Law & Social Inquiry
Journal of the American Bar Foundation

Law & Social Inquiry
Volume 44, Issue 1, 1–30, February 2019

International Judges on Constitutional Courts: Cautionary Evidence from Post-Conflict Bosnia

Alex Schwartz

Hybrid constitutional courts are associated with deeply divided and post-conflict contexts where the impartiality of the domestic judiciary is suspect. Such courts enlist international (i.e., foreign) judges to create an ostensibly neutral counterbalance to the presumed political biases of local judges. This mixed-methods case study of the Constitutional Court of Bosnia-Herzegovina questions the value of these hybrid courts. Contrary to what might be expected, the results of multidimensional scaling indicate that Bosnia's foreign judges have not provided a reliable counterbalance to apparent ethno-national divisions on the Court. Furthermore, qualitative analysis suggests that the foreign judges have contributed to several strategic mistakes that have probably harmed the Court's tenuous authority. It is also suggested that the presence of international judges on constitutional courts may actually discourage the kind of strategic behavior that is needed to build and sustain judicial power, particularly in deeply divided and post-conflict contexts.

INTRODUCTION

Recent international interventions seeking to (re-)build the rule of law in the wake of violent conflict do not have an impressive track record. Failures abound (e.g., Afghanistan, Iraq, Libya) and success tends to be tenuous at best (e.g., Bosnia-Herzegovina, Kosovo, Rwanda). Nevertheless, these efforts have generated a kind of menu for constitutional design—a set of institutional options and best practices—disseminated by governmental, international, and nongovernmental organizations for conflict resolution, state building, and transitional justice.[1] Fields of academic inquiry have mushroomed in an effort to evaluate the various items on the menu (see Reilly 2001; Bell 2003; Stromseth, Wippman, and Brooks 2006; Choudhry 2008; McGarry and O'Leary 2013).

One of the institutional innovations to gain some popularity during this time, among both interveners and academics, is the hybrid court. Hybrid courts respond

Alex Schwartz is an Assistant Professor and the Deputy Director of the Centre for Comparative and Public Law at the Faculty of Law, University of Hong Kong. The author can be contacted at schwartz@hku.hk. He thanks Damir Banović, Karlo Basta, David Feldman, Nedim Kulenović, David Law, Joseph Marko, Christopher McCrudden, Brendan O'Leary, Zoran Oklopcic, and Chris Raymond for helpful comments and suggestions. The early phase of research for this article was generously supported by a British Academy-Leverhulme grant (SG140608).

1. The work of the US Institute for Peace, the Organization for Security and Cooperation in Europe, Carnegie Endowment for International Peace, and International IDEA are important examples of these efforts.

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

to a common post-conflict dilemma: in the aftermath of conflict, domestic institutions may lack capacity and be prone to ethnic bias or "victor's justice," but purely international institutions are an unattractive alternative because (so it is feared) they will lack buy-in from the local populace. In response to this dilemma, hybrid courts seek the best of both worlds: international personnel are recruited for their professionalism and impartiality and domestic personnel are included to promote local legitimacy. The most studied of these courts are the hybrid criminal tribunals that were created to prosecute the perpetrators of war crimes in Bosnia-Herzegovina, Cambodia, Timor-Leste, Kosovo, and Sierra Leone (see Dickinson 2003; Stromseth, Wippman, and Brooks 2006, 274–301). The related phenomenon of hybrid *constitutional* courts has attracted less attention from scholars (but see Feldman 2011; Grewe and Reigner 2011; Choudhry and Stacey 2012; McCrudden and O'Leary 2013; Graziadei 2016; Schwartz and Murchison 2016). Like their criminal counterparts, hybrid constitutional courts enlist international judges for their putative expertise and impartiality; it is envisioned that the inclusion of foreign judges will provide neutral swing votes that offset or counterbalance the political biases of local judges who, it is feared, will divide along group lines. Or, to put things in slightly more technical terms, it is implied that the foreign judges will be something like median judges with respect to divisions on the court and therefore be able to cast the pivotal votes in split decisions.[2] Hybrid constitutional courts also appear to have joined their criminal counterparts as part of the standard menu of institutional design promoted by international organizations and interveners in post-conflict polities. Both Bosnia-Herzegovina and Kosovo have such a court and proposals for a settlement to the Cyprus conflict include similar designs (Yakinthou 2009, 86–87).

Given their ongoing significance, in practice and prescription, hybrid constitutional courts deserve more scrutiny than they have thus far received. Several questions appear particularly imperative: Are foreign judges really impartial with respect to local politics? Can foreign judges be relied on to provide a pivotal counterweight to the influence of local biases on an otherwise divided court? Do hybrid constitutional courts strengthen the rule of law in post-conflict settings? These questions not only are relevant to policy makers and constitutional designers, they also have implications for broader academic debates about the factors that affect the growth (or failure) of judicial power.

This article is an attempt to gain some traction on these questions, subjecting the underlying assumptions of hybrid constitutional courts to empirical scrutiny. Relying on an original data set, and building on previous research by Schwartz and Murchison (2016), I employ a mixed-methods approach in a case study of the Constitutional Court of Bosnia-Herzegovina (the Court). After canvassing some theoretical reasons for skepticism about the value of foreign judges, the analysis progresses through three stages. First, I test the extent to which, all else equal, the

2. Empirical studies of judicial behavior define the median judge (or justice) as the "the Justice in the middle of a distribution Justices (in an ideological distribution for example), such that half the Justices are to the right of (more 'conservative' than) the median and half are to the left of (more 'liberal' than) the median" (Martin, Quinn, and Epstein 2005, 1277). Typically, these studies presume a left-right (i.e., liberal-conservative) ideological distribution; however, as we will see here, the same analytical framework can be applied to other kinds of ideological divisions.

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

foreign judges exhibit signs of significant bias for or against each of Bosnia's three main ethno-national factions. Next, using multidimensional scaling, I estimate the ideal points of the foreign judges relative to their domestic counterparts to determine if the former can plausibly play the role of swing judges. Finally, I undertake a qualitative review of closely divided decisions to evaluate the role foreign judges may have played in steering the Court's decisions at several critical points. As will be shown, the role of the foreign judges is not unequivocally positive. Although they may have helped mitigate the influence of ethno-national politics in the outcomes of split decisions, this contribution is not as steady (or balanced) as might be hoped. Furthermore, the foreign judges appear to have played a decisive part in several strategic mistakes that are likely to have damaged the Court's authority, a finding that lends further support to the view that the capacity for strategic judicial behavior is a key factor in the development of a court's authority. I conclude by suggesting that hybrid constitutional courts, like other modes of international intervention, come with a risk of moral hazard: the presence of foreign judges—and associated international enforcement mechanisms—may actually discourage the kind of strategic behavior that is needed to build and sustain judicial power over time.

THEORETICAL REASONS FOR SKEPTICISM ABOUT FOREIGN JUDGES

It is usually taken for granted that the judiciary will be native to the polity it serves. Although judges are not typically elected by popular vote, it is probably implicit in the way judicial legitimacy tends to be constructed in modern states that judges are representatives of the *demos*, at least in some vague or indirect sense. It is not surprising then that hybrid constitutional courts are exceedingly rare and associated, almost exclusively, with exceptional settings where the capacity or impartiality of the local judiciary is suspect (e.g., Bosnia-Herzegovina and Kosovo).[3]

The blueprint for the contemporary hybrid constitutional courts appears to have originated with Cyprus's ill-fated power-sharing constitution of 1960. As originally designed, the Supreme Constitutional Court of Cyprus was composed of one Greek Cypriot, one Turkish Cypriot, and a "neutral" international judge to serve as the court's president and to cast the pivotal vote in the event that the other two judges disagreed on a decision (see Yakinthou 2009, 55; Ehrlich 1966). Despite (or perhaps because of) this design, this court was ineffectual in the series of constitutional conflicts that precipitated the collapse of power sharing in Cyprus;[4] the local judges divided along ethno-national lines, the Greek Cypriot leadership openly defied the court's rulings, and the foreign judge eventually resigned, never to be replaced (Ehrlich 1966, 1042). So far, the hybrid constitutional courts in Bosnia-Herzegovina

3. Arguably, Hong Kong's Court of Final Appeal, which includes a roster of nonpermanent judges from other common law jurisdictions, might also be characterized as a hybrid constitutional court. Though Hong Kong is an exceptional legal-political context in several ways, the reasons for the hybridity of the Court of Final Appeal are very different from the other examples discussed here. For discussion of the creation of the Court of Final Appeal, see Young, da Roza, and Ghai (2014).

4. See the Supreme Constitutional Court's rulings in *The Turkish Communal Chamber and the Council of Ministers* (1963), 74–77 and *The House of Representatives and the Turkish Communal Chamber* (1963), 128.

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

and Kosovo have not shared the grim fate of their Cypriot predecessor. Still, there are signs that the model may not be delivering on its promises. In Bosnia, the foreign judges have been accused of political bias and Bosnian Serb and Croat political parties are calling for their outright removal (see Graziadei 2016). The model is also contested in Kosovo, with some parties claiming that the foreign judges have overstayed their constitutional mandate (see Qerimi 2014).

