical set of preferences over a particular policy, say, the question of whether to outlaw all communist political parties.¹⁰ Assume: (1) the sequence of policy making unfolds as we suggest above; (2) the actors possess complete and perfect information about the preferences of all other actors;¹¹ (3) the actors prefer an outcome that is as close as possible to their most preferred point than to one that is further away in either direction.

[Figure 1 about here]

Under these assumptions and this preference distribution, should the President or Parliament try to enact its preferred policy? And, if so, should the other attempt a Court challenge? The answer to the first question is simple enough: The President should attempt to enact her preferred policy (perhaps via a decree). That is because she knows the Court shares her preferences. Hence, if her policy is challenged, the Court will uphold it, thereby giving it even greater weight. The answer to the second is equally transparent: Parliament should not attempt a challenge. That is because it too realizes that the Court will rule in favor of the President, which militates against undertaking a litigation effort that would not only fail but actually worsen the situation by giving the President's action legal affirmation.

We could, of course, alter the preferences, the details of the governmental process, the number of players, and so forth. But it is the more general point that should not be missed: Under this sequence of policy making, elected officials, if they wish to see their favored policy effectuated, must take into account the preferences and likely actions of the Court because a possibility for a successful challenge exists (Stone

1994). The Court, on the other hand, because it has “last licks” (Ferejohn & Weingast 1992b; Segal 1997), need not worry about the government’s preferences. It is free to set policy as it so desires.

1.2.2 European-Type Courts as Constrained Actors

The basic contours of the above account will be familiar to students of Western European politics. Stone (1995), for example, depicts constitutional courts as nearly third chambers of government, with the power to “recast policy-making environments, to encourage certain legislative solutions while undermining others, and to have the precise terms of their decisions written directly into legislative provisions.” Given that European-type constitutional courts decide only constitutional disputes and make decisions that are formally binding, this characterization, at least on its face, seems sound. Nonetheless, scholars have recently challenged it, arguing that these tribunals are, in fact, constrained in consequential ways. Vanberg (1999), for example, argues that all constitutional courts, even those in advanced democracies such as Germany, must be attentive to the preferences of external actors if they wish to advance their goals because justices are “dependent on the cooperation of governing majorities...to lend force to their decisions” (see also Smithey 1999).

While Vanberg presents intriguing theoretical and empirical support for his position with regard to the German *Bundesverfassungsgericht*, we and many other scholars believe his general claims about the constraints facing constitutional courts are equally, if not more, compelling for those in emerging democracies, especially in Eastern Europe.¹² For, unlike courts in evolved democracies, those in Eastern Europe have yet to establish their own independence, legitimacy, or authority (or, for that matter, the authority of their constitutional systems) (Melone 1997; O'Connor 1996; Reid 1995; Utter & Lundsgaard 1994; Vlashin 1993), which in turn limits their ability, again perhaps to a greater extent than their counterparts in mature democracies, to issue rulings that other actors will respect and implement even when it is not in their self interest to do so. What this means, in practical terms, is, first, that elected officials have not been hesitant to suspend their courts, fail to comply with their decisions, threaten impeachment against particular justices, or take other steps designed to punish justices or render their decisions inefficacious (Boylan 1998; Melone 1997; Schwartz 1998; Solomon 1997a). And, second, that when these threats occur the courts are often unable or unwilling to mount defenses at least in part because

they toil in countries where, under previous regimes, “it had been unthinkable that an independent institution should exist which could exert constitutional control over the processes of government and law enforcement” (Reid 1995); such was bourgeois and simply incompatible with their systems of government (Ludwikowski 1996; Smith & Danilenko 1993; Utter & Lundsgaard 1994).¹³ It is thus not surprising that when the Russian Constitutional Court, in its first decision, struck down a presidential decree as unconstitutional, Yeltsin did not quite know what to make of the Court’s holding; in fact, he complied only after “some coaxing” on the part of the Court’s Chair (Ahdieh 1997). Nor is it stunning that when members of the Russian Constitutional Court asked their U.S. counterparts about how they ensured compliance with their decisions, they were taken aback with the Americans justices’ response: “They simply did not understand us,” the Russians bemoaned. “It simply had not entered their heads that the decisions of the Court would not be implemented” (Reid 1995)

The dearth of any tradition or culture of an independent judiciary is but one reason for the legitimacy problems confronting justices on these new courts. Another, albeit related, centers on the fact that they (again in contrast to their Western colleagues) have yet to build up reservoirs of public and political support from which to draw when confronted with threats (Gibson, Caldeira, & Baird 1998). Certainly some of this stems from their comparative youth. But the relative lack of legitimacy and support may also be a function of a general and long-held suspicion of judges existing among the populace (Berman 1963; Boylan 1998), which will take time for courts in new democracies to dispel (Boylan 1998; Hausmaninger 1995). And, while there is evidence that this is now in fact occurring in Russia and throughout Eastern Europe (Nikitinsky 1997; Remington, Smith, & Haspel 1998; Savitsky 1995; Sharlet 1993b; Smith 1996)—as one justice puts it, “People have stopped asking the usual Russian question, ‘Where are the police?’ and instead started to ask ‘Where is the Constitutional Court?’” (Nikitinsky 1997) or as one scholar of the Russian Court writes, “that [government actors,] an increasing number of groups and literally thousands of individuals are turning to it to solve problems is a testimony to the Court’s growing credibility”(Sharlet 1993b)—it is a task that many of their Western counterparts have already completed (Gibson, Caldeira, & Baird 1998; Grosskopf 1999). Such has not been lost on those counterparts who, in fact, have told Eastern European justices that they must build up sufficient public and “political

capital”—mostly by avoiding serious confrontations with elected actors— if they hope to become efficacious actors in their governments (Sharlet 1993b, 1996).

Other factors may exist as well but, from a theoretical vantage point, they all lead to the same conclusion: To model constitutional courts, at least in Eastern Europe, as completely unconstrained by their political environments would be akin to modeling, say, the early U.S. Supreme Court as similarly unconstrained: in both cases such would fail to capture the political realities confronting the justices (Graber 1998; Knight & Epstein 1996).

2 A Model for the Study of Constitutional Courts

With these insights in mind, we now sketch a model that we believe captures the role of courts in democratic societies and that we can invoke to generate testable propositions. That model takes the form of a strategic interaction between a Constitutional Court (CC) and three elected actors, a President (P), an Upper Chamber (UC) of Parliament, with representatives from each region within the society; and a Lower Chamber of Parliament (LC), which is drawn nationwide.¹⁴ The interaction between the Court and these other actors begins with CC deciding whether to take a case involving a particular policy issue, and, if it accepts the case, where to place the policy. After CC moves, the other actors must decide whether to modify, override, evade or otherwise disregard CC's decision or harm CC in some other way. These sorts of “attacks,” we assume, may have short- and long-term effects on the Court. In the short term, they may nullify or render inefficacious particular decisions (Eskridge 1991a, 1991b; Vanberg 1999). In the longer term, they may chip away at the Court's legitimacy, that is, their impact may accumulate over time such that CC itself becomes an ineffective political institution (Ahdieh 1997; Gibson, Caldeira, & Baird 1998; Knight & Epstein 1996).

We further assume that all actors involved in this interaction have positions, what we call “most preferred positions,” over a given policy space, that is, the position where they would ideally like to see government policy placed.¹⁵ Figure 2 depicts these points over a two-dimensional space in an environment in which the actors' preferences are separable and utility functions are linear. As illustrated, the President (P) and the Upper Chamber (UC) and Lower Chamber (LC) hold distinct positions on the separation of powers dimension, with P favoring a strong executive system and the chambers preferring one that endows

significant authority to the parliament.¹⁶ CC is between the two on this dimension; it also takes a middle position, somewhat between P and the LC on the one side and UC on the other, on the federalism dimension, which taps the extent to which actors desire a government that is centralized (at one extreme) or decentralized (at the other).¹⁷

[Figure 2 about here]

All actors prefer policy that is as close as possible to their ideal points but they are not unfettered in their ability to achieve that goal. Beginning with the elected actors, because they may incur costs associated with challenging a decision produced by the Court (Eskridge 1991b; Rodriguez 1994), they may be willing to tolerate policy that is not on their ideal points. Specifically, an interval—what we call a tolerance interval—exists around each of their ideal points such that they would be unwilling to challenge a Court decision placed within that interval.

Those intervals, which the figure depicts for the President, and the Upper and Lower Chambers and are common knowledge among them and the Constitutional Court, represent the elected actors' ex ante assessment of the relative costs and benefits of attempting an "attack" on the Court.¹⁸ To make that assessment, as previous literature suggests, these actors take into account four factors, some of which speak to the particular case at hand and others, to the Court itself: (1) case salience—the degree to which the case under consideration by the Court is especially relevant or important to them (e.g., Canon & Johnson 1998; Epstein & Knight 1998; Vanberg 1999); (2) case authoritativeness—the ability of the justices to produce a clear, consensual ruling in the general legal area at issue in the dispute (e.g., Eskridge 1991a; Kluger 1976; Murphy 1964); (3) public (specific) policy preferences—the position of the public, in policy space, with regard to particular matter under review (e.g., Barzilai & Sened 1997; Vanberg 1999);¹⁹ and (4) public (diffuse) support for the Court—the confidence that the public has in the Court (e.g., Caldeira 1987; Gibson 1989, 1991; Holland 1991; Vanberg 1999).²⁰ Each, in turn, serves to define the breadth (*i.e.*, lengthen or shorten) of tolerance intervals over a particular Court decision, such that (1) the less salient the case, (2) the more authoritative past decisions within the general issue area, (3) the closer the Court's policy is to the public's preferences, and (4) the more confidence the public has in the Court, the longer the tolerance interval (and vice versa).²¹

For policies falling within their tolerance interval, the actors have calculated that the benefits of acquiescing to the Court's decision override the cost of an attack; for policies falling outside the interval, they have determined that the benefits of an attack outweigh the costs of acquiescence; and for policies at the extreme ends of the interval, they are indifferent between attacking and not so doing. Note, though, that the inclusion of the confidence dimension ensures that the Court can contribute to its own well being and, thus, incorporates the intuition American judges have shared with their Eastern European counterparts: If their court is attentive to the preferences of relevant actors, then their institution's legitimacy should increase over time assuming that it reaches decisions that other actors accept and with which they comply. In our model, this requires the Court to reach decisions that are within the intersection of tolerance intervals or to avoid disputes for which no intersection exists. What this, in turn, suggests is that tolerance intervals can increase (or decrease) over time, quite apart from the particulars of a dispute (Ahdieh 1997; Caldeira 1987).

Finally, given that attacks on the Court (CC) may have both short- and long-term effects on its ability to establish efficacious decisions and, more generally, its legitimacy in society, the Court itself is constrained by the existing tolerance intervals of the elected actors. If, for example, CC places a case on its agenda and decides that dispute outside a range acceptable to these actors, it runs the risk of producing a decision that the President, Lower Chamber, and Upper Chamber will attempt to overturn or ignore; if such decisions accumulate, they may work to undermine CC in the eyes of, say, the public, thereby shortening the elected actors' tolerance intervals over the long term. That is because, to reiterate, the elected actors construct their tolerance intervals with some attention to the public's overall (or diffuse) support for the Court, and not just on the basis of those factors relevant to a particular dispute (Caldeira 1987; Smith 1996). On the other hand, if the Court over time accepts and decides cases within the overlap of the tolerance ranges, not only will the elected actors implement those decisions but there also will be a cumulative effect on the Court's legitimacy and its ability to maximize its policy preferences: in the long run, the tolerance intervals will expand, thereby giving CC a good deal more leeway, both in terms of case selection (Epp 1998) and decision making (Caldeira 1987; Volcansek 1991).

The figure above enables us to explore these conditions. Consider, first, the separation of powers dimension. As we can see, the intersection of the tolerance ranges is empty, meaning that the Court is maximally constrained: Any decision may be subject to attack by one or more elected actors. Because, under such circumstances, CC cannot safely issue any ruling on the merits, we would expect to see it avoiding such disputes—that is, not accepting them for review, much less resolving them on their merits. Federalism presents a different story: On this dimension, the intersection of the tolerance ranges is non empty (represented by the gray area in the figure), suggesting that the CC could place policy anywhere in this set. Even more to the point, since the Court's ideal point falls within the intersection, it is able to act as if it were an unconstrained actor—not only accepting federalism cases but deciding them as it so desired.

3 Developing Conceptual Predictions

From this relatively simple model emerge several rather intriguing conceptual predictions about the ability of constitutional courts to establish legitimacy and credibility within their societies. The first set centers on the short term: If courts wish to issue efficacious decisions, then they will not accept petitions for review that involve policy dimensions for which an intersection of tolerance ranges does not exist; so doing would lead elected actors to challenge them or their decisions. Rather they will accept cases involving policies for which the tolerance set is non empty and will reach decisions, within that set, that are as close as possible to their ideal points.²²

The second set of predictions focuses on the longer term: If courts agree to resolve disputes that involve policy dimensions for which an intersection of tolerance ranges does not exist and do so repeatedly over time, then they shorten those tolerance ranges. This, in turn, makes it more difficult for them to exercise discretion over case selection (as well as to issue decisions in line with their policy preferences) and to establish their legitimacy. Alternatively, if courts accept cases involving policies for which the tolerance set is non empty and reach decisions within that set, then they lengthen the tolerance intervals. Such has the effect of making it easier for them to exercise discretion over case selection and, in turn, to issue decisions in line with their policy preferences and establish their legitimacy.

Taken collectively, these hypotheses have direct bearing on case-level decisions but they also implicate the aggregate level: We should see particular kinds of disputes dominating courts' agendas (in our example,

federalism), with others (in our example, separation of powers) remaining unresolved—at least until the actors' preferences change or the tolerance intervals alter in length. While some portion of these changes may be beyond the control of the justices (such as, turnovers in the parliament or presidency), they can affect the other by taking into account the preferences of the relevant actors.

4 Application

Three of the most compelling features of the predictions generated by our model are, first, we could assess them in various contexts. That is because the predictions (1) are not, in the main, bound to any particular society—be it an established democracy or democratizing society—and (2) seek to capture the process by which judicial tribunals establish and maintain legitimacy—a process with which all courts grapple (Goebel 1971; Knight & Epstein 1996). Second, the predictions sit comfortably with existing literature, that is, they square with the insights generated by a range of studies—from those that focus on public opinion (Gibson, Caldeira, & Baird 1998) to formal (Barzilai & Sened 1997; Eskridge 1991a, 1991b; Knight & Epstein 1996; Vanberg 1999), statistical (Spiller & Gely 1992; Vanberg 1999), and jurisprudential (Ahdieh 1997; Smithey 1999) treatments of judicial decision making. Third and related, a good deal of anecdotal evidence exists to support them. Some of this comes from the U.S. context, specifically from studies of early Supreme Court eras, which show that the justices would have been unable to establish efficacious policy had they failed to take into account the desires of other key actors and the nature of the political environment under which they were operating (Alfange 1994; Epstein & Walker 1995; Graber 1998; Knight & Epstein 1996). Other evidence emanates from the comments of various contemporary constitutional court justices, both in emerging and established democracies, which lend credence to the notion that they do, in fact, take into account external political actors when they set their agendas and reach their decisions, as well as acknowledge the importance of cultivating the public's confidence (e.g., Ahdieh 1997; Attanasio 1994; Nikitinsky 1997; Reid 1995; Vanberg 1999). There also is scattered support for the idea that elected officials may be willing to tolerate court decisions that do not fall on their ideal points. Vanberg's (1999) interviews with members of the *Bundestag* provide some (e.g., "There is not a single deputy here who thinks it would be advisable to move against the Court. A serious confrontation would create a public discussion in which one could easily get a bloody nose."), as does commentary offered

by observers of the Eastern European political scene (e.g., Savitsky 1995; Waggoner 1997). Further, we have amassed some evidence of our own. That evidence, which we develop in the Section 4.2, pertains to the Russian Constitutional Court.

4.1 Why Russia?

Of course, we could have developed evidence from just about any court—be it in an established democracy or in a democratizing society—because our model, as we suggest above, is not bound to any particular society. So a few words may be in order about why we chose, and chose quite carefully, to focus our analytic inquiry on Russia’s Constitutional Court.

First, of all the new Eastern European constitutional courts, the *Konstitucionnyj sud* has (arguably) garnered the most attention from political, legal, and policy-making communities (see, e.g., Ahdieh 1997; Attanasio 1994; Blankenagel 1994; Bowring 1993; Boylan 1998; Brzezinski 1993; Chetvernin 1994; Cooper 1996; Feofanov 1993; Hausmaninger 1992, 1995; Henderson 1998a, 1998b; Kitchin 1991, 1992; Maggs 1997; Morshchakova 1998; Ovsepian 1996; Pashin 1994; Pomeranz 1997; Reid 1995; Schwartz 2000; Sharlet 1993a, 1993b; Smith 1993; Smith & Danilenko 1993; Solomon 1997a, 1997b; Thomas 1995; Tracy 1993; van den Berg 1999; Waggoner 1997; Weisman 1995; Wishnevsky 1993). There are many explanations for this, at least one of which centers on the Russian Court’s location—in the capital of the what was the world’s other great superpower; others implicate its rocky history and its controversial activities. Either way, the quantity of literature (albeit largely descriptive) provides us with insights into the Court we would not otherwise possess. These are especially important for testing our model, which requires us to develop estimates of the preferences and tolerance intervals of the key actors. Moreover, the intensity of interest in Russia suggests that a focus on the Court there may encourage a broader search for the importance of judicial bodies in the governmental process—an end our research hopes to promote.

Second, the Russian Court has generated a sufficient number of cases for analysis²³—and, more important it has done so, as we detail below, under periods of variability in the political environment. What this means is that we can attain the variation our model requires, in terms of the preferences and tolerance intervals of the key actors, while controlling for other important contextual features. To put it in slightly

different terms, a focus on Russia allows to exploit the best features of case-study and cross-national research designs.

Finally, and relatedly, we gain theoretical and analytic leverage on the general problem of institutional emergence and maintenance by focusing on the Russian case. Since Eastern European constitutional courts emerged from similar governmental systems, are comparably configured, and now confront like problems (Moffett 1998), our focus on Russia should permit for generalization, at the very least, on constitutional courts throughout the region (Henderson 1998b). But there is more: Because many former Soviet Republics—while following Russia’s lead when it came to developing the particular institutional features of their courts—adopted the general contours of the European Court model, our research may have implications for democracies, mature and otherwise, that have centralized court systems and, perhaps, even for those that do not. After all, our model seeks to capture the process by which courts establish and maintain legitimacy—a process with which all courts (including the U.S. Supreme Court) grapple (Goebel 1971; Knight & Epstein 1996).

4.2 The Russian Case

With that, let us now turn to the Russian Constitutional Court. Given the amount of writing on the Court, we need not say too much about its history or activities, save for a few essentials. The first is simple enough: As we suggest above (see also note 13), it is probably safe to say that prior to the Constitutional Court’s creation in 1991,²⁴ Russians had very little experience with an independent judiciary. This was certainly the case during the pre-Gorbachev years (Berman 1963; Boylan 1998; Butler 1988; Ludwikowski 1983; Plank 1996; Reid 1995; Thomas 1995; Utter & Lundsgaard 1994; Weisman 1995), and it remained so through the late 1980s (Feofanov 1993; but see Sharlet 1993b).

Second, despite their lack of experience the Russians designed a European-styled Constitutional Court that represented a substantial break from the past to say the least (Thomas 1995), for they endowed it with features typically thought to induce judicial independence. So, for example, under the 1991 “Law on Constitutional Court of the RSFSR” (which gave effect to the 1991 constitutional amendment creating the Court; see note 24), the justices were provided with life tenure (until the age of 65) and a vast array of powers such as the ability to:

- (1) adjudicate a wide range of constitutional complaints, including those brought by citizens (alleging infringements of their rights) and by the President, members of the Parliament or both (challenging the constitutionality of enactments);
- (2) expose individual views in the form of dissents and concurrences;
- (3) review the constitutionality of all state actions (in the absence of a concrete dispute) on the request of various executive and legislative bodies;
- (4) issue advisory opinions on the impeachment of the President;
- (5) assess, at the request of the President, the Parliament, or other executive and legislative bodies, the constitutionality of treaties that have not gone into effect; and
- (6) take up cases, on its own initiative, involving the constitutionality of decisions made by the President and other high officials.

At least formally, then, the Russians gave their new Court broad powers, “while imposing few constraints” (Sharlet 1993b, 4). Or, as one constitutional court judge later put it, “the authors of the law...gathered all the possible prerogatives from every existing [court] model and assigned them to Russia’s constitutional court” (Schwartz 2000, 116).

Third, it is important to know that the new Court ran into trouble in rather short order.²⁵ To be sure, it successfully asserted its independence (at least from the President) in one of its earliest rulings,²⁶ but it faced a far bumpier road from that point on. The first sign of trouble came in the Tatarstan Case, decided in March 1992, in which the justices struck down as unconstitutional a question in a referendum Tatar hoped to put to its citizens.²⁷ When the Tatar government chose to ignore the ruling, the justices requested that their Chair, Valerii Zor’kin, convince Parliament to seek compliance with their decision. Parliament acceded, issuing a resolution that supported the Court’s ruling and requesting the President to enforce it.

That was insufficient, however, to deter Tatarstan from going ahead with its referendum about a week later.²⁸

Even in the face of such defiance, the justices could not have predicted the fate that awaited them only a year and a half later: On October 7, 1993, Yeltsin signed a decree suspending the Constitutional Court until the adoption of a new constitution.²⁹ The President did not mince words: “The Constitutional Court of the Russian Federation has found itself in a deep state of crisis.” Indeed, he was so enraged at the Court that some expected it to be written out of the 1993 Constitution. That did not happen, though the provision on the *Konstitucjonnyj sud* (Article 125) was short and rather vague on all matters other than its size (which was increased from 15 to 19) and its competencies, leaving it up to Parliament to enact a federal constitutional law to flesh out the details. That act, which the justices played a role in drafting, was signed by the President on July 21, 1994.