Anecdotal impressions aside, there are theoretical reasons for skepticism about hybrid constitutional courts. For one thing, the impartiality of foreign judges is not self-evident. Foreign judges are presumably less enmeshed in local politics than their domestic counterparts, but that hardly means that their decisions will be unencumbered by political preferences or motivations. Indeed, empirical studies of judicial behavior on international courts suggest various political influences, from simple home-state bias to broader geopolitical affinities (Posner and de Figueiredo 2005; Voeten 2008). At the International Court of Justice, for example, E. A. Posner and de Figueiredo (2005) find that the international judges tend to favor states with similar political systems, levels of wealth, and cultural characteristics (though they find insufficient evidence to conclude that regional and military alliances have a similar effect). These findings have some potential relevance for hybrid constitutional courts. Foreign judges on hybrid constitutional courts come to the bench with their own affinities and priors about the local context. In the case of Bosnia, for instance, all but two of the foreign judges have come from Western Europe. Rightly or wrongly, Western European perspectives on the Bosnian war are typically more sympathetic to Bosniaks (i.e., Bosnian Muslims) than to Bosnian Croats or Serbs (Burg and Shoup 1999, 162–84; see also Ramet 2005, Chap. 4). So, it is at least plausible that the foreign judges might be influenced by similar predispositions and therefore be less likely to play the role of neutral swing judges in split decisions.

Even if one grants the assumption of impartiality, there are other reasons for skepticism about hybrid constitutional courts. In the academic literature on judicial behavior, political preferences (or attitudinal factors) are now generally thought to interact with other stimuli (both legal and extralegal) to influence judicial decision making. Whereas earlier studies based on the US Supreme Court emphasized the influence of political preferences over other factors, the emerging consensus favors a more complicated picture (see Dyevre 2010); the factors that motivate judges may include everything from an institutional interest in the authority and reputation of their own court (Vanberg 2005; Staton 2010; Dothan 2015), good relations with colleagues (Macfarlane 2013), prestige (Baum 2009), and workload (Epstein, Landes, and Posner 2013), to earnest commitments to legal values (Bailey and Maltzman 2011).

Within this mix of motivations, political preferences mingle and sometimes compete with strategic considerations. Although judges may seek to realize policy outcomes for ideological reasons, they cannot succeed in doing so without also considering how other actors will react to their decisions (Epstein and Knight 1998). A decision that challenges powerful political elites too boldly may backfire by provoking retaliatory court curbing or by simply going unenforced. To be sure, if judges want to establish some credible authority, they will have to issue some challenging

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

and potentially risky rulings (see Law 2009). But if they are to succeed in this endeavor, judges need to be discerning about when to assert themselves, patiently building public support and a reputation for efficacious rulings while avoiding conflicts they cannot win. Thus, as many studies of judicial politics from jurisdictions around the world have suggested, the growth and maintenance of judicial power would seem to depend critically on judges striking a strategic balance between deference and incremental activism (for an overview, see Vanberg 2015, 179–81; see also Epstein, Knight, and Shvetsova 2001; Ginsburg 2003; Carrubba 2009).

Presumably, the less a judge is beholden to attitudinal influences, the better placed she is to engage in this kind of strategic behavior. Indeed, there is some empirical evidence for this conjecture at the US Supreme Court. Taking their inspiration from research in political psychology, Enns and Wohlfarth (2013) find that the decisions of ideologically moderate swing justices are more reflective of other considerations, including strategic deference to the policy preferences of the government and/or public opinion. By analogy, one might reason that foreign judges on hybrid constitutional courts, if they are in fact relatively impartial swing judges, will also be best situated to take strategic considerations into account.

But the very same distance that insulates foreign judges from attitudinal influences might also desensitize them to strategic considerations. Strategic models of judicial behavior typically posit that judges have an interest in their institutional authority *and* sufficient (if sometimes imperfect) knowledge about other actors and their likely reactions (see Vanberg 2005). Both these qualities may be relatively lacking in foreign judges. To the extent that they have opportunities beyond the local context, foreign judges may have a lesser stake in the long-term authority of the court. And—precisely because they are outsiders—foreign judges may misapprehend local preferences and fail to anticipate adverse reactions to their decisions. On this second view, we would expect foreign judges to be prone (and perhaps especially so) to strategic mistakes that hinder or hurt a court's authority.

These skeptical concerns are general and somewhat abstract. In what follows, we will see if they are corroborated by an empirical analysis of the Bosnian Constitutional Court. Before doing so, some contextual background on Bosnia-Herzegovina is warranted.

BACKGROUND ON BOSNIA-HERZEGOVINA

The Constitution of Bosnia-Herzegovina is not the product of an indigenous constitutional founding moment. Following the declarations of independence of the Yugoslav republic of Bosnia-Herzegovina in 1992, a brutal conflict for territory ensued between the forces of the Republic of Bosnia-Herzegovina, Croat paramilitaries backed by the Croatian military, and Serb paramilitaries backed by the Yugoslav army. Roughly a hundred thousand people were killed and around two million displaced before NATO intervention and international pressure eventually forced the belligerent parties to negotiate a settlement in 1995. That settlement, the Dayton Agreement (named after the city in the United States where it was signed), sought to bridge the Bosniak objective of a sovereign state with the Croat

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

and Serb objectives of separate/irredentist breakaway republics (see Bieber 2006; Keil 2016). Thus, a new constitution was created, drafted in part by a team of US lawyers, and included as an annex to the Dayton Agreement; the English-language version remains the only official version of the text. The resultant Constitution of Bosnia-Herzegovina preserves the former Yugoslav republic's territorial integrity, but divides power between two substate entities: the mostly Bosniak and partially Croat Federation of Bosnia-Herzegovina (FBiH) and the Serb-dominated Republika Srpska (RS).[5] Meanwhile, the constitution prescribes a complex system of consociational power sharing for the central state (hereafter BiH): a three-person presidency allocated along ethno-national lines (i.e., one Bosniak, one Serb, and one Croat)[6] and a Council of Ministers, one-third of which must be appointed by the RS entity.[7] These power-sharing mechanisms are complemented by a set of mutual veto powers.[8]

The imprint of international intervention is not only evident in the process that led to the constitution; the settlement itself gives international actors a continuing role in supervising and enforcing its implementation. To that end, a Peace Implementation Council was established, composed of countries from around the world (including both NATO members and non-NATO members) and international and supranational organizations (including the European Union, the Council of Europe, NATO, and the World Bank). The Office of the High Representative for Bosnia-Herzegovina (or OHR) was also created to represent the international community and supervise the day-to-day civilian implementation of the agreement. In an effort to thwart potential spoilers, the Peace Implementation Council later entrusted the High Representative with even broader powers (aka the Bonn Powers) to issue binding decisions and to remove public officials from office. The High Representative has sometimes made aggressive use of these powers, so much so that the office has been likened to a European "Raj" (Knaus and Martin 2003; see Caplan 2004; Everly 2008).

The imprint of the international community is also evident in the structure and organization of the Constitutional Court of Bosnia and Herzegovina.[9] In addition to four judges appointed by the legislature of the FBiH entity (who by

5. Following an arbitration process to settle a territorial dispute that was not yet resolved at the time of the agreement, a distinct administrative district, Brčko, was later formed and initially administered by the international community. Although Brčko is formally part of both substate entities, it is now administered by its own municipal government and subject to the laws of the central state.

6. The Bosniak and Croat members of the presidency are elected by voters registered to vote in FBiH who may vote for either the Bosniak or Croat member of the presidency but not for both, while the Serb member of the presidency is directly elected by voters registered to vote in RS. See Constitution of Bosnia-Herzegovina, Art. V.

7. See Constitution of Bosnia-Herzegovina, Art. V, 4(b); and Art. IV, 3(e).

8. See Constitution of Bosnia-Herzegovina, Art. V, 2(d). There are effectively two veto powers: (1) the "vital national interest" veto, which may be activated either by a member of the presidency or a majority of the ethnic caucus in the House of Peoples; and (2) the so-called entity veto, whereby all decisions in both houses require support of at least one-third of the delegates elected from each substate entity. For a critical discussion of the veto powers, see Bahtić-Kunrath (2011).

9. See Constitution of Bosnia-Herzegovina, Art. VI. It should be noted that the Court is technically a reconstituted version of the original Constitutional Court of the Socialist Republic of Bosnia and Herzegovina (a constituent republic of the Yugoslav federation).

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

convention are always two Bosniaks and two Croats) and two by the legislature of the RS entity (who by convention are always Serbs), the Court is composed of three "international" judges appointed by the President of the European Court of Human Rights in consultation with the Bosnian Presidency. These judges cannot be from Bosnia-Herzegovina or from any of its neighboring countries.[10] So far, the foreign judges have included men and women from Austria, France, Germany, Macedonia, Moldova, the United Kingdom, Sweden, and, most recently, Italy. Their backgrounds vary. Some have been accomplished academics (e.g., David Feldman, Constance Grewe, and Joseph Marko) while others have been distinguished judges, including former judges of the European Court of Human Rights (e.g., Tudor Pantiru and Margarita Tsatsa-Nikolovska).

The Court is not the only judicial institution to have made use of foreign judges in Bosnia. The now defunct Human Rights Chamber for Bosnia and Herzegovina, established under the Dayton Agreement to process European Convention on Human Rights (ECHR) claims, included eight foreign judges alongside six domestic judges. The Court of Bosnia and Herzegovina, a state-level institution established in 2002 for administrative law and criminal matters (including war crimes, organized crime, and corruption), also initially included a roster of foreign prosecutors and sixteen foreign judges. But the Human Rights Chamber's mandate expired in 2002, its jurisdiction now subsumed by the Constitutional Court, and the Court of Bosnia and Herzegovina has since phased out the use of foreign personnel. Thus, the Constitutional Court is the only judicial institution in Bosnia to retain a foreign dimension. Although the Bosnian Constitution contemplates the possible removal of the foreign judges from the Court, there has never been sufficient support across the three main communities to phase out the foreign judges (Graziadei 2016, 15). In addition, the OHR has always insisted that the foreign judges have played a vital role on the Court by providing impartial expertise (see OHR 1999, 11).