This new Court law, it is important to note, contained provisions that decreased certain aspects of the tribunal's independence and authority, while enhancing others. So, for example, (1) Justices no longer serve for life (they now have 12-year terms) but the retirement age was increased from 65 to 70;³⁰ (2) the Court may no longer decide cases on its own initiative, nor may it “pass judgment on the constitutional character of political parties,”³¹ but it is easier for ordinary citizens to file constitutional complaints; (3) the Court now has “more independence in solving organizational, financial, and personnel questions” but the powers of the Chair have been reduced; and (4) the Court may no longer issue advisory opinions on the impeachment of the President but it can hand down findings on other procedural matters.³²

Not only is the Second Constitutional Court different in design from its predecessor, it has engendered a higher level of respect as well. As Remington (1998, 219) suggests “the Court, it appears, [is] gradually establishing its status as legitimate source of judicial power which could one day check potential abuses of [governmental] power.” Statements from Yeltsin support Remington’s observation; in fact, he—the very President who suspended the Court in 1993—claimed just five years later that he “had to comply with [a ruling he disliked] because...the Constitutional Court has ruled and there’s nothing more one can do” (Interfax Russian News 1998a, 1998b).

4.3 Analysis

Even from this brief account emerge two very intriguing questions: Why did the first Russian Constitutional Court (1991-93) fail to establish its legitimacy and role in Russian society? Why is the Second Court (1994-) faring far better? Our model, which is geared toward exactly these kinds of questions, provides some answers.

Recall that on our account—a dynamic model of sequential decision making by the Court and other institutional players—the Court exists as a player in the game and collects payoffs for more than one period, while other players collect payoffs in one period only. Then the other players are replaced by their institutional equivalents with, possibly, different policy preferences. We model the idea of legitimacy through the concept of tolerance intervals, which serve as constraints on the Court’s decisions. And we capture the idea of changes in legitimacy by allowing the length of the tolerance intervals to change over time. Finally, in our model we analyze the effects of changes in these intervals by changing the parameter values that define interval length. By so doing, we capture the various political contexts in which the Court makes its decisions.

For a broad range of parameter values, equilibria correspond to the heuristics presented earlier (see Section 2 and note 22). So, for example, a new Court avoids reaching decisions outside the tolerance intervals of other institutional players, preferring instead to promote its legitimacy and adjust the status-quo policy slowly. This follows from the fact that any decision would result in a challenge to the Court—with possible consequences including a loss of legitimacy and reversal of its policy. Our prediction is that the Court continues to avoid “unsafe” cases and proceeds to accumulate legitimacy (thus raising the cost of challenges by other actors) until such time when players’ tolerance intervals begin to lengthen and overlap.

Do such predictions hold for the *Konstitucjonnyj sud*? Addressing this question vis-à-vis our model requires us to: (1) identify policy spaces relevant to Russian Court cases, (2) characterize the cases on those dimensions, and (3) develop estimates of (a) the most preferred positions of all relevant Russian actors—including the Constitutional Court, the President, the Supreme Soviet (through 1993), the Duma (Lower Chamber) (after 1993), and the Federation Council (Upper Chamber) (after 1995);³³ and (b) the tolerance intervals of the elected branches over each of the dimensions. The first is easy enough. Based on our reading of the relevant literature (e.g., Reid 1995; Remington, Smith, & Haspel 1998; Schwartz 2000),

we learn that policies with which the Court deals tend to cluster along three dimensions: the two we mentioned above, Separation of Powers (the distribution of power between the executive and legislature) and Federalism (the distribution of power between the central government and the regional authorities), as well as Individual (Human) Rights and Freedoms. The second task also is relatively simple. Following the competencies laid out in the laws on the Constitutional Court, along with (adaptations of) standard classification systems used in the judicial politics field (e.g., Spaeth 1999), we group all cases decided during the first Court era (1992-93) and the first two years of the second one (1995-96)³⁴ into one of these three categories. Figure 3 depicts the results of these procedures.

[Figure 3 about here]

Let us now move to the more difficult task of estimating the most preferred positions and tolerance intervals of the relevant actors over each of the three dimensions. This is indeed more difficult because the sorts of quantitative indicators scholars have devised—mostly based on analyses of the votes of actors (e.g., Segal 1997) or the manifestos of political parties (e.g., Budge & Laver 1992; Budge, Robertson, & Hearl 1987)—are fraught with problems. Of special concern to us, along with others working in a comparative context (e.g., Laver & Schofield 1990) are, first, that these votes or party statements may be the products of sophisticated behavior designed to maximize policy or electoral goals, rather than reflections of sincere preferences (Epstein & Mershon 1996). And, second, that these approaches, when used to assess the preferences of political actors relative to one another, often invoke different underlying scales to measure positions along the same policy space (Segal 1997). In light of these non-trivial concerns, we base our placement of the actors' most preferred positions and our development of their tolerance intervals not (primarily) on quantitative data, but on qualitative evidence we systematically mined from expert judgments, historical accounts, statements of the actors, and, in fact, all other existing and relevant documentary material we could obtain—whether in English or Russian. Sources of these materials, which we extensively reference below, include academic and press reports, interviews given by and with the key actors, as well as writings and remarks made by the justices of the Constitutional Court, President Boris Yeltsin, and observers affiliated with the leadership of Russia's parliamentary parties.

While we believe this approach is best suited to the Russian context, we understand that it is not without its share of problems. Most important, we are unable to make precise assessments of the degree of uncertainty inherent in each judgment we reach and to report this estimate along with every judgment, as we would be able to do were we analyzing quantitative data with a statistical procedure that came with formal measures of uncertainty. This problem, of course, plagues virtually all qualitative research. And, yet, our inability to make formal assessments is less problematic for our study than it might be for others. That is because identifying the *exact* location of the actors (as well as the *exact* length of their tolerance intervals) on the policy dimensions of interest is not critical to our analysis. We simply need to determine the ordering, from left to right, of relevant players and whether the Court perceived that an (approximate) overlap of tolerance intervals existed. We are as confident as we can be that our procedures enabled us to do so—a degree of confidence bolstered by checks of our placements against patterns of parliamentary roll-call votes and other more “objective” indicators contained in Hough (1997); Remington (1994); Smyth (1990); Sobyenin (1994). Moreover, and again as is the case for most qualitative research, if researchers elaborate their judgments in sufficient detail, readers themselves can assess the relative merits of those judgments. It is to that elaboration that we now turn.

Beginning with the Separation of Powers dimension, we place—as Figure 4a depicts—the ideal points of the President and the Supreme Soviet at opposite extremes, with the Court positioned between them (albeit closer to the constitutionally-empowered legislature) for the years 1992-93. These placements reflect the politics of this early period in Russia’s development—a period characterized by an on-going and ever-intensifying struggle between the President and the legislature over the division of their constitutional prerogatives (Hahn 1996; Rahr 1993; Remington 1994). To be more specific, in 1991 (while still in the USSR) a majority in the Parliament, desiring to expand Russia’s sovereignty, opted for a strong presidency and granted that office extensive (though temporary) emergency powers. But, with Russia’s independence in early 1992, the Parliament attempted to recapture the leading constitutional role that it surrendered. It did so by taking advantage of the fact that the then-functioning 1978 constitution allowed it to pass amendments without presidential interference. Each time Parliament made an effort to amass prerogatives in this fashion (that is, draw power away from the President), however, the President

responded with an attempt to dissolve it (see, e.g., Shevtsova 1996); indeed, before the violent confrontation between the Parliament and the President in October 1993 that ended with the adoption of the new 1993 Constitution, Yeltsin had twice (in December 1992 and March 1993) tried to dismiss the Parliament and impose a strong presidential rule. While (eventually) both the President and Parliament admitted the necessity of reforming the institutional system and agreed to work on a new Constitution, the approaches they took simply mirrored their earlier positions. For example, the draft constitution proposed by Yeltsin (officially published in April 1993) called for an executive branch with practically unlimited authority; the last legislative draft (published in May 1993), in direct contrast, called for a parliamentary system, with the President little more than a diplomatic head of state.

[Figure 4 about here]

Throughout this presidential-parliamentary conflict over the relative distribution of powers, the position of the Court was a position of (relative) compromise: With the sides to the conflict standing at opposite extremes, the Court found itself removed from both. To be sure, the Court opposed the President on the matter of dissolving the Parliament but the Court's chair, publicly voiced the view that Russia's future lay in a presidential—and not parliamentary—republic (see, e.g., Zamayatina 1993). Hence, our placement of the Court between the President and the Parliament.

The preferred positions of the actors for the 1995-96 period, also illustrated in Figure 4a, over the Separation of Powers dimension did not change much. For, even after the adoption of the Constitution in December 1993 and the primary prerogative issues resolved (mostly in the President's favor), the clash between Parliament and the President persisted.³⁵ So too the Court, now composed of two sets of justices—members of the old Court (many of whom opposed Yeltsin in the previous period) and those who were added after the adoption of the new Constitution as part of Yeltsin's reform—remained between the President and chambers of Parliament, though (owing to the preferences of the new justices) somewhat closer to Yeltsin than its 1991-93 counterpart.

Also constant, at least on the Separation of Powers dimension during the 1992-93 and 1995-96 periods, were the tolerance intervals of the elected actors: they were (1) relatively short and (2) did not

overlap (see Figure 4). These estimates of length reflect the four components we articulated in Section 2; namely,

- (1) Cases in this area were particularly salient to the President and Parliament (see, e.g., Vitruk 1998); and they were determined to do battle, as these words from Yeltsin make clear: “I do what I think is necessary. ... Everything must be ruled by one rigid principle of a decree. Frankly speaking, somebody must be the First in the country” (Shevtsova 1996). As for the Parliament, the 1993 and, to an even greater extent, the 1995 State Dumas were dominated by the left, with the Communists (the principal political leftist force), running on a platform that called for abolishing the presidency and amending the constitution to the parliamentary format. The armed confrontation between the Parliament and the President, as well as statements issued by Yeltsin’s lieutenants during the 1996 presidential campaign (warning that if Yeltsin lost to a communist challenger, civil war was inevitable in the country) are indicative of the extent to which the players’ tolerance intervals were and remained short.

- (2) The justices were unable to produce clear, consensual rulings in this area: Of the nine Separation of Powers cases decided by the Court between 1992 and 1993, six contained at least one dissenting vote; for the purpose of comparison, in only two of the eleven Individual Rights cases decided during the same period was there dissensus.

- (3) The position of the public over Separation of Powers issues was closer to the political actors (at least to the President) than to the Court. Evidence for this claim abounds but perhaps the clinching piece is that the Court was on the losing side of the battle between Parliament and the President. Between 1992 and 1993, the pro-government media presented the position of the Court and its chair, Zor’kin, as pro-parliament, despite the fact that Zor’kin had brokered a compromise agreement on cabinet formation between Yeltsin and the parliament (Russian Information Agency ITAR-TASS 1992a, 1992b). Even Zor’kin himself acknowledged (in an interview with “Russia” TV on December 12, 1992) the strength of the popular support for the President, commenting that he hoped the opposition to Yeltsin would

“submit to the will of the majority,” if it truly wished to avoid “bloodshed and upheaval” in the country (Report 1992).

- (4) Public (diffuse) support for the Court, by every indication, was quite low. For example, in a survey conducted in January 1993, 10 percent of Russians said that they generally trusted the Constitutional Court; that figure for the President was 23 (Rossiiskie Vesti 1993). Similar surveys conducted in the latter part of the 1990s reveal little change.

Turning to the dimension of Federalism, at least for the 1992-93 period (see Figure 4b) we once again place the President and the Supreme Soviet at opposite ends of the spectrum. That the President preferred decentralization is only natural: Knowing that the constitutional basis for his authority was relatively weak and that Russia was the lone republic in the USSR without its own executive organization, he cast about for mechanisms to enhance his power. An important one came in the form of alliances with regional elites, who Yeltsin invited to “take as much sovereignty as [they] can stomach.” In contrast, hardliners in the Supreme Soviet—even though they occasionally conceded to regional demands in an effort to counter Yeltsin’s power play—espoused an ideology of central planning. The Court was between the two, much as it had over Separation of Powers issues (see, e.g., Sharlet 1994; Walker 1995). By 1996, owing largely to the introduction of the Federation Council (see note 33), the alignment over Federalism altered. As Figure 4b shows, the Council—consisting of the region’s governors and legislative heads—of course came to occupy the decentralization extreme, while the 1995 Duma—governed by PR-elected parties and dominated by nationalists and the left—was closer to the centralism end (Paretskaya 1996); indeed, most political parties in the Duma were Moscow-based, with weak or no regional ties, with many local regional leaders competing for office without party labels and not belonging to any national party organization (Ordeshook 1996). Since the President continued to cooperate actively with the regions, we place him closer to the middle than to the Duma and, actually, quite near the Court, which continued to occupy a near-center position. This placement reflects a number of public interviews with and scholarly writings of the justices (see, e.g., Baglai & Tumanov 1998; Linkov 1997; Rossiiskaya Gazeta, 1993), in which they

expressed arguments in support of equal legal status (parity) of all federal subjects as is directly stipulated in Articles 5 and 72 of the Constitution. With most, if not all, of its members publicly advocating equal legal status for all federal subjects, the Court's (moderate) position amounted to abiding by, to the extent possible, the constitutionally defined federal principles rather than proceeding to redefine federal terms on any bi-lateral basis.

Note, too, the critical difference between the 1992-93 and 1995-96 tolerance intervals over Federalism. As was the case for Separation of Powers (and for the same reasons), they were short and did not overlap during the first period:

- (1) As our discussion above suggests, federalism cases were particularly salient to the relevant actors (see, also Ebzeev 1997).
- (2) The justices were unable to produce clear, consensual rulings: Of the nine Federalism cases decided between 1992 and 1993, five contained at least one dissenting vote.
- (3) The position of the public over Federalism was closer to the political actors than to the Court. As even the most basic principles of federal organization continued to remain unspecified during this period, Republics within Russia with ethnic minorities on their territory claimed their right to a special treatment different from that of the Russians-populated federal units (oblasts). Thus, the citizens' views were polarized and aligned with different institutional players depending on their residence in an ethnic republic or a Russian region.³⁶ The compromise position of the Court pleased no one.
- (4) Finally, public (diffuse) support for the Court, as we already mentioned, was quite low.

During the second period, we observe a marked change. While the issue of federalism remained important in the politics of Russia, its salience for the main institutional players drastically declined (see, e.g., Dowley 1999; Lapidus 1999; Lynn & Novikov 1997; Solnick 1995; Stoner-Weiss 1999). With the adoption of the new constitution, the President and the legislature ceased using federative matters as an

arena for coalition-building in the battle over the constitution. This led to a lengthening of the players' tolerance intervals and, even more important, the emergence of an intersection (see Figure 4b). Let us elaborate.

The 1993 Constitution defined the main federative principles, which by 1995 were accepted by the leaders of all regions (with the sole exception of the rebel Chechen republic). Under this document, the desires of the most active

pro-independence regional politicians extended only as far as achieving a more favorable status within the Russian Federation. Because the new constitution brought about an end to the constitutional struggle between the branches of the central government, Yeltsin could significantly modify his stand on the issue of federalism—which, as he said, was now founded on the principle of granting the regions whatever independence they can handle . . . within the framework of the constitution (Digest 1996).

In practice, the new approach meant that Russia would start as a state with highly centralized fiscal resources and policy making, and the Yeltsin administration would be able to decide (via special treaties) exactly how much “independence” each region deserved. The calculus of political competition created a push for decentralization throughout the 1995–1996 period, as Yeltsin turned to making concessions to regional elites as a tool to secure their loyalties in his forthcoming reelection, since they had on many occasions demonstrated a remarkable ability to influence voters (Badovskii & Shutov 1997). Yeltsin managed to obtain the backing of most regional executives during the crucial 1996 presidential campaign, with 77 of the 89 of them publicly endorsing his bid for reelection and only one governor standing openly against him (Cherkasov 1996; Orttung & Paretskaya 1996). His success was due, in large measure, to the special bi-lateral treaties he signed with some of the regions (others waited in line to receive theirs). Moreover, because governors and assembly chairs of the federation members constituted the new Federation Council, the Council was bound to maintain cordial relations with the President while, at the same time, able to apply pressure for greater (especially fiscal) decentralization (see, e.g., Ostapchuk 1996). The bargaining between Yeltsin and individual members of the Council was always productive, and as a body, it had no complaints with the administration's stance on federalism (Easter 1997; Filippov &

Shvetsova 1999; McAuley 1997; Triesman 1996). As for the Duma, even though it had repeatedly demanded a right to review and ratify all power-sharing treaties, the Federation Council firmly rejected all such demands. But, realizing that it could gain influence in the regions and the attention of regional bosses through the redistribution of federal funds and the passage pork-barrel legislation, a consensus emerged in the Duma that united all parties: Push for a greater centralization of fiscal resources and for expanding opportunities to regulate issues of importance to the regions. In the words of one Duma deputy, “In the RF Federal Assembly, the efforts of the State Duma are rather effectively neutralized by the counteractions of the upper chamber, which takes the side of the most refractory regions. . . . At any rate, to this day the upper chamber has not approved a single law that would make the regional authorities give up even a few of their liberties for the sake of strengthening the federal structures of power” (Mitrokhin 1996). What this suggests is that while the Duma continued to occupy the opposite extreme from the Council, it too had reasons for acting in a conciliatory way toward the regions. And that is why (coupled with Yeltsin’s posture) a significant overlap of tolerance intervals on the Federalism dimension surfaced during this period.

Finally, Figure 4c displays the most preferred positions and tolerance intervals over Individual Rights. For both periods, the Court was to the left of the elected actors, followed by the President who took a position closer to the Court than to the rather hardliner majority in the Supreme Soviet and the medians in the Duma and Federation Council. The periods were similar in yet another way: During both an intersection of tolerance intervals emerged. This overlap (and the longer tolerance intervals over Individual Rights) came about because, even though diffuse support for the Court remained low (factor 4), (1) the battle in which the relevant actors were engaged was over constitutional prerogatives, not individual rights, making this dimension far less salient to them; (2) the justices were able to reach unanimous decisions in nine of the eleven of these disputes, and (3) the Court enjoyed public support for its position favoring the expansion of rights.

These placements and tolerance intervals, we believe, require somewhat less elaboration than those over Federalism and Separation of Powers because they were entirely transparent to all participants. Yeltsin himself articulated as much in various speeches and addresses to Parliament, with this statement

exemplary: “It is clear that states that suppress freedom are doomed to defeat.” He also, on more than one occasion, cited the creation of the Constitutional Court and the strengthening of the judicial system as major milestones in protecting individual rights and praised new legislation “regulating new property rights, land ownership rights, entrepreneurial activity, privatization, banking, offering the guarantees to the mass media,” which “helped bring our domestic legislation closer to the modern standards in the sphere of individual rights,” while indicating that more work needed to be done (Shtern 1996).

4.3.1 Behavioral Predictions

With the estimates depicted in Figure 4 now in hand, we can plug them into the hypothetical model we laid out in Section 2 to generate behavioral predictions. Those yielded are as follows:

- (1) To the extent that no intersection of tolerance intervals existed over the dimensions of Federalism and Separation of Powers, the 1992-93 Court—to begin to establish itself as a credible and legitimate force in its society—needed to avoid those areas. In contrast, the Court could safely hear and decide disputes involving Individual Rights: an overlap of intervals existed.

- (2) To the extent that no intersection of tolerance intervals emerged over the Separation of Powers dimension, the 1995-96 Court also should have avoided that area. But, given the existence of an overlap on the dimension of Individual Rights and of Federalism, the justices could safely decide cases implicating those issues.

Two features of these propositions require some attention. The first is that they hinge on the ability of the Court to avoid deciding cases that lay outside the intersection of tolerance intervals. Does the Court have this power? The simple answer is yes. We already have noted the degree of discretion the justices possess (see Section 1.1 and note 6). Even more to the point, comments by scholars (see, e.g., Schwartz 2000, 149; Sharlet 1993b), along with interviews we conducted with Court personnel confirm the capacity of the Court to “duck” petitions (e.g., assert that they do not have jurisdiction over the dispute) that it does not want, for whatever reason, to review.³⁷ And, critically, the justices themselves, as our discussion in the next two sections reveals, acknowledge that they have this power.

The second aspect is that these propositions, of course, reflect “ideal” Court behavior, that is, behavior our model suggests the Court ought to have engaged if it desired to establish its authority. Since we know, however, that the First Court—insofar as it was suspended— failed at that task, we do not expect the data to reveal conformance with the first proposition; data on the 1995-96, on the other hand—insofar as that Court is achieving some measure of success—should reflect the pattern suggested in the second proposition.

4.3.2 Results: The First Court Era

Now that we have plugged actual loadings into our model, the question is whether we are able to explain the behavior actually evinced by the Russian Court. In other words, do the data support our expectations? The answer, as Figure 5 depicts, is yes. Beginning with the 1991-93 Court, we observe that it issued 29 decisions. Of those only 11 (37.9%) were in the “safe” area of Individual Rights— “safe” to the extent that an intersections of tolerance ranges existed; the remaining 62% (n=18) were in the two areas (Federalism and Separation of Power) that our model suggests the Court ought have avoided.