Whatever the merits of foreign judges, their continuing presence on the Court is controversial. The foreign judges are accused of favoring the more centralizing preferences of Bosniak politicians and the OHR, tipping the balance against the Serb and Croat judges in split decisions (Feldman 2011, 219). Motivated by such concerns, proposals for reforming the Court to remove the foreign judges have been made at various points, the most recent of these coming in the wake of the Court's split decision in *Case U-3/13* (November 2015) in which the majority (which included the foreign judges) ruled that a law establishing January 9 as a public holiday in the RS entity was unconstitutional.[11] Milorad Dodik, a Serb politician and President of RS, promptly condemned the Bosniak judges for imposing their political preferences "with the help of foreign judges"[12] and called a referendum in

10. See Constitution of Bosnia-Herzegovina, Art. VI, 1(b).

11. January 9 is significant because it marks the day in 1992 when Bosnian Serbs proclaimed the "independence" of Republika Srpska, in addition to being the day when Eastern Orthodox Serbs celebrate St. Stephen's Day. For this reason, as discussed below, the majority in *U-3/13* concluded that the law unconstitutionally discriminated against non-Serbs.

12. Rodolfo Toe, "Bosnian Serb Party Demands Top Court's Reform." 2015. http://www.balkaninsight.com/en/article/sds-proposing-changes-to-bosnian-constitutional-court-12-08-2015-1/1431/146.

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

RS on whether to respect the Court's decision.[13] Despite a temporary injunction by the Court to prevent it from taking place, the referendum was held on September 25, 2016 and the results were overwhelmingly—99.8 percent—in favor of defying the Court.[14] The Court's decision remains unimplemented—the holiday continues to be observed—and the main Serb and Croat parties have proposed legislation in the BiH Parliament to replace the foreign judges with new domestic judges.[15]

Dodik's accusations cut to the heart of the model of hybrid constitutional courts. As was noted at the outset, the model assumes that foreign judges will be impartial vis-à-vis local politics and, consequently, tend to be the swing judges in cases where the domestic judges divide along ethno-national lines. In what follows, I explore how plausible these assumptions are in light of the empirical record.

ARE THE FOREIGN JUDGES IMPARTIAL?

Previous research on the Court suggests that the decision making of the domestic judges is significantly influenced by ethno-national affiliation; looking at abstract review cases, and controlling for other potential influences, Schwartz and Murchison find that the "average marginal effect (AME) of a co-ethnic petitioner on the probability of finding a constitutional violation is .63 [.49, .78] for Bosniak judges, .64 [.49, .78] for Serb judges, and .67 [.52, .82] for Croat judges" (2016, 42). Perhaps Dodik is right and the foreign judges are, for the sort of reasons noted earlier, prone to a parallel kind of bias and similarly inclined to favor Bosniak challengers over Serb challengers.

This allegation of pro-Bosniak/anti-Serb bias can be tested empirically. To do so, I examine the votes of the foreign judges in all split decisions arising under the Court's abstract review jurisdiction from 1997 until the end of 2015.[16] Abstract review cases are particularly amenable to this analysis because the challengers' ethno-national affiliation can be discerned easily from publicly available data (cases heard under the Court's appellate jurisdiction cannot be reliably coded in this way). The unit of analysis is the judges' votes in each case. Because the dependent variable is binary—that is, whether or not the foreign judges vote to find a constitutional violation—I use a logistic regression model. The main explanatory variable of interest is the ethno-national affiliation of the challenger in each case. If the allegations are correct, the foreign judges should be significantly more likely to find a constitutional violation when the challenge is brought by a Bosniak petitioner and less likely to find a violation where the challenge is brought by a Serb.

13. Denis Dzidic, "Bosnian Constitutional Court Under Pressure from Serb Referendum." 2016. http://www.balkaninsight.com/en/article/bosnian-constitutional-court-under-pressure-from-serb-referendum-08-29-2016015-1.

14. "Bosnian Serb Referendum Backs Disputed 9 January Holiday." 2016. http://www.bbc.co.uk/news/world-europe-37465653.

15. Rodolfo Toe, "Croat and Serb Parties Call for Reform of the Constitutional Court of Bosnia and Herzegovina." 2015. http://www.balkaninsight.com/en/article/croat-and-serb-parties-call-for-reform-of-the-constitutional-court-of-bosnia-and-herzegovina-12-01-2015. On the legality of these reform proposals, see Graziadei (2016).

16. This is the same data set used by Schwartz and Murchison (2016), but updated to include non-unanimous cases decided between 2013 and 2015.

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

Naturally, there are other factors that may confound the analysis unless explicitly controlled for. For one thing, Bosniak and Serb petitioners tend to challenge different units of government. RS entity laws, for example, are frequent targets for Bosniak challengers, while BiH laws are more frequently challenged by Serb petitioners. The foreign judges may, as their critics allege, tend to favor the BiH level over the entities. It is also quite plausible that the entities—particularly RS—may be relatively more constitutionally defiant. Another important potential confounder, also related to the challenge, is the ECHR. If the foreign judges really are more expert in the law of the ECHR, they may be relatively more sensitive to (or perhaps more scrutinizing of) ECHR claims. No doubt, these factors do not exhaust the universe of possible influences on the foreign judges' behavior, but, at least ex ante, they would seem to be the most likely sources of omitted variable bias and so I use dummy variables to incorporate each of them as controls.[17]

I do not attempt to control for other potential influences; given the relatively small *N* available for the analysis (ninety-three observations), there is a real danger of overfitting the model with excessive covariates, a danger that arguably outweighs the risk of omitted variable bias (see Babyak 2004). Thus, I estimate a series of four relatively simple models with just four to five covariates. Model 1 focuses on the effect of a Bosniak petitioner as compared with non-Bosniak petitioners, controlling for the effect of ECHR claims and the unit of government being challenged (the BiH level is the reference category); Model 2 maintains the same control variables, but shifts to estimate the effect of a Serb petitioner vis-à-vis non-Serbs; and Model 3 proceeds in the same vein, but with the focus on the effect of Croat petitioners vis-à-vis non-Croats. The final model—Model 4—completes the sequence with separate variables for Serb and Croat petitioners, using Bosniak petitioners as the reference category. Each model clusters standard errors by case; to the extent that the foreign judges decide cases together on the same panel and rarely dissent from one another, this is intended to account for within-case correlations in their voting behavior.[18] The results are reported in Table 1.

Across the first three models, none of the effects of interest meets the conventional $p < 0.05$ level of statistical significance, though the effects in Models 1 and 2 are in the expected directions (i.e., positive and negative, respectively). The same is true of Model 4, the final and most complete of the four models. To facilitate interpretation, especially for those who prefer not to stare too long at regression tables, Figure 1 plots the average marginal effects on the probability of finding a constitutional violation that derive from this last model. As can be seen from the plot, the foreign judges do not display a significant bias for or against petitioners of any ethno-national affiliation. They tend to favor Bosniak petitioners over Serb petitioners, and Croat petitioners over Bosniak petitioners, but these tendencies are not statistically significant at conventional levels of $p < 0.05$ or $p < 0.10$. To be

17. Unfortunately, there are too few foreign judges to control adequately for their respective countries of origin as a potential influence on their decisions.

18. Ideally, one would report standard errors clustered by judge to account for the likelihood that a judge's votes may be correlated with one another across cases, but with only seven foreign judges in the data, the number of clusters is too small to correct confidently for any within-cluster variance (at least twenty clusters are needed before clustered standard errors begin to improve standard error estimates reliably).

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

TABLE 1.
Logistic Regressions for Finding a Constitutional Violation in Abstract Review Cases

	Model 1	Model 2	Model 3	Model 4
Bosniak petitioner	0.68	–	–	–
	(1.02)			
Serb petitioner	–	−2.49*	–	−1.99
		(1.29)		(1.53)
Croat petitioner	–	–	2.03	1.25
			(1.5)	(1.53)
Challenge to FBiH law or gov't action	1.92*	2.73**	2.79**	3.13**
	(1.06)	(1.1)	(1.41)	(1.33)
Challenge to RS law or gov't action	0.84	0.74	1.89	1.27
	(1.05)	(.81)	(1.19)	(1.29)
The case raises an ECHR issue	0.92	0.76	−0.06	0.30
	(0.79)	(0.74)	(1.0)	(1.0)
Constant	−1.73*	−0.96	−2.11*	−1.52
	(0.71)	(0.73)	(1.09)	(1.24)
Log pseudolikelihood =	−57.32	−52.83	−53.94	−51.57
McFadden's R^2 =	0.11	0.18	0.16	0.20
Wald $chi^2(9)$ =	6.30	9.15	6.3	10.31
Prob. > chi^2 =	0.18	0.06	0.19	0.07
N =	93	93	93	93

Notes: Robust standard errors, clustered by case, in parentheses; *$p < 0.10$; **$p < 0.05$.