[Figure 5 about here]

Not only did the Court *not* avoid these sorts of disputes; it decided them in ways, at least according to the preference distributions illustrated in Figure 4, that were bound to lead to trouble. So, for example, coming on the heels of the Court’s “highly visible public setback” (Sharlet 1993b) in the Tatarstan Case, was its (in)famous decision in Communist Party litigation (1992). This case began in Fall 1991, when Yeltsin issued a series of decrees that had the effect of suspending the Communist Party and nationalizing its assets. The President’s action, in turn, immediately led to charges, including those leveled by Court Chair Zor’kin in a 1991 interview,³⁸ that the President had exceeded his authority.

The Court’s official involvement in the litigation began in February 1992, after it agreed to determine—upon the request a group of a Communist Party deputies—whether the decrees were constitutional. During this “Trial of the Century,” the Court held a total of 52 sessions on the case, at least some of which were “more like public demonstrations than legal proceedings” and heard testimony from 62 witnesses. Controversies abound; indeed, the Court itself set off one when it tried to compel Gorbachev to testify and fined him when he did not.³⁹ Finally, on November 20, 1992 the Court announced its decision.

In “a carefully constructed compromise” (Smith 1996, 136), it voted to uphold Yeltsin’s ban on the Communist Party but only as it pertained to national bodies; he could not bar local parties and regional party cells, nor could he confiscate property. Accompanying the Court’s opinion was a rather strong dissent arguing that the Court decided the case on the basis of “expediency rather than law.”

Immediate reaction to the ruling seemed to bode well for the Court’s future. As Remington (1998, 217) puts it: “[the] decision was widely regarded as judicially sound and politically shrewd in that it allowed the communists and the president’s side to claim victory. The court also, perhaps wisely, avoided taking sides on the president’s assertion that the CPSU was itself unconstitutional. The Court thus positioned itself as a politically neutral institution. This was no mean achievement in the tense, polarized environment of the time.” Wishnevsky (1993, 5) agrees, claiming that Russian observers termed it a “Solomonic judgment” (see also Schwartz 2000, 130). This may have been true at the time but the decision eventually took a toll on the Court. As Sharlet (1993b) suggests, the case was not resolved “to anyone’s complete satisfaction. The costs were considerable...The Court emerged from the case battered, riddled by division and increasingly politicized.” There is some truth to this. The ruling did, in fact, “create sharp rifts among the justices,” some of whom were upset that Zor’kin had commented on the case before the Court decided it (Smith 1996, 136). Several justices (and lawyers) also began grumbling that the Court’s “forced involvement in sensitive political controversies, together with political disagreements among its members, could in the near future tempt the other branches of government either to limit [its] plenary powers or merge it with the Russian Supreme Court” (Wishnevsky 1993).⁴⁰ These justices “consistently proposed that the Court curb its political activism and instead give priority to civil rights matters” (Hausmaninger 1995, 354-355).

This is exactly the course of action our model commends—the Court ought to have heard and decided cases in the “safe” area of Individual Rights—but it is not the one Zor’kin (and his allies on the Court) took. Quite the opposite: He (and, by implication, the Court) became increasingly involved in the emerging constitutional crisis in Russia—and not by taking politically neutral positions (as some have characterized his decision in the Communist Party Case). Rather and even though he continued to support a “strong presidential republic” (Russian Information Agency ITAR-TASS 1993), the Chair began regularly to side with those who sought to curtail Yeltsin’s efforts to expand presidential power at the expense of legislative

authority. Between March and June of 1993, Yeltsin and Zor'kin (and his supporters on the Court) clashed repeatedly in public and over various judicial decisions. And internal divisions on the Court continued to increase, with some of the justices calling for Zor'kin's resignation because of his overtly "political activities"⁴¹

Perhaps because he came to see that abolition of the Court was a real possibility, or perhaps because he realized that he had backed the losing side, or perhaps because the President began to take away some of his perks (*e.g.*, his car and the Court's security guards), by June of 1993 Zor'kin softened his opposition to Yeltsin's desire to augment presidential power. But that did not stop the Court, on September 21, 1993, from taking its largest leap yet into separation-of-powers matters. After the President issued his famous "Decree on Step-by-Step Constitutional Reform in the Russian Federation," which dismissed the Parliament and called for new elections, the Supreme Soviet immediately passed a resolution terminating Yeltsin's powers and requested the Constitutional Court to rule on the decree. Despite wording in the President's document that "instructed" the Court not to meet, Zor'kin called an emergency session for that very day. After a three-hour discussion, the Chair announced the Court's decision to the Supreme Soviet: The decree constituted grounds for the President's impeachment or automatic termination.⁴² The next day, Zor'kin issued an "Announcement of the Chairman of the Constitutional Court," which proposed early presidential and parliamentary elections to restore the governmental system.

Such behavior—deciding highly-charged political disputes before building up a reservoir of good will among political actors and the public alike (which the Russian Court may have been able to accomplish by accepting petitions in the "safe" area of Individual Rights)—according to our model, would lead elected actors to challenge the Court or its decisions. Yeltsin, as we know, did just that, suspending the Court two days after Zor'kin's "Announcement" appeared.⁴³

4.3.3 Results: The Second Court Era

Let us now consider the Second Court. As we noted earlier, it is apparent to observers that this Court is on its way toward establishing credibility in Russian society; at the very least, it has not faced serious challenges from other relevant governmental actors. Accordingly, we anticipate that the Court behaved in

ways consistent with our predictions; namely, it accepted and decided cases involving Individual Rights or Federalism and avoided Separation of Powers disputes.

As Figure 5 depicts, the data support this expectation. During the 1995-96 period, nearly 90% of its 34 decisions fell into the two “safe” areas of Individual Rights (n=24) and Federalism (n=6). By contrast, Separation of Powers cases accounted for only 11.8 (n=4)%. This represents a wholesale departure from the First Court era, which devoted over 60% of its docket to the “unsafe” areas of Separation of Powers and Federalism.

Do these results reflect purposive behavior on the part of the justices—that is, behavior designed to restore their credibility and begin the process of developing legitimacy in Russian society—or are they mere artifacts? For obvious reasons, this is a difficult question to answer but several pieces of evidence are suggestive. One is that alternative explanations for the Court’s behavior are few and far between, and those that exist do not seem particularly promising. So, for example, one might argue that to test fully the predictions generated by our model we require data on all petitions coming to the Court, not just those the Court accepted and decided. For the possibility exists that the justices issued opinions largely in, say, Separation of Powers cases because those are the only kind they received. Militating this possibility, however, is the sheer number of petitions that came to the Court during the periods under consideration: Before it was suspended in 1993, the Court received approximately 30,000 petitions; the Secretariat of the Court referred 600 to the justices for serious consideration (the balance did not meet various Court requirements; see note 6). Since the Court’s reconstitution in 1995, it has received 40,000 petitions, with the justices considering 1,500.

A second piece of evidence, and this one lending direct support to our explanation, is that Court members, by many accounts, deliberately sought to avoid “acute political questions” (Smith 1996), both in and outside of Court.⁴⁴ As one justice noted, during the First Court era “we looked to the division of powers as a sort of panacea, able to solve all our problems.” But now the

Court must avoid getting involved in current political affairs, such as partisan struggles. When in December 1995, before the Duma elections and in the very heat of the electoral campaign, we received a petition signed by a group of deputies concerning the constitutional validity of the five percent

barrier for party lists. We refused to consider it. I opposed considering this request, because I believe that the Court should not be itching for a political fight....

[We must revive] our prestige and status. We must find a stable niche in the state machinery (Nikitinsky 1997, 84, 85, 87).

In fact, the Court has not seriously challenged the President's power, even though it has had several opportunities to do so;⁴⁵ rather, it has limited his authority only in cases in which the issues were less visible and less "highly charged."⁴⁶

Yet another piece of evidence comes in the form of statements from justices suggesting that their deepened involvement in Individual Rights also was no accident. "Whereas the [Second] Court has tried to limit the cases it takes from political entities," one justice observed, "it tries to ensure maximum review of human rights cases" (paraphrased in Schwartz 2000). As Ahdieh (1997, 85) points out, this shift seems to stem directly from the Court's belief that by neglecting individual rights petitions during its developmental period it failed to capitalize on a "unique opportunity" to convince Russians that it was "a forum where there rights might be defended." Given our data, the Second Court does not appear to be making this same "mistake."

To be sure, a few justices (mostly holdovers from the First Court) resent these trends, claiming that the Court is now "too cautious, too much self-restraint, and tries to hard to abstain from politics and concentrate on routine questions" (van den Berg 1999). Some members of the Duma apparently agree—or at least enough to have attempted to convince their colleagues to consider an amendment to the 1994 Law on the Constitutional Court that would have made it more difficult for the justices to refuse certain kinds of appeals.

That this measure did not pass, that the more activist justices are no longer prevailing may reflect a recognition on the part of many Russians that, for the Court to evolve as an independent and legitimate institution, it had to make strategic adjustments in its behavior—the very adjustments that are model suggests: hearing and deciding "safe" cases, especially those in the area of Individual Rights through which it can build up a reservoir of public support. Making this adjustment should, in turn, lead to a broadening

(and eventual overlap) of tolerance intervals over other legal issues, thereby ensuring the Court's legitimacy in the long run.

5 Discussion

Certainly, the application of our model to the Russian case is not without its share of Achilles' heels: To assess fully its predictions (and rule out possible alternative explanations), it may be desirable to collect data on the full range of petitions that come to the Court and to develop an alternative scheme for developing the most preferred positions and tolerance intervals of the relevant actors. Nonetheless, the data drawn from the Russian case are certainly consistent with our model and, thus, provide room for optimism: If it is able to explain features of the Russian system, as we believe it is, then it may be able to do the same for the many Eastern European systems that come out of similar traditions and, not so surprisingly, have constructed comparable courts. Moreover, as we implied earlier, we see no reason why our model would not be equally applicable to the American Court (and those modeled after it); indeed, research invoking variants of the strategic account to study both American and European-styled tribunals suggests as much (Helmke 1999; Knight & Epstein 1996; Parikh & Adler 1999; Vanberg 1999), though we believe the addition of the notion of tolerance intervals has the potential to enhance even further this line of inquiry. That is because as these intervals increase, so too does the latitude afforded to justices. Accordingly, they may help to explain why courts in evolving democracies appear so fettered, while those in mature democracies—whether of the American or European model—seem less constrained, seem more able to reach decisions disliked by elected officials and the public; the latter have built up such reservoirs of public support that legislators and executives are loathe (though not unwilling) to challenge them (e.g., Caldeira 1987; Grosskopf 1999; Segal 1997; Vanberg 1999; Volcansek 1991).

More generally, our work may have important implications for questions relating to the role of constitutional courts in the establishment and maintenance of constitutional democracies. Transitions to constitutional democracies are, as scholars have long recognized, on-going and complex processes. While the basic framework for the democratic system is initially established by the enactment of a constitution, the fine-grained institutional structure evolves over time as the product of the legal and political interactions among various political actors. In principle, constitutional courts play an important role in this

evolution, primarily through their authority to resolve constitutional disputes by interpreting the constitution's basic provisions. But the court's capacity to use effectively this authority is, in important ways, a function of its legitimacy.