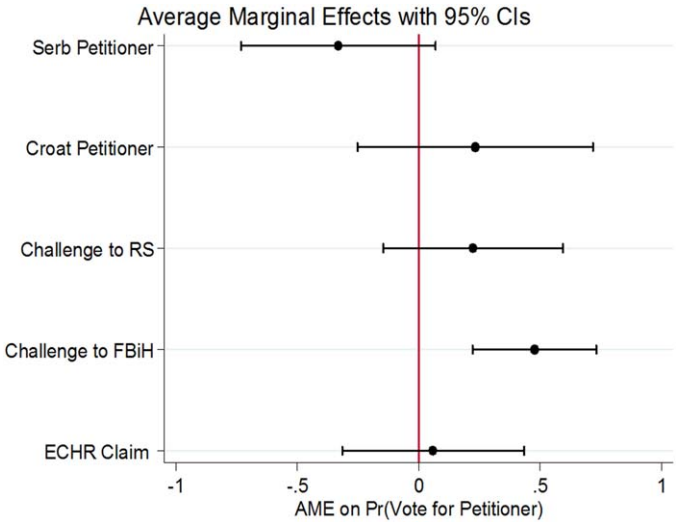

FIGURE 1.
Marginal Effects after Logistic Regression (Model 4) [Color figure can be viewed at wileyonlinelibrary.com]

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

sure, the marginal effect of a Serb petitioner in comparison to a Bosniak petitioner comes close to statistical significance at the more generous $p < 0.10$ level. Under a less conservative test, this would amount to a significant effect; indeed, estimating the same model with naïve standard errors, for example, gives the Serb petitioner coefficient a *p*-value of 0.045 and a marginal effect of −0.33 [–0.56; −0.10]. But because the foreign judges so often vote en bloc, the more conservative results reported here are probably to be preferred over alternatives that treat observations from the same case as independent of one another. In sum, one cannot confidently reject the null hypothesis that, despite some vague tendencies, the foreign judges are basically indifferent to the ethno-national affiliation of the abstract review petitioners who appear before them.

A few ancillary findings are worth noting. According to all four models, the foreign judges are, all else equal, significantly more likely to favor challenges brought against the FBiH entity over challenges against the central state. But there is no evidence from any model to support the accusation that the foreign judges are biased against the RS entity relative to the central state; the coefficients are in the expected direction, but none of them meets conventional levels of statistical significance. The effect of the ECHR on the probability of the international judges finding a constitutional violation is also nonsignificant across all models.

ARE THE FOREIGN JUDGES LIKELY SWING JUDGES?

Despite failing to meet standards of statistical significance, some of the tendencies observed above are consistent with popular allegations that the foreign judges favor (or disfavor) certain groups or units of government. Indeed, the lack of statistical significance is probably not all that meaningful (nor of much consolation) to those who *feel* that the foreign judges are biased against them. Moreover, to the extent that these tendencies might even slightly dispose the foreign judges to side with some domestic judges more frequently than others, the potential to play a pivotal swing role may be compromised.

This potential is not merely a theoretical one. When the Court does divide, it tends to divide in ways that would allow the foreign judges to cast pivotal votes. To illustrate this tendency, Figure 2 displays the dissenting coalitions that occurred between 1997 and 2015, descending from most frequent to least frequent. The most frequently occurring pattern by far consists of both Serbs in dissent (27.3 percent of all split decisions). In all such cases, the three foreign judges could have altered the outcome had they joined en bloc with the two Serb judges. The same is true of one of the other most frequent patterns, in which both Serbs and both Croats dissent (12.1 percent). Indeed, in these cases, the vote of just one foreign judge could have altered the outcome. It should also be noted that in the vast majority of split abstract review decisions, the foreign judges lump their votes together (70 percent) and there is not a single one of these cases in which all three of them are in dissent.

Absent records of their deliberations, we cannot know with certainty which judges cast the pivotal vote in these decisions (the Court does not disclose the

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

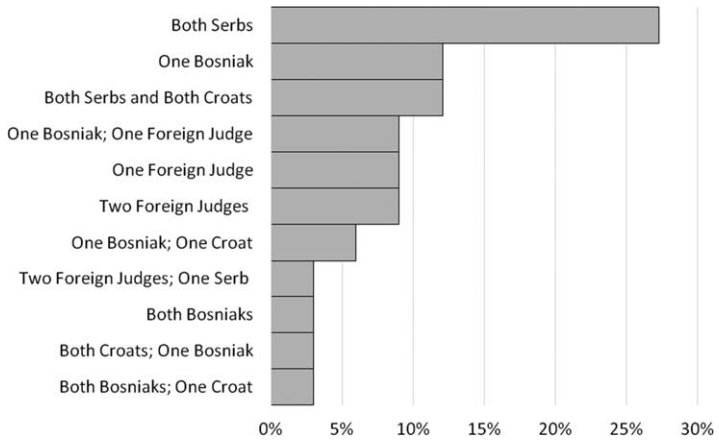

FIGURE 2.
Frequency of Dissenting Coalitions in Abstract Review Decisions (1997–2015)

details of its internal conferences or the sequencing of the judges' voting in particular cases).[19] Nevertheless, it is possible to infer from the record of published dissents which of the judges were most likely to have been the pivotal swing judges in those cases.[20] Assuming a distribution of judicial "ideal points" arrayed along a one-dimensional ideological spectrum, the judge who occupies the middle position with an equal numbers of judges arrayed on either side of her—that is, the median judge—is the most likely, all else equal, to cast a pivotal vote in a closely divided case (Martin, Quinn, and Epstein 2005, 1277; Enns and Wohlfarth 2013). Given an odd number of judges, there can only be one true median. But if the theory behind hybrid constitutional courts is correct, then one of the foreign judges should be the true median judge and, presumably, the other two should be ideologically proximate on either side of her.

To determine whether the foreign judges have in fact been medians, and therefore likely to have acted as swing judges, one needs to reconstruct the main spectrum of disagreement on the Court and then locate the judges, relative to one another, within that spectrum. Currently, the most popular method for doing this sort of thing derives from item response theory (IRT), an approach adapted to the study of judicial behavior by Martin and Quinn (2002) in their pioneering work on the US Supreme Court. The IRT approach assumes that: (1) disagreement occurs within a one-dimensional policy space (e.g., liberal vs. conservative); (2) that each judge has an ideal point representing her ideological disposition within the policy

19. Conference deliberations within the Court tend to follow a standard format: the judge rapporteur assigned to the case by the Court's president (the rapporteur's name is normally kept secret) makes an introduction to his or her colleagues and presents a draft judgment for discussion; the judges are then invited to comment individually (but in no particular order); eventually, the president calls a vote of the judges to see if there is a majority in favor of the rapporteur's draft; if the judge rapporteur is in the minority, one of the judges in the majority is then assigned the role of redrafting a decision to reflect the majority view.

20. It should be noted that the record of published dissents probably underestimates the extent of disagreement on the Court; a judge who is not in agreement with the majority in a given case need not author or register a dissent to that effect.

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

space; (3) that each judicial vote represents a choice between two alternatives in the policy space; and (4) that each judge will be more likely than not to choose the alternative most proximate to his or her ideal point (Bailey 2016, 6–18). The IRT model then estimates the latent ideal point of each judge by leveraging patterns of agreement and disagreement in nonunanimous cases until, eventually, the best fit is found.

The IRT approach has some attractive features. IRT models can control for case characteristics, they can allow for meaningful cross-time comparisons, and they can provide estimates of uncertainty (see Bailey 2016, 9–10). However, the IRT approach also has some important disadvantages, at least for the purposes of this study. Although IRT does not require or presume any knowledge about the substance of the ideal points it seeks to recover, it works best if one already knows something about the relevant dynamics of disagreement. Unguided by priors, an IRT model can misinterpret noisy data in potentially dramatic ways (Bailey 2016, 10). In particular, the assumption that the structure of disagreement is one-dimensional is not always appropriate; indeed, this assumption is contested even in the United States where the IRT approach is dominant (see Fischman and Jacobi 2016). In the case of Bosnia, previous empirical research provides good reason to suspect that ethno-national politics will be the main source of disagreement on the Court (see Schwartz and Murchison 2016), but there is no extant science about the extent to which other ideological factors—including more conventional left-right politics—may compete to drive disagreement on the Court. If those other factors are important enough, an IRT model is likely to be confused by multiple dimensions of disagreement across and within cases.

In light of these methodological considerations, I apply multidimensional scaling (MDS) to estimate the judges' ideal points relative to one another. MDS begins with a matrix of disagreement for all possible pairs of judges. Based on this matrix, the MDS estimator reconstructs a spatial model in n dimensions within which the judges' estimated ideal points are located. The resultant spatial model is scaled so that the relative distances between the judges' estimated ideal points on each dimension approximate their relative rates of disagreement. The recovered dimensions can also be ranked according to how much of the observed variance each separately "explains." Like IRT, MDS requires no assumptions about the substance of disagreement among the judges. But unlike IRT, MDS does not interpret all disagreement along a single dimension and so it is less likely to be confused by multiple sources of disagreement (Bailey 2016, 26). Of course, like all methods, the MDS approach has some drawbacks. For one thing, the analyst must read through the split decisions to (subjectively) determine the substance of disagreement for the recovered dimensions. Another disadvantage of MDS is that it can only locate judges relative to one another if they actually sat together on the same panel hearing the same cases and therefore had an opportunity to disagree with one another (see Grofman and Brazill 2002). In other words, the method only works for what are sometimes called "natural courts," that is, a period of time in which a court's composition does not change.

For the same reasons noted earlier, I restrict the MDS analysis to abstract review cases. This should also help reduce the inevitable noise that results from

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

lumping many legal issues together (see Fischman and Jacobi 2016). Moreover, these are the cases that, according to previous research (Schwartz and Murchison 2016), are most likely to divide the domestic judges along ethno-national lines and, consequently, benefit from the supposed neutrality of the foreign judges. The data set includes two natural courts with sufficient longevity to yield enough nonunanimous abstract review cases for fruitful analysis: 1997–2001 (122 observations by fourteen cases) and 2011–2015 (ninety-six observations by eleven cases). Obviously, it would be better to have a larger *N* than this. But taken together, these two natural courts actually capture a significant proportion of the Court's output: ten of the Court's nineteen years of decision making and roughly 79 percent of its nonunanimous abstract review cases. For both natural courts, I perform a classical MDS estimation allowing for a solution with two dimensions. The analysis then focuses on the highest ranked dimension for each court.[21]

Beginning with the 1997–2002 natural court, the main dimension accounts for 84.4 percent of the variance. The second dimension is much weaker—it explains only about 5 percent of the variance. Ethno-national patterns are clearly evident from even a cursory glance at the plot of the first dimension (see Figure 3): the Court divides into two wings, with the Serbs and Croats on one end of the spectrum and the Bosniaks (together with the foreign judges) on the other. Within this spectrum, the two Serb judges (Popović and Savić) share the same ideal points at one extreme end. The estimates for the two Croat judges, which are very close together, also fall on this side of the spectrum (though they are much more moderate than their Serb counterparts). Meanwhile, both Bosniak judges are located on the other wing of the Court. Two of the foreign judges—Danelius and Favoreu—are virtually identical.

A review of cases that are most ordered by the first dimension—that is, those cases where the cut point between majority and dissenting coalitions corresponds to the order of their ideal points (see Edelman, Klein, and Lindquist 2012)—suggests that disagreement along this dimension is primarily driven by two types of cases. First, there are cases where a majority coalition (typically consisting of Bosniaks,

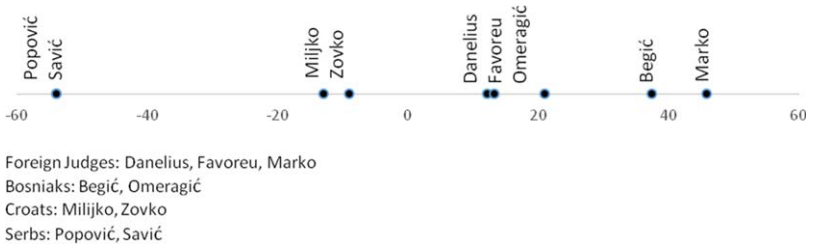

FIGURE 3.
One-Dimensional MDS Plot of the 1997–2002 Natural Court [Color figure can be viewed at wileyonlinelibrary.com]

21. The measure of the variance explained by each dimension is derived from the eigenvalues generated by Stata's "mdsmat" command. For the sake of brevity, I do not analyze the substance of the second dimension, which, in any case, has much less explanatory power in both natural courts.

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

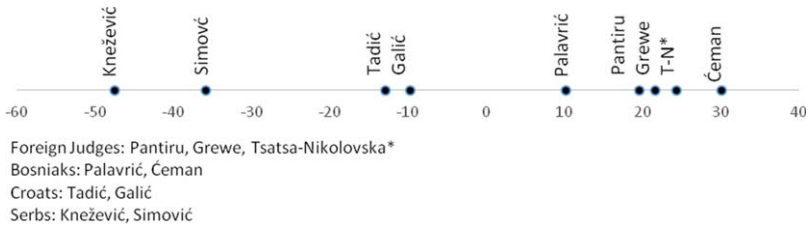

FIGURE 4.
One-Dimensional MDS Plot of the 2011–2015 Natural Court [Color figure can be viewed at wileyonlinelibrary.com]

Croats, and foreign judges) votes to uphold a law imposed by the OHR against the dissenting votes of Serb judges (and sometimes also Croat judges).[22] Second, there are those cases where a majority coalition, typically consisting of Bosniaks and foreign judges, invalidates entity laws against the dissenting votes of the Croat and Serb judges.[23] In other words, the first dimension appears to reflect disagreement between those judges who favor the OHR's efforts to centralize power and those who favor autonomy for the substate entities. Given the way in which constitutional preferences tend to track ethno-national affiliation in Bosnia, it is no great surprise to see that Croats and Serbs are on the more decentralist wing while Bosniaks are on the more centralist wing. What is more striking, at least for the purposes of this discussion, is that one of the foreign judges—Joseph Marko—has the *most* centralist ideal point estimate of all judges on the first natural court.

Turning to the 2010–2015 natural court (see Figure 4), the main dimension accounts for approximately 67.2 percent of the disagreement (while the second dimension accounts for 15.7 percent). Although the first dimension is weaker on this natural court, it displays very similar ethno-national patterns. The two Serb judges (Knežević and Simović) are far to the "left" end of the spectrum (though this time there is some distance between them). The two Croat judges (Tadić and Galić) fall on this same side, but again noticeably closer to the center. Meanwhile, the two Bosniaks (Palavrić and Ćeman) and three foreign judges (Pantiru, Grewe, and Tsatsa-Nikolovska) fall on the other side of the spectrum, though this time all three foreign judges cluster very close together. A review of the cases that are most ordered on the first dimension suggests that disagreement on this second natural court is driven primarily by disputes over entity-level powers, with questions of central state competence playing only a minor role (a change that is probably due to the High Representative taking a much less active role in lawmaking in later years). These cases typically involve majority coalitions of the foreign and Bosniak (and

22. *Case U-16/00* (February 2, 2001), upholding the High Representative-imposed Law on the Sale of Apartments with Occupancy Rights; *Case U-25/00* (March 23, 2001), upholding the High Representative's Decision Amending the Law on Travel Documents of Bosnia and Herzegovina; *Case U-9/00* (November 3, 2000), upholding the OHR-imposed Law on State Border Service; *Case U-26/01* (September 28, 2001), upholding the High Representative-imposed Law on the Court of Bosnia and Herzegovina.

23. *Case U-5/98III* (July 1, 2000) and *Case U-5/98IV* (August 19, 2000), invaliding aspects of the FBiH and RS constitutions.

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

sometimes Croat) judges invalidating RS entity laws, with at least one Serb (and sometimes also the Croat judges) in dissent.[24]

With respect to the question of whether the foreign judges are plausible medians, the evidence from both MDS plots is ultimately mixed. In the first natural court, one of the foreign judges is the median (Danelius) and another (Favoreu) is very close. The catch, as noted above, is that the third foreign judge (Marko) occupies the most extreme position on his end of the spectrum. Moreover, although Danelius is estimated to be the most likely swing judge in closely divided decisions, and therefore more likely than any of the other judges to side with the Serb and Croat wing of the Court, there are no actual instances of 5–4 decisions in which he creates a winning collation by joining with the two Croats and two Serbs; all 5–4 decisions involve Danelius siding with the other foreign judges and the Bosniaks. In other words, his role as a swing judge is more potential than actual. The results from the second natural court are even less encouraging. In the second natural court, none of the foreign judges is the median. Rather, the median is a Bosniak (Palavrić). Moreover, all three foreign judges (Pantiru, Grewe, and Tsatsa-Nikolovska) are individually to the "right" of the median and, collectively, they are closer on average to the most extreme point on that side of the spectrum than they are to the median. So, it seems unlikely that any of the foreign judges on the second natural court is in a position to have played the role of a swing judge. In sum, the point to take away from these mixed findings is that the foreign judges are not reliably median and so cannot be depended on to provide a moderating counterbalance to ethno-national divisions on the Court. Indeed, their positioning relative to the domestic justices implies that they are more likely than not to tip the balance in favor of the Bosniak wing of the Court.

Is there a legal explanation for these patterns? One might speculate, for example, that the centralist constitutional disposition of the Bosniak wing of the Court may be more supported by the text of the constitution. If so, the foreign judges might be more likely to side with that wing simply because the Bosniaks, as opposed to the Serbs or Croats, are more likely to be on the right side of the law. This is a difficult question to address in any definitive way. Generally speaking, the cases decided by constitutional courts are often ones where the meaning and implication of constitutional text is indeterminate or, at the very least, subject to reasonable disagreement. Many would say that in such cases, judges make (rather than apply) the law (see, e.g., Posner 2011). Others would say that despite competing reasonable interpretations, the law nevertheless furnishes "right answers" in even the hardest cases (see, e.g., Dworkin 1986). This longstanding debate is beyond the scope of the present discussion. That said, if there are right answers when it comes to disputes about constitutional law in Bosnia, it cannot be denied that the constitutional text suggests a highly decentralized structure. The division of powers is such that most legislative and administrative competencies are the exclusive province of the entities (see Art. III). Furthermore, several of the Court's

24. *Case U-1/11* (July 13, 2012), invalidating the RS Law on the Status of State Property; *Case U-10/14* (July 4, 2014), invalidating the RS government Decision on Registration of Residence; *Case U-14/12* (March 26, 2015), invalidating aspects of the FBiH and RS entity constitutions; *Case U-3/13* (November 26, 2015), invalidating the RS Law on Holidays of the Republika Srpska.

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

landmark decisions develop or rely on doctrines that find little explicit support in the actual text, turning instead on contested teleological interpretations of the constitution as a whole (see *U-5/98III*, discussed in some detail below). In short, the "black letter" of the constitution probably does not explain the centralist tendencies of the foreign judges. In any event, it seems evident that the foreign judges do not reliably perform the moderating role that the theory of hybrid constitutional courts would assign to them. Indeed, given their centralist tendencies, it is no surprise that their presence is more a bone of contention than a source of authority.

ARE THE FOREIGN JUDGES STRATEGIC?

It is clear that the Court's authority has been tested, but not just by criticism. Many of its decisions have either gone unimplemented or have faced protracted delays in implementation. According to a 2015 report authored by the EU Delegation to Bosnia and Herzegovina, as many as eighty-nine decisions were (at that time) unenforced within the time limits prescribed by the Court (see also Banović, Muharemović, and Kapo 2014). *Case U-3/13*, noted earlier and discussed again below, is probably the most blatant example of these compliance problems. Other prominent examples include nonimplementation of the Court's 2010 decision on the city of Mostar's election system, leaving the city without a government since 2012 (*U-9/09*), and nonimplementation of the Court's 2012 decision invaliding an RS law on state property (*U-1/11*). In theory, the responsible officials are, under Article 239 of the Criminal Code of BiH, liable to public prosecution and a maximum of five years' imprisonment for failing to implement a decision. In practice, however, the Prosecutor's Office of Bosnia and Herzegovina is loath to file charges, citing its limited resources and the frequent difficulty of identifying which official is responsible for noncompliance, particularly where implementation requires the action of a collective body such as a legislature (Banović, Muharemović, and Kapo 2014, 7). These episodes do not bode well for the Court's authority; to the extent that noncompliers are not brought into compliance, future episodes of noncompliance probably become more likely (see Dothan 2015, 70–75).