In the initial stages of the transition to a constitutional democracy, if the legitimacy of the constitutional court is low, as will commonly be the case, the court is caught in a uncomfortable dilemma. At a time when the emerging democracy is most in need of a way of resolving basic constitutional questions—such as issues of the distribution of authority among the branches of government—the court is least able to do so effectively. That is, for courts that are concerned about establishing their own long-term authority and power in their constitutional systems, they will be least willing to consider basic questions about the authority and power of the other branches of government.

This claim follows directly both from our theoretical analysis and our consideration of the Russian case, and it suggests an interesting and potentially fundamental point about the role of constitutional courts in the early stages of transition to a constitutional democracy: Their primary role will be to reinforce those features of the constitutional system about which there is already substantial agreement. As for those issues about which there is greater disagreement, new constitutional courts will leave those for another day, either for the day when the issue has been resolved through political agreement by the other branches or when the court itself has solidified its own place in the constitutional system.

Whether constitutional courts in emerging democracies in Eastern Europe will be able to accomplish this, to solidify their place is, at least according to our model, largely up to the courts themselves. If they behave as did the first Russian Constitutional Court, their futures are dim indeed; but if they view the quest for legitimacy as a long-term process—one that occasionally requires them to tradeoff short-term policy victories for long-term credibility (and, eventually, policy) gains—as does, apparently, the second Constitutional Court, then their future place in their governments may be assured. Either way, it is incumbent on scholars to study the processes as they unfold. Of course, we recognize that so doing presents many challenges—not the least of which involve locating and collecting data and other information necessary to animate the framework we offer. But we believe the hunt will be worthwhile; at the very least,

it will go some distance toward filling the voids, of which so many scholars have spoken, in our knowledge of courts abroad.

6 Notes

¹Tate (1995, 28) defines the judicialization of politics as (1) “the process by which courts and judges come to make or increasingly to dominate the making of public policies that had previously been made (or, it is widely believed, ought to be made) by other governmental agencies, especially legislatures and executives and (2) the process by which nonjudicial negotiating and decision making forums come to be dominated by quasi-judicial (legalistic) rules and procedures.”

²For a list of these, navigate to: www.worldbank.org

³As Gorbachev wrote (1987, 107): “It is especially important to enhance the role of courts as an elective body very close to the population, to guarantee the independence of judges, and to observe most strictly democratic principles in legal proceedings, objectiveness, contested election, and openness.” But whether Gorbachev used the term “the independence of judges” in the same way as do politicians in evolved democracies is debatable (see note 13).

⁴Jacob (1996) points to another reason for the neglect: the lack of “a widely accepted paradigm...which models the relationship between law, courts, and politics in a cross-national context.” But this may no longer hold: As judicial specialists and scholars of societies abroad converge over theories that assume strategic rationality on the part of all political actors (Bates 1997; Epstein & Knight 2000), we now have a tool to bridge comparative and judicial politics and, thus, surmount the problem of the lack of a “widely accepted paradigm.”

Since we adopt a strategic framework to address our research question, we have much more to say about this approach in the text. Suffice it to note here that a debate has already ensued, between Vanberg (1998a; 1998b) and Sweet (1998), over whether approaches grounded in assumptions of rationality are fruitfully applied to courts. While we believe Sweet makes some important points, evidence from recent work (e.g. Barzilai & Sened 1997; Helmke 1999; Knight & Epstein 1996; Vanberg 1999) tends to support Vanberg’s claims. More broadly, both comparative and judicial specialists agree, in ever increasing numbers, that approaches grounded in assumptions of rationality—especially the strategic account, which belongs to a class of non-parametric rational choice models as it assumes that

goal-directed actors operate in *strategic* or *interdependent* decision-making context—hold promise for the analysis of politics.

⁵We stress “basic” because, while the similarities among courts within each classification may be greater than their differences, important variations do exist (see Harutyunyan & Mavcic 1999 for examples). With regard to the European (also called the Austrian or Kelsen) system, some scholars distinguish between the German and French models. In the former, ordinary citizens can file constitutional complaints, most of which are concrete disputes that address the ex post constitutionality of statutes (there is abstract review too, and officials may bring cases in their official capacity but neither is numerically dominant in Germany); under the French model, only specified state actors can bring constitutional cases, which the Court can address only in the abstract and only before the statute under review goes into effect. Most European constitutional courts follow one or the other of these models (or are hybrids). Nonetheless (and again), it is worth emphasizing, the vast majority of scholars categorize courts on the basis of the two models presented in Table 1 (see, e.g., Finer, Bogdanor, & Rudden 1995; Schwartz 1993; Tate & Vallinder 1995b; Utter & Lundsgaard 1994; Vallinder 1995).

⁶For example, between 1994 and 1996, the Russian Constitutional Court received about 15,000 petitions. The Secretariat of Court notes that 98 percent did not meet the “requirements of the [1994] law and for that reason were declined” by him (Kudriavtsev 1996). The remaining 2% (n=300) were considered by the justices; they voted to decide 39 of the 300 on the merits. Comments from members of the Court reinforce the implication from these data; namely, the justices enjoy a considerable degree of discretion over case selection (see, e.g., Nikitinsky 1997 and Section 4.3.3 of this essay). Along the same lines, actions the justices have taken in various cases, such as “ducking” hard issues, reveal that they can evade controversies they agreed to but, for various reasons, no longer wish to resolve (see, e.g., Schwartz 2000 and note 43). We return to these points in the text (see Section 4.3.1).

⁷Of course, variations exist in the individual court systems (just as they do in Western Europe) in terms of their structure, jurisdiction, and case-processing procedures (see Harutyunyan & Mavcic 1999 for examples). But, again, most opted for the general European system, with specific modifications patterned on Russia’s adaptation of it (Sheive 1995).

⁸In countries where the court has some sort of a priori review power, the government need not act prior to court review. Though many constitutional courts do possess such power in one form or another, relatively few—both in Eastern and Western Europe—possess it over a full range of disputes. Accordingly, we outline the more typical case.

⁹Many studies neglect the fact that, despite the wording of various laws and provisions, most constitutional courts have discretion over their agendas—discretion that goes beyond simply determining whether they have jurisdiction to hear a particular dispute. See note 6 and our discussion in Section 4.3.1 for more details.

¹⁰We realize that the this example is stylized. We use it here only to make a point about the role of constitutional courts in their governmental systems

¹¹Here and throughout, we represent the institutions of government as unitary actors. Their most preferred points, thus, are those held by the median members of each (see also note 15).

¹² We should be clear about what we are and are not saying. We are not saying that all constitutional courts, including those in advanced democracies, are not constrained by other actors and features of their institutional context; in fact, we agree with Vanberg (1999) that they are. What we are saying is that, for the reasons we enumerate in the text, the constraints are perhaps even stronger for courts in societies moving to democracy.

¹³Along these lines, it never occurred, even to Gorbachev, who had argued that *perestroika* required commitment to *pravovoe gosudarstvo* (a state based on the rule of law), “that judicial power should hold a co-equal position with the other branches, let alone be above them” (Feofanov 1993). This was so, despite the fact that, prior to the collapse of the former Soviet Union, “brief experiments in what could be termed judicialization of politics did occur” (Thomas 1995). For the most part, these were limited and unsuccessful (Hartwig 1992). The one exception may have been the Committee on Constitutional Supervision, devised by the USSR Supreme Soviet as part of its reform of the Brezhnev Constitution. But the Committee was shortlived and its effectiveness, a matter of some debate (Hausmaninger 1995; Kitchin 1995; Remington 1998; Schwartz 2000; Sharlet 1993b; Thomas 1995). Finally, we should note that some Socialist constitutions provided for constitutional courts; *e.g.*, the Yugoslavian Constitution of 1963 and the

Czech/Slovak Constitution of 1965. Yet the Court in Yugoslavia “failed to gain great influence within the legal structure” and the Czech Court was not created during this period (Hartwig 1992).

¹⁴We, thus, assume the existence of a bi-cameral legislature but the model could be adapted to the uni-cameral case.

¹⁵ The assumption that collective actors, such as the chambers of parliament or the constitutional court, have a unique policy preference point is, of course, a simplifying assumption. Institutional actors consist of groups of individuals who may differ among themselves in their preferences over policy questions. But since each institution has its own procedures for aggregating these individual preferences into some type of institutional preference ranking, we adopt this simplifying assumption in accord with standard approaches to separation of powers models (see, e.g., Eskridge 1991a; Eskridge 1991b).

¹⁶ We thus assume that, on the Separation of Powers dimension, each branch of government prefers more authority and power rather than less. Although there may be strategic circumstances that would lead one branch of government to eschew responsibility in a particular fact situation, we believe such instances are the exceptions and not the general rule (especially during a period of democratic transition).

¹⁷For purposes of presentation we depict only two policy dimensions while it is clear, at least in the Russian case, that a third (Individual/Human Rights) exists. In Section 4 we take into account all three dimensions.

¹⁸ To facilitate the analytical exposition, we assume that all actors in the game have perfect information about the ideal points and the tolerance intervals of all other actors. We could ease this assumption without undermining the basic insight about the effects of preferences and tolerance intervals on strategic choice. In fact, by doing so and allowing, thus, for the possibility that the actors have incomplete information about the size and location of the tolerance intervals, we can gain important leverage on explaining the effects of both uncertainty and learning on constitutional decision making and on the evolution of the separation of powers system.

¹⁹ Again we make a simplifying assumption about the policy preferences of the public; namely, there is a point in the substantive policy space that the public prefers. In so assuming, we are not ignoring the fact that citizens differ in

their preferences over the substantive issues that come before the Constitutional Court. For our purposes, it is sufficient to interpret the public's policy preference point as the dominant preference within the electorate.

²⁰ Diffuse support for an institution of government is the product of an on-going process of growing confidence on the part of the public. Since it takes time for such support to develop, it is reasonable to question whether it is a relevant consideration for actors in emerging democracies. Our answer is simple: The relevance of diffuse support is an empirical matter, which may vary in importance from case to case. Accordingly we include diffuse support as one of the primary determinants of the breadth of tolerance intervals, even in the initial stages of institutional development in an emerging democracy, and, as such allow for the possibility of variation in different cases.

²¹ Note that our argument about the long-term effect of the court's decisions on diffuse support and, thus, on the breadth of the actors' tolerance intervals is not, in our view, inconsistent with the claim by Gibson and others (see, e.g., Caldeira & Gibson 1995) that diffuse support is not responsive to particular court decisions. We interpret Gibson's claim as follows: diffuse support is not a direct function of the willingness of a court to render decisions that are consistent with the substantive preferences of the public. That is, the level of diffuse support enjoyed by a court will not rise or fall in the face of an individual court decision that comports (or does not) with public opinion.