The question to be addressed in this section is whether the foreign judges have unwittingly contributed to these problems. To that end, I seek to isolate and evaluate the choices of the foreign judges from a strategic perspective (for reasons suggested above, I do not attempt to evaluate the strictly *legal* merits of these choices). I adopt a rather parsimonious standard for strategic merit. Because all courts must rely on other actors or institutions to implement their judgments, I assume that the foreign judges (like all judges) have an institutional interest in the likelihood that others will comply with (rather than defy) their rulings. From this strategic perspective, any decision that provokes an interbranch conflict is fraught with risk; it may hurt a court's authority directly (if the court is sanctioned) or indirectly (if the court's reputation for obtaining compliance with its rulings is tarnished) (Epstein, Knight, and Shvetsova 2001; Dothan 2015). One measure of strategic merit, then, is the extent to which a series of judicial choices asserts authority while avoiding interbranch conflicts and the consequent dangers of noncompliance or reprisal.

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

The comparative judicial politics literature has identified a variety of tactics that judges can use to evade interbranch conflict (see Epstein and Jacobi 2010; Dothan 2015). One such tactic is strategic avoidance, "postponing decision of contentious issues that might threaten a court's institutional viability" (Delaney 2016, 4). Judges can also craft vague decisions to hedge against noncompliance, making it more difficult for others to determine if the ruling has or has not been implemented (Staton and Vanberg 2008). Alternatively, judges can write shorter and more legalistic decisions to make it appear they had little discretion to decide otherwise (Dothan 2015). Perhaps the most important of such tactics is for judges to adjust their decision making to avoid rulings that stray too far from the preferences of powerful political actors (Epstein, Knight, and Shvetsova 2001). Political elites may tolerate adverse court decisions as long as the costs of noncompliance (or retaliation) outweigh the costs of acquiesce. However, when a court decision falls beyond this range, elites will probably seek to defy or punish the court. Thus, strategically astute judges will aim for decisions that fall within the "tolerance intervals" of relevant political actors (and, if no such rulings are possible, they will try to avoid deciding the issue in the first place) (see Epstein, Knight, and Shvetsova 2001; Delaney 2016).[25]

To be clear, I am not suggesting here that strategic considerations are the only sort of considerations that judges should be mindful of when deciding disputes. Other goals matter, including more traditionally judicial ones like upholding the rule of law, protecting minorities, and promoting constitutional order. However, disregard for strategic considerations may hinder a court's ability to pursue any of these other objectives. For this reason, judges need to take their own authority into account, alongside these other values, if they are not to become mere paper tigers. When the risk to their own authority is especially grave, or the consequences for these other values are relatively minor, it may be better to render a decision that is less than ideal, legally speaking, to build or preserve power for future occasions.

In the case of Bosnia, the "strategic environment" of constitutional review (Whittington 2003) is undoubtedly complex. The Court has been beset by two forces that pull in very different directions. On one side stands the High Representative. For the first several years, the High Representative took a very active role in supervising the implementation of the peace agreement. During this time, the Court could rely on the High Representative to force compliance with its decisions. Although this power is no longer exercised, it remains a possible source of support. But the High Representative is also a potential threat to the Court's power. Pursuant to Annex 10 of the Dayton Agreement, the High Representative is the ultimate authority over the interpretation of the constitution and, by virtue of the Bonn Powers, can override the Court's decisions (see Everly 2008; Banning 2014). On the other side are the main Bosnian ethno-national factions who control the state and entity governments and legislatures, two of which—the Croat and the Serb parties—favor robust decentralization or, in the case of the Serbs, outright

25. Following Epstein, Knight, and Shvetsova, I assume that the breadth of tolerance intervals is a function of case salience (how important the issue is to the relevant political actors), the extant track record of the court as a legal authority, public opinion on the issue in question, and general "diffuse support" for the court (2001, 130). But because there is no existing public opinion research on diffuse support for the Court, the analysis that follows speaks only to the first two of these factors.

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

secession as an alternative to that (Basta 2016). The ability of these actors to retaliate against the Court is significantly circumscribed by the consociational system of government. Given a fragmented and decentralized political system, coupled with several hard veto points, it should be very difficult for domestic political actors to launch a direct attack against the judiciary (Ferejohn 2002; Tsebelis 2002); so long as the Court respects the tolerance interval of at least one of the relevant veto players, court curbing will be blocked (see Ginsburg 2003, 68).

But noncompliance can be an easier, if less direct, threat to judicial authority. Unlike direct court curbing, noncompliance requires no coordinated effort. If the costs of noncompliance are relatively low, the relevant political actors can simply ignore an adverse ruling. This threat is particularly acute in places like Bosnia, where the legitimacy of the constitution is contested and commitment to the central state institutions is uneven. In addition, as is the case in many transitional societies, independent judicial institutions are relatively new to Bosnia, and so judges cannot fall back on longstanding norms of compliance or reservoirs of public support to underpin their authority (see Epstein, Knight, and Shvetsova 2001, 126–27). Moreover, for the same reason that it reduces the danger of retaliation, consociational power sharing probably exacerbates the danger of noncompliance: some decisions will require the coordination of multiple veto players to be implemented (Schwartz and Harvey 2012). In short, the Court has good strategic reasons to mind both the generally centralist preferences of the OHR and the varying but often radically decentralist preferences of some of the domestic political actors.

Isolating and evaluating the choices of the foreign judges within this environment is no simple task. Like many European apex courts, the Court speaks in a single institutional voice; majority judgments are not attributed to any particular judge (although, behind the scenes, a single judge may be responsible, as rapporteur, for drafting the opinion). Thus, it is only when a judge dissents that he or she has an opportunity to write as an individual. However, dissents do not determine outcomes and so they can play only a secondary role in a court's strategic success. To get around this problem, I focus on those cases where the votes of the foreign judges would have been pivotal to the result if they were in fact acting as swing judges. In other words, assuming the foreign judges are relatively impartial, these are cases in which their putatively impartial vote would have been decisive. Two types of cases meet this description. First, there are split decisions where the vote of at least one of the foreign judges would have altered the outcome. Second, there are 7–2 split decisions in which the result would have been otherwise had all three judges voted differently (arguably, because the foreign judges do often vote as a bloc, their collective vote can be treated as pivotal in such cases). As we shall see below, although these two sets of decisions show some sensitivity to the more obvious threat of High Representative override, they are relatively insensitive to the less direct, but still significant, threat of entity noncompliance.

Restraint in Cases Challenging the High Representative

Much of the Court's early work involved disputes relating to the state-building efforts of the High Representative, who often acted "on behalf" of the central state

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

in imposing new laws and creating new institutions. In several of these cases, the foreign judges were pivotal in the hypothetical sense described above: the Court divided along ethno-national lines, with both Serbs (and sometimes both Croats) in dissent and both Bosniaks and all three foreign judges in the majority. All of these cases were brought by Serb challengers.

The first of these cases is *U-9/00* (November 3, 2000), a seminal decision in which the Court divided 7–2 (with the two Serbs in dissent). *U-9/00* concerned a challenge to the Law on the State Border Service of Bosnia and Herzegovina. The law in question was no ordinary law; it was enacted by the High Representative after the BiH Parliament failed to agree on a draft law proposed by the presidency. *U-9/00* raised some difficult and important constitutional questions. First, it was not obvious that the High Representative really had the power to usurp the role of the parliament in passing this law. Although the High Representative's powers under Annex 10 had been extended by the Peace Implementation Council in the so-called Bonn Declaration to encompass "binding decisions," neither Annex 10 nor the Bonn Declaration explicitly empower the OHR to pass primary legislation (see the discussion in Banning 2014). Second, assuming that the High Representative did have the power to pass legislation, it was not obvious that the Court would have the power to review the legislation on constitutional grounds. Article 5 of Annex 10 makes the High Representative "the final authority in theatre" with respect to the interpretation of all aspects of the peace agreement (including, inter alia, the provisions relating to the powers of the High Representative himself). But if the High Representative could pass legislation and that legislation was immune to review, the integrity of the constitution and the rule of law in Bosnia would be jeopardized. The majority's solution to this dilemma was to adopt an expansive interpretation of the Bonn powers, but also find that the exercise of those powers is marked by a "sort of functional duality."[26] On this theory, the High Representative is a creature of international law and, as such, will normally be above constitutional review. But when the High Representative is "substituting" for the national authorities' legislative powers, the act in question is to be regarded as domestic law and is therefore subject to review for conformity with the constitutional law of Bosnia-Herzegovina just like any other domestic law. Finding then that the law in question was functionally a law of Bosnia-Herzegovina, the majority concluded that it was a valid exercise of parliament's powers under Article III.1 (powers which, in this case, were being wielded by the OHR).

U-9/00 can be counted as a good strategic move on the part of the foreign judges. Had they sided with the Serb judges in dissent (who argued that the law in question was not properly a law at all), they would have missed a relatively safe opportunity to establish a basis for reviewing legislation passed by the High Representative. Given that the High Representative would go on to impose more legislation over the next several years, the Court would have looked truly ineffectual if it could not at least pretend to scrutinize those acts.[27] Hence, the approach in *Case*

26. *U-9/00* at para. 5.

27. It should be noted, however, that the power of review is limited significantly by the ability of the High Representative to elect whether to pursue a course of action by decree or by legislation; if the former, the decision is deemed to be an exercise of international powers rather than an exercise of domestic power bound by the constitution.

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

U-9/00 was carried forward in several subsequent cases where legislation passed by the High Representative was found to be reviewable but nevertheless compatible with the constitution.[28]

Two examples are noteworthy for the purposes of this discussion insofar as the foreign judges were potentially pivotal to the results. The first of these is *Case U-25/00* (March 23, 2001), in which the Court divided 7–2 (with the two Serbs in dissent) over the constitutionality of OHR-imposed amendments to the BiH Law on Travel Documents. The amendments in question established a uniform design for all Bosnian passports. In addition to challenging the High Representative's power to amend the laws, the challengers argued that the design of passports was exclusively the responsibility of the entities who, under Article I(7), have the power to issue passports to their respective citizens. The foreign judges voted with the majority to uphold the law as a valid exercise of the central state's powers to regulate passports, finding that the High Representative's legislative powers, when substituting for domestic lawmakers, included the power to amend existing laws.

The second example is *Case U-26/01* (September 28, 2001), where the foreign judges voted with the Bosniaks to uphold the constitutionality of the Law on the Court of Bosnia and Herzegovina (the Serb and Croat judges dissented). The law was imposed by the OHR to establish a new state-level court for criminal matters and administrative law. The stated rationale for the law was that the existing entity-level courts were either ill-equipped to adjudicate such matters or, in the case of administrative law, lacked jurisdiction.

The law was challenged by members of the RS National Assembly who claimed that the High Representative, acting as a state-level legislator, had no constitutional authority to create a new state-level judicial body—the constitution nowhere contemplates the creation of an additional state-level court. The majority rejected this argument, finding the requisite authority for the law to be implicit in Article I.2 of the Constitution, which states that "Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections," and Article II.1, which further stipulates that "Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms." These two provisions could easily have been read as merely negative constraints; instead, the majority read in a positive power to do what is "necessary" to ensure that the rule of law is upheld and that human rights are vindicated, including the creation of new judicial institutions.

Although there may be questionable legal reasoning in these cases (see Kulenović 2016), they are consistent with a sound strategy of deferential review. These cases were highly salient ones for the OHR since they threatened a core element of the international community's agenda in Bosnia: the consolidation of central state power (see Knaus and Martin 2003; Caplan 2004). Had the Court

28. See *Case U-16/00*, where the Court divided 7–2 (with the Serbs in dissent) over the constitutionality of amendments promulgated by then High Representative Carlos Westendorp to the FBiH entity's Law on the Sale of Apartments with Occupancy Rights; *Case U-25/00* (discussed below); and *Case U-26/01* (discussed below).

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

obstructed this agenda, the High Representative might very well have overruled the relevant decisions, thereby impairing the Court's authority for other more winnable fights.[29] Indeed, the Court did go on to successfully challenge the OHR in *Case U-6/06*, invalidating a law adopted to reduce the salaries of the judiciary, including those of the Court. Over the opposition of the High Representative, who had originally promulgated the law and also intervened as an amicus curiae in the case, the Court unanimously ruled that legislative interference with its remuneration was an unconstitutional violation of judicial independence. In sum, it seems the foreign judges were right to pick their battles with the OHR; had the Court provoked losing battles in earlier challenges, it might not have been able to defend its own interests later.

Overreach in Cases Challenging the Entities

The deferential approach to reviewing acts of the High Representative is not mirrored in disputes relating to the substate entities. Although there are some cases that suggest a certain amount of calculated restraint, the foreign judges were pivotal to several critical strategic mistakes.[30] These cases all involved highly salient issues in which the Court ruled against the intense preferences of the relevant authorities and publics.

The first of these strategic mistakes is perhaps the most well-known and controversial of all the Court's decisions: *U-5/98* (often called *The Decision on the Constituency of Peoples*). The case arose from an abstract review petition brought by Alija Izetbegović, then Bosniak member of the BiH Presidency, challenging provisions within the entity constitutions. In the case of the RS entity, the challenged provisions were alleged to be Serb-centric while, in the case of the FBiH entity, the challenged provisions were alleged to grant Bosniaks and Croats special rights and recognition while excluding Serbs. The collective equality of constituent peoples is not explicitly guaranteed in the constitution. Rather, Izetbegović argued that the idea was implicit in the preamble, insofar as it proclaims the constitution to be an act of Bosniaks, Croats, and Serbs as "constituent peoples." The majority in *U-5/98* endorsed this theory and, in a series of partial decisions, applied it to invalidate many of the impugned provisions of the entity constitutions. This was a bold move. The majority not only relied on some rather esoteric argument to justify the normative force of the preamble, it also rejected more concrete "originalist" arguments about the design of the settlement in favor of a broad and teleological view of the

29. This is not mere speculation. In *Case AP-953/05* (July 8, 2006), the Court unanimously found that the absence of any legal process to address the High Representative's frequent removal of public officials deemed to be obstructionist was a violation of the right to an effective legal remedy under Article II(2) of the Constitution of Bosnia and Herzegovina in conjunction with Article 13 of the ECHR. The High Representative responded by effectively annulling the Court's decision, issuing a decree stating that if any domestic authority took steps to provide for such a review mechanism, this would itself be considered an act of obstructionism.

30. See *Case U-19/01* (upholding an RS entity labor law); *Case U-15/08* (upholding RS government activities in lobbying foreign governments); and *Case U-15/09* (upholding RS government communications with the United Nations).

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

constitution (see Marko 2004, 25–29; Kulenović 2016). In the wake of the decision, the Bosnian political parties were (predictably) unable to agree to the necessary amendments. The High Representative intervened and imposed a range of amendments to the entity constitutions, expanding power sharing to all levels of government and requiring that all three constituent peoples within both entities be accorded the same status and rights (see Bieber 2006, 121–33).

From a strategic perspective, the problem with *U-5/98* is its inevitable reliance on the power of the OHR for securing compliance. The foreign judges must (or should) have known that a decision to invalidate important and symbolic sections of the entity constitutions was bound to attract condemnation from most of the local political spectrum and necessitate a difficult amendment process, one that could easily be (and was in fact) derailed by disagreement among the relevant veto players (see Bieber 2006, Chap. 6). The difficulty is not only a function of substantive opposition to the Court's decision, but also the coordination costs of constitutional amendment. These costs are even higher in FBiH, as power sharing between Bosniaks and Croats expands the number of veto players. Given these conditions, noncompliance and the eventual intervention of the OHR were utterly foreseeable. Over the medium term, the Court succeeded insofar as the decision was ultimately implemented. But, under these circumstances, the implementation of *U-5/98* could do nothing to build the Court's authority; without the OHR's intervention, the decision would have been a dead letter. Moreover, the decision probably damaged the Court's legitimacy by feeding the narrative that the foreign judges are too closely aligned with their Bosniak colleagues and the interests of the OHR.

As the High Representative began to play a less interventionist role in years to come, later foreign judges did not adjust their approach to reflect the change in the strategic environment and so the actual limits of the Court's authority were eventually exposed. Two recent cases, in which the foreign judges were potentially pivotal to the result, illustrate this apparent lack of strategic acumen: *Case U-14/12* (March 26, 2015) and *Case U-3/13* (November 26, 2015).

In *Case U-14/12*, a 5–4 majority of the Court (with the Croat and Serb judges in dissent) ruled that certain aspects of power sharing at the RS and FBiH entity levels were unconstitutional violations of the right against discrimination protected under Article II(4) of the Constitution and Article 1 of Protocol No. 12 to the ECHR. The constitutional provisions in question stipulated that only persons who declare themselves as members of one of Bosnia's three "constituent peoples" may run for offices of the president or vice-presidents in the RS and FBiH entities; those who do not—that is, "Others"—are therefore barred from holding these offices. Ironically, these provisions were imposed by the OHR to implement the Court's earlier ruling in *U-5/98*. A key part of the background to *U-14/12* was the decision of the European Court of Human Rights in *Sejdić and Finci v. Bosnia and Herzegovina*. The majority in *Sejdić and Finci* found that the BiH Constitution discriminated against "Others" insofar as it did not allow them to stand for election to the offices of the BiH Presidency or BiH House of Peoples (one of Bosnia's two state-level legislative chambers). The impugned provisions in *U-14/12* were essentially identical to those at issue in *Sejdić and Finci* and so, the petitioner argued, they too must be discriminatory. However, unlike the provisions in *Sejdić and Finci*, which are

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

contained in the national-level constitution and so cannot be invalidated by the Court, the impugned provisions in *U-14/12* are contained in entity constitutions and are therefore amenable to constitutional review. The majority in *U-14/12* agreed with the petitioner's argument and invalidated the offending provisions of the entity constitutions.

Whatever the legal or moral merits of the petitioner's argument in *U-14/12*, the decision is suspect from a strategic perspective because noncompliance was (once again) highly likely. Like *U-5/98*, the decision required constitutional amendments, which, as noted above, raise the costs of compliance. The foreign judges should have seen this difficulty. After all, implementation of the *Sejdić and Finci* ruling had already proven to be an elusive goal, despite the fact that this was (and still is) an imperative for Bosnia's accession to the European Union; the main Bosnian political parties still cannot agree on how to replace the offending provisions (see Tolksdorf 2015). It is no surprise then that *U-14/12* generated similar implementation problems. The Court could have avoided this result. As the dissent points out, there were reasons to find that the questions at issue were not yet "ripe" for judgment.[31] For one thing, the decision in *Sejdić and Finci* had not been implemented and so, they argued, any determination on the merits in *U-14/12* would effectively prejudge the manner in which the decision of the European Court of Human Rights should be reconciled with the existing power-sharing structures provided for by the BiH Constitution: "Only after amending the Constitution of BiH in accordance with the said Decision, can the constitutionality of the challenged provisions be assessed."[32] Rather than making use of these circumstances to avoid deciding on the legal merits and upsetting existing power-sharing arrangements, the majority issued a ruling that exposed the Court to yet another conspicuous episode of noncompliance and gave still more ammunition to critics who claim that the foreign judges are too closely aligned with the Bosniak judges.