Our claim here is a different one. We argue that diffuse support is a function of the evolution of constitutional decisions over time. That is, if the constitutional court issues decisions with which the other branches of government consistently comply, then this compliance can have a positive effect on diffuse support in the public at large. On our account, the strategic effect of constitutional decision making on diffuse support is not a function of a connection between judicial and public preferences on substantive issues, but rather a function of the court issuing decisions that consistently garner the support of the other actors who come before it.

²²We understand that, under certain conditions, the Court might place policy on the ideal point of one actor or in a gap between non-overlapping tolerance intervals. Given space limitations, we do not explore these conditions here but plan to do so in future research. Here we only wish to note that for a broad range of parameter values, the model's equilibria correspond to the heuristics presented above.

²³ Figure 3, which we discuss shortly, supplies information on the cases.

²⁴The Russians began planning for their Court as early as 1989. In that year, the Supreme Soviet created the Committee on Constitutional Supervision (see note 13), and authorized the republics to create similar apparatus. Russia did so, establishing (in 1989) its own committee, but by constitutional amendment (in December of 1990) it decided to create a full-fledged Constitutional Court. That Court's powers were defined in a constitutional amendment of May 1991 and later fleshed out in the (July) 1991 law discussed in the text.

²⁵Actually, how quickly the Court ran into trouble is a matter of some debate. Some argue that during the Court's first year of existence it had accrued a degree of "legitimacy and judicial authority" (Sharlet 1993b, 11) and was, in general, "more successful than many expected" (Brzezinski 1993, 687); others disagree, noting that "after slightly more than a year of existence, the Russian Constitutional Court does not seem to have become a bastion of legality" (Wishnevsky 1993). But almost all commentators concur that by its second year, the Court was skating on thin ice.

²⁶This came in the Internal Security Case (1992) in which the Court struck down a presidential decree—merging the police and internal security forces into one ministry—on the ground that the Constitution gave the Supreme Soviet the authority to create ministries. Yeltsin eventually accepted the ruling but, as we noted in the text, only after some "coaxing" by the Court's Chair (see Ahdieh 1997, 80; Utter & Lundsgaard 1994, 242). That Yeltsin complied is important because it "truly altered both elite and mass consciousness of the law and of the bounds it places on political authority. Suddenly the law was no longer a toothless tiger" (Ahdieh 1997, 80). Moreover, the decision was "appreciated by the Russian media of all political hues" because it indicated to them that the Court was not in Yeltsin's "pocket" (Wishnevsky 1993, 2-3). On the other hand, Yeltsin's initial reaction—sincere puzzlement that the Court's invalidation of a decree "was actually binding upon [his] government—indicates the degree to which Russia and other Eastern European countries were unprepared for judicial review" (Utter & Lundsgaard 1994, 242).

²⁷The question was: Do you agree that the Tatarstan Republic is a sovereign state and a party to international law, basing its relations with the Russian Federation as partners? Yes or no?"

²⁸For more details on the Tatarstan Case, see Schwartz (2000); Sharlet (1993b); van den Berg (1999); and Wishnevsky (1993).

²⁹Section 4.3 details the events leading up to the Court's suspension and analyzes them via our model.

³⁰Interestingly, justices who remained from the first Court era serve under the older provision, that is, for life (until the age of 65).

³¹The Court's initial grant of jurisdiction did not cover political parties; it was amended in December of 1992 to enable the justices to hear the Communist Party Case (discussed in Section 4.3.2).

³²For more on the differences between the old and new Constitutional Court laws, see Blankenagel (1994); Butler (1998); Hausmaninger (1995); Nikitinsky (1997); Ovsepien (1996); Pashin (1994); van den Berg (1999).

³³1995 was the final year of the term of the 1993 Parliament, whose members had been elected simultaneously with constitutional reform. The members of the upper and lower chambers of that 1993 Parliament were selected by the same rules. By 1996, however, the lower chamber was reelected and the upper chamber became an assembly of elected regional executives and legislative heads. For this reason, we include the upper chamber (the Federation Council) as a separate actor during the Second Court era.

³⁴The first Court era began in 1991 but the Court did not hand down a decision until 1992; the second Court era started in March 1995 when the justices held their first session.

³⁵The clash was largely over legislative powers versus the president's decree authority—with the conflict over the Chechen war but one example.

³⁶ When the conflict between the President and the Supreme Soviet had reached its violent resolution and (in a December 1993 referendum) the vote was held in support of Yeltsin's draft of a Constitution proclaiming equality of all federation members, there a serious attempt was made by the elites and voters of the ethnic republics to boycott the vote and invalidate the referendum results.

³⁷So, for example with regard to the Communist Party Case, which we describe in some detail momentarily, Sharlet (1993b), argues that the Russian Court should have taken the step its U.S. counterpart occasional does when it wants to avoid controversial issues—“duck” them on technical grounds. In contrast, Schwartz (2000, 129) claims that this course of action would have been untenable in the Communist Party Case because the Court must hear cases properly referred to it. But data and comments of the justices themselves suggest otherwise (see note 6 and Section 4.2.3). And Schwartz (2000, 149) himself states that the Russian Court did just that in the Chechnya Case (described in note 45); namely, it decided to “avoid the hard issues.” Schwartz (2000, 154) also notes that the Second Court has tried to limit its participation in disputes involving the other political organizations—a course of action that it could not take without some discretion over its docket, much less the ability to evade cases it had agreed to decide.

³⁸That Zor’kin took a stand on this and other “political” matters is hardly behavior in which (most) American judges would engage but he did it regularly (Dean 1995; Sharlet 1993a; Slater 1993).

³⁹For more on the proceedings, see Ahdieh (1997); Brzezinski (1993); Feofanov (1993); Schwartz (2000); Wishnevsky (1993).

⁴⁰Several scholars voiced the same concerns. See note 37.

⁴¹For more on this period, see, *e.g.*, Ahdieh (1997); Hausmaninger (1995); Reid (1995); Remington (1998, 217); Slater (1993); Smith (1996); van den Berg (1999).

⁴²It later came out that four justices had voted against Zor’kin’s position.

⁴³The specific events leading to the suspension were as follows: Between September 29 and October 4, 1993 a constitutional crisis ensued, with Yeltsin retaining his power. On October 5, the Court announced that “in the existing legal situation [four pro-Yeltsin justices would no longer participate in much of the Court’s work], it is unable to hear cases involving rulings on the constitutionality of international treaties and normative acts of the Russian Federation”; it would now only hear petitions from citizens and organizations. The next day, Zor’kin—under pressure from Yeltsin—resigned as the Court’s Chair but stayed on as a justice. (The President’s Chief of Staff had

phoned Zor'kin, telling him that if he did not resign the administration may bring criminal charges against him. After the conversation, Zor'kin met with twelve of his colleagues, four of whom told him to resign. One, who went public with his vote, said unless Zor'kin resigns "the Constitutional Court will simply be unable to function because it will lack sufficient authority in the eyes of the public.") On the following day, October 7, Yeltsin suspended the Court.

⁴⁴Exceptions do exist. For example, when the Court agreed to hear the Chechnya Case (see note 45), the "Chief Justice improperly made extrajudicial comment on [it]. He clearly signaled his own preference, and his reading of the courts mood to be in support of the executive's case." After the Court announced its decision, he gave numerous interviews explaining it (Smith 1996, 519-520).

⁴⁵The most prominent example came in the Chechnya Case, in which a group of communist members of Parliament challenged Yeltsin's decrees initiating the war there. The Court avoided ruling on some of the issues but generally found in favor of the President. For more on the case, including public reaction, see Cooper (1996); Morshchakova (1998); Schwartz (2000); Smith (1996); Waggoner (1997).

⁴⁶An example is its 1998 decision, holding that President Yeltsin was in his second term of office and, thus, ineligible to run for reelection in 2000. Since it seemed clear that Yeltsin did not plan to run again (at least he said as much), this was a less risky decision than it might have seemed on its face.

7 References

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Table 1. Key Characteristics of Court Systems

	<i>American System</i>	<i>European System</i>
<u>Institutional Structure</u> (Who has the power to engage in judicial review?)	Diffused. Ordinary courts can engage in judicial review, that is, they can declare an act unconstitutional.	Centralized. Only a single court (usually called a “constitutional court”) can exercise judicial review; other courts are typically barred from so doing, though they may refer constitutional questions to the constitutional court
<u>Timing</u> (When can judicial review occur?)	A Posteriori (sometimes called Ex Post). Courts can only exercise judicial review after an act has occurred or taken effect.	A Priori (sometimes called Ex Ante) and A Posteriori. Many constitutional courts have a priori review over treaties; some have a priori review over governmental acts; others have both a priori and a posteriori review, while still others have either but not both.
<u>Type</u> (Can judicial review take place in the absence of a real case or controversy?)	Concrete Review. Courts can resolve only real cases or controversies.	Abstract and Concrete Review. Most constitutional courts can exercise review in the absence of a real case or controversy; many can exercise concrete review as well.
<u>Standing</u> (Who can initiate disputes?)	Litigants, engaged in a real case or controversy, who have a personal and real stake in the outcome, can bring suit.	The range can be broad, from governmental actors (including executives and members of the legislature) to individual citizens.

Sources: Finer (1995); Kitchin (1992); Ludwikowski (1996); Schwartz (1993); Stone (1994); Tate (1995); Utter and Lundsgaard (1994).

Figure 1. Hypothetical Set of Preferences Over Whether to Outlaw All Communist Parties



Figure 2. Hypothetical Set of Preferences and Tolerance Intervals of Key Governmental Actors

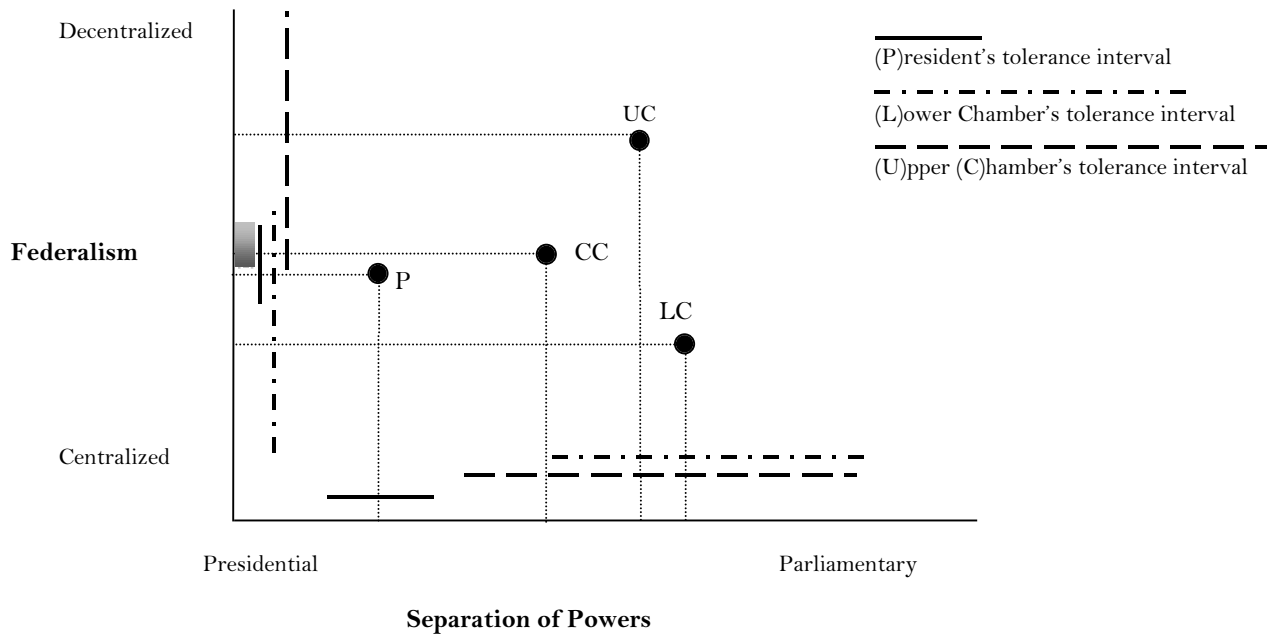
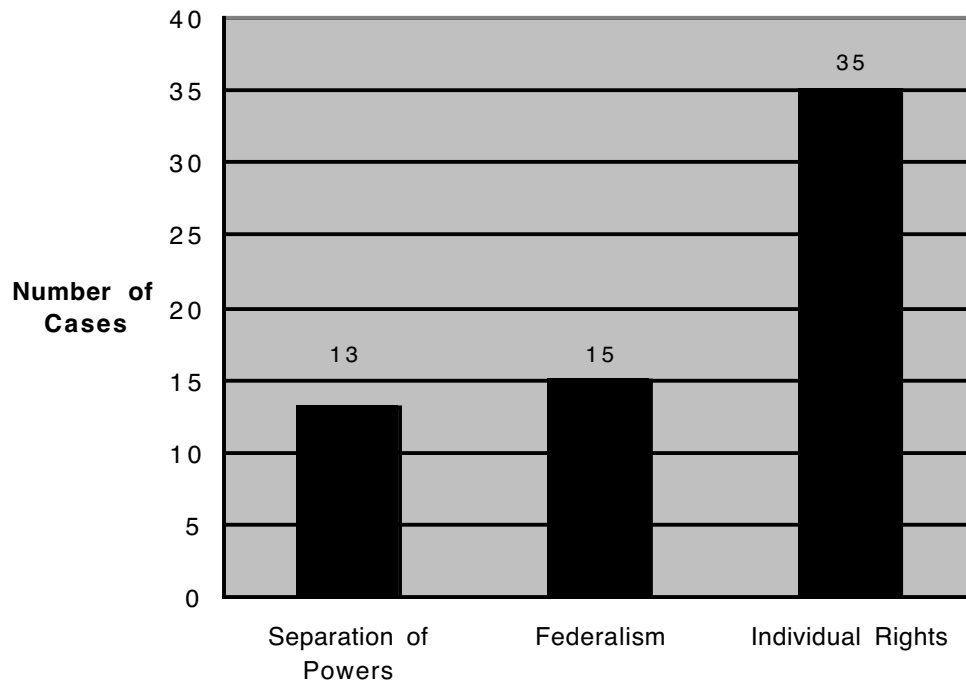


Figure 3. Issues involved in Cases Decided by the Russian Constitutional Court between 1992-93 and 1995-96



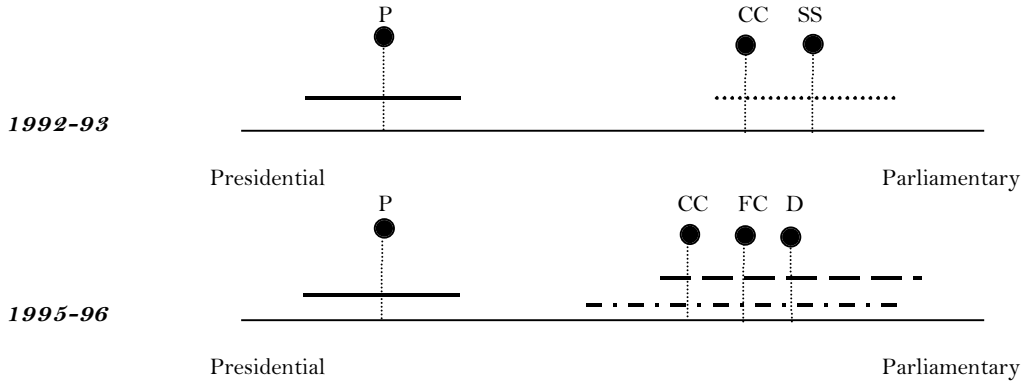
Note: N=63. We exclude 4 decisions that were technically necessary to correct omissions in the Constitution.

Source: All cases decided by the Russian Constitutional Court are available (in Russian) at:

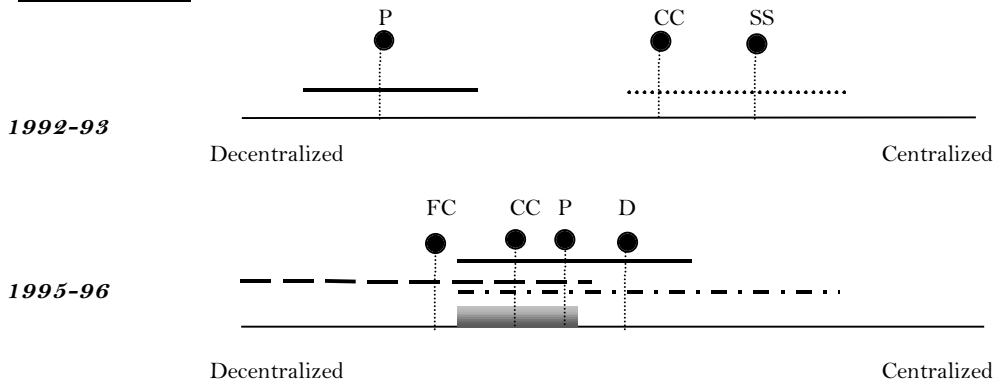
www.cityline.ru/politika/ks/ksbook.html.

Figure 4. Most Preferred Positions and Tolerance Intervals, 1992-93 and 1995-96

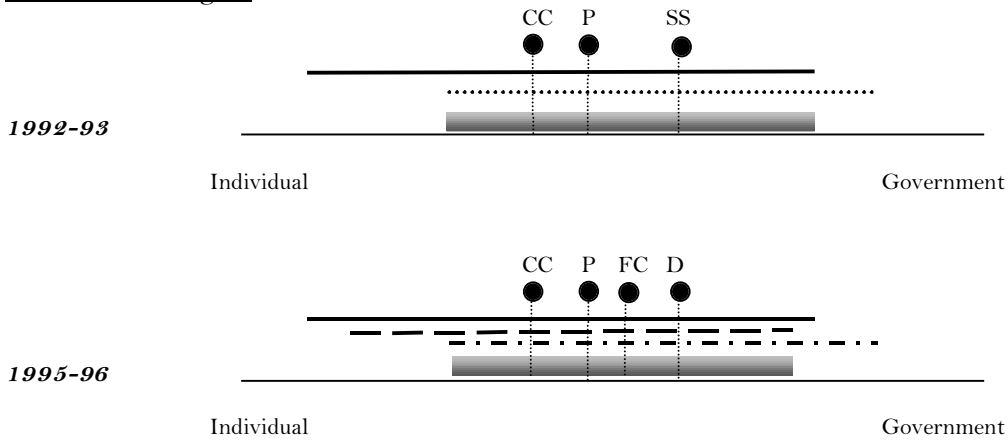
4a. Separation of Powers



4b. Federalism

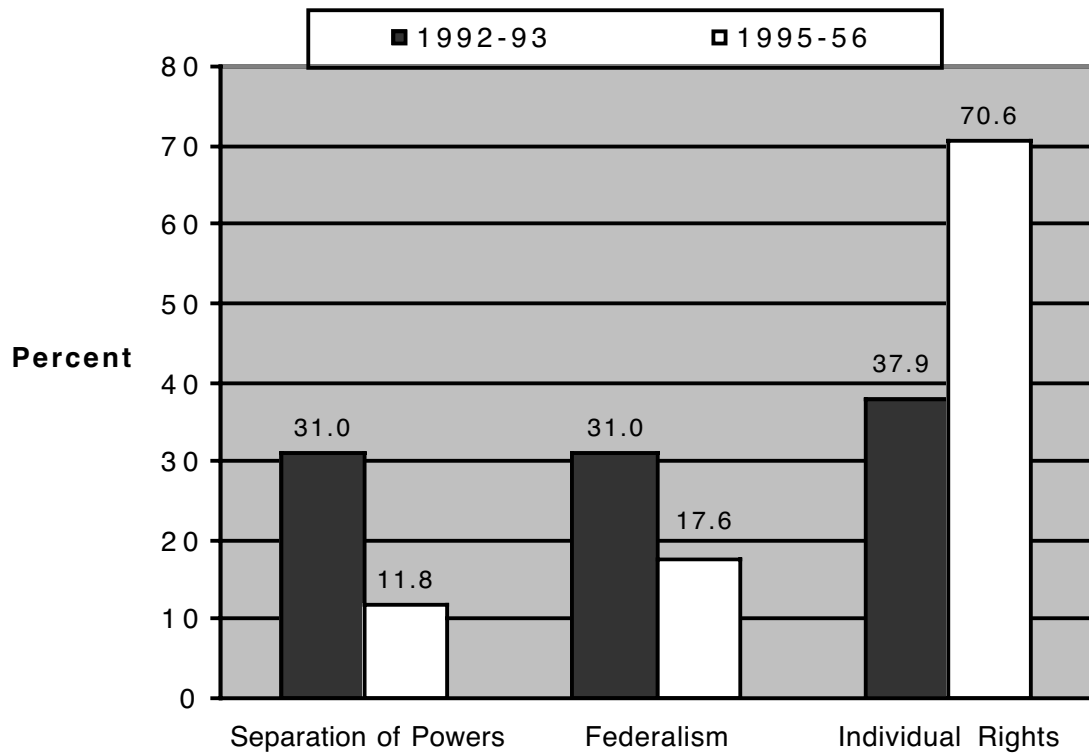


4c. Individual Rights



Legend: ● = most preferred positions of the P(resident), S(upreme) S(oviet), C(onstitutional) C(court), F(ederation) C(ouncil), and D(uma). — = P's tolerance interval; - - - = FC's tolerance interval; - · - · - = D's tolerance interval; ····· = SS's tolerance interval; ■ = intersection of tolerance intervals.

Figure 5. Cases Decided by the Russian Constitutional Court, by Issue Area and Period



Note: The data represent the percentage of case types heard during each period. So, for example, between 1992 and 1993, 31% of the 29 cases the Court decided dealt with Federalism; between 1995-96, that figure was 17.6. Total N for 1995-96=34.