The second recent example is *Case U-3/13*. As noted earlier, that case arose from a challenge to the constitutionality of the RS entity's official national holiday. The challenge was brought by Bakir Izetbegović, the current Bosniak member of the presidency (and son of former President Alija Izetbegović). He argued that the day in question was discriminatory because it was effectively a Serb day. In doing so, he relied on the principle of the equality of constituent peoples and another of the Court's decisions—*Case U-4/04*—which had invalidated entity coats of arms and religious holidays for similar reasons. A 6–2 majority of the Court (with the two Serb judges in dissent) accepted this line of argument and found that the holiday was unconstitutional.

Even before the Court heard the case, there were strong indications that a ruling to invalidate the RS holiday would generate compliance problems. For one thing, the earlier decision in *Case U-4/04* was subject to delayed and reluctant implementation; the Court had to issue an additional ruling on enforcement before the necessary changes to the entity constitutions were eventually made (see

31. *U-14/12*, joint dissenting opinion of Valerija Galić, Miodrag Simović, Mato Tadić, and Zlatko M. Knežević.

32. Id., para. 2.

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

Graziadei 2015). A new judgment directed against the RS holiday could be expected to meet similar resistance. Moreover, the RS government had warned the Court, in no uncertain terms, that it would overtly defy any ruling to invalidate the holiday (see EU Delegation to Bosnia and Herzegovina 2015). This was not a bluff. Dodik's government refused to respect the Court's ruling and launched a concerted and vociferous campaign to reform the Court and oust the foreign judges. These efforts may well come to nothing; any changes to the Court's structure will require the support of Bosniak politicians, and they tend to be favorably disposed to a continuing foreign judicial presence. That said, the Court's authority is in crisis; it cannot serve as an effective arbiter of constitutional dispute if its legitimacy continues to be so openly contested. An increase in implementation problems seems likely. However, this latest crisis was not inevitable. Like the decisions that preceded it, the results could have been otherwise had the foreign judges shown more sensitivity to the limits of their authority.[33]

All told, the foregoing analysis paints a picture of apparent strategic miscalculation. Early on, the Court operated with an artificial aura of authority, relying heavily on the High Representative to enforce bold and far-reaching decisions. Once the High Representative receded into a more passive role, the Court was left saddled with a case-law legacy that overshot its actual authority. Instead of strategically retreating from a now unsustainable approach, the Court pushed forward and provoked fights it could not win. The votes of the foreign judges were critical to this trajectory.

DISCUSSION AND CONCLUSION

The empirical findings presented here suggest that the value of hybrid constitutional courts is, at best, ambivalent. The evidence goes at least some of the way toward vindicating Bosnia's foreign judges against the accusations that have been made against them; they do not seem to be significantly influenced by the same kind of biases that motivate the domestic judges. Nevertheless, the results of multidimensional scaling suggest that the foreign judges are not reliable medians and so the presumption that they will cast the pivotal swing votes in ethnically split decisions is problematic. Alternatively, if we give the foreign judges the benefit of the doubt, and presume that they do typically act as swing judges, then they must bear responsibility for the Court's strategic mistakes. Admittedly, these findings suffer from a degree of "observational equivalence"; as is often the case in studies of judicial behavior, what we observe may be consistent with both attitudinal and strategic explanations (see Fischman and Law 2009, 145–50). In this instance, the tendency of the foreign judges to favor challenges against the entities relative to challenges against the central state (and the OHR) might reflect the influence of a

33. As Graziadei (2015) points out, the majority was probably not entirely blind to the strategic considerations raised by *U-3/12*: "Probably in order not to seem biased, the Court decided on the same day a case against Izetbegovic's party. On that day (26 November 2015), the Court only took two important decisions. . . . The Court's timing to present the Republic Day decision seems taken in light of strategic considerations to preserve its legitimacy for Bosnian Serbs."

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

centralist attitudinal bias, as critics allege. However, it also might reflect a strategic miscalculation of the risks and dangers of entity noncompliance. In either case, however, the foreign judges appear to have contributed to the Court's crisis of authority, which is precisely the sort of problem hybrid constitutional courts are supposed to avoid.

Is it fair to blame the foreign judges for this crisis? Not entirely. None of the decisions canvassed above would have been possible without the votes of local judges too. However, the local judges have a kind of readymade excuse: they are just doing what the Court's structure presumes they will do (i.e., vote along ethno-national lines). Indeed, the presence of the foreign judges may even discourage the local judges from taking strategic considerations into account. So long as foreign judges are there to correct course (and international interveners keep watch), what incentive is there for the local judges to think strategically about the Court's authority? If you behave as a simple partisan for your faction, your faction is more likely to win regardless of how the other side behaves (because some of the time the foreign judges will side with you). Conversely, if you elevate institutional interests over factional interests, the other faction can take advantage to pursue its own interests unchecked. Or so the local judges might think. If so, this would not be the only instance of international intervention unwittingly creating a moral hazard by "crowding out" local efforts to build and sustain institutions (see Fukuyama 2005; Ginsburg 2011).

The case of Bosnia-Herzegovina is highly idiosyncratic, given the complex political system, design of the Court, and the extraordinary powers of the High Representative. Still, we can see some potentially generalizable lessons in the preceding analysis. One such lesson is that hybrid constitutional courts are not a panacea for the problems they are intended to ameliorate. First, despite their relative distance from local politics, the assumption that foreign judges will counterbalance local divisions seems to be mistaken; foreign judges are not necessarily the most likely judges to be pivotal when local judges divide along ethno-national lines of affiliation. Indeed, as this study demonstrates, any tendency to side with one faction over another—even if not driven by attitudinal bias—can undermine the potential for foreign judges to provide a counterbalance to ethno-national divisions and, consequently, hurt the court's authority. Second, overreliance on the power of the international community to enforce controversial decisions purchases short-term results at the expense of the sort of incremental activism that constitutional courts typically use to build authority over time. Eventually, the international community is likely to relax its attention, and that is precisely when a constitutional court needs a reservoir of authority. To accumulate this reservoir, judges need to be thinking strategically about the consequences of their decisions *all along*, picking their battles carefully at each turn. Insofar as they are less embedded in the society in question, foreign judges may be poorly situated to engage in this kind of strategic calculation. There is probably no substitute for local knowledge when it comes to anticipating which judicial decisions are more or less likely to provoke confrontations with the political branches. Domestic judges may well have strong political biases, but they are also better placed to appreciate the limits of their own authority.

The foregoing also raises more general questions about the design of courts for deeply divided societies: Can a constitutional court be broadly legitimate when the constitution it serves is so intensely contested? Can a state that is otherwise regarded as an illegitimate imposition by major segments of the polity be legitimated ex post by judicial institutions? Or, to use a sports analogy, how much does it really matter that the referee is independent and impartial if you would rather not be playing football in the first place? One looks in vain, I fear, for anything in the experience of the Bosnian Constitutional Court to counter a deeply skeptical conclusion: constitutional courts are powerless to achieve broad legitimacy, both for themselves and for the constitutional systems they serve, in contexts where the system itself is beset and contested by rival and seemingly incommensurable ethnonational narratives (see Basta 2016).

Putting this deeper kind of skepticism to one side, alternative court designs, particularly those that would avoid reliance on foreign judges, deserve more consideration from policy makers and academics alike. One such alternative is suggested by the design of the Belgian Constitutional Court. Belgium is also a divided society (though its divisions are much less intense than those in Bosnia). To reflect this sociopolitical fact, the Belgian Constitutional Court includes an equal number of judges from the country's two major ethno-linguistic blocs (six French-speaking judges and six Dutch-speaking judges). But instead of including foreign judges as neutral tiebreakers, the Belgian model alternates the tie-breaking vote between both wings on an annual basis. In addition, the Belgian Constitutional Court does not make dissents public, thus insulating its judges from the kind of allegations that have plagued the Bosnian Constitutional Court. As Graziadei (2016) suggests, this design may encourage more compromise in decision making. Whether the Belgian model would succeed in a place like Bosnia—where divisions are more intense and the rule of law is more tenuous—remains to be seen. To that end, further comparative research can help improve constitutional design by clarifying the likely consequences and implicit tradeoffs of alternatives to hybrid constitutional courts.

REFERENCES

Babyak, Michael A. "What You See May Not Be What You Get: A Brief, Nontechnical Introduction to Overfitting in Regression-Type Models." *Psychosomatic Medicine* 66, no. 3 (2004): 411–21.

Bahtić-Kunrath, Birgit. "Of Veto Players and Entity-Voting: Institutional Gridlock in the Bosnian Reform Process." *Nationalities Papers* 39 (2011): 899–923.

Bailey, Michael A. "Measuring Ideology on the Courts." 2016. On file with author.

Bailey, Michael A., and Forrest Maltzman. *The Constrained Court: Law, Politics, and the Decisions Justices Make*. Princeton, NJ: Princeton University Press, 2011.

Banning, Tim. "The Bonn Powers of the High Representative in Bosnia Herzegovina: Tracing a Legal Figment." *Goettingen Journal of International Law* 6, no. 2 (2014): 259–302.

Banović, Damir, Sanela Muharemović, and Dzenana Kapo. *Strengthening the Capacity of the Constitutional Court of Bosnia and Herzegovina: How to Improve Decision Implementation and Enforcement?* Sarajevo: Center for Political Studies, 2014.

Basta, Karlo. "Imagined Institutions: The Symbolic Power of Formal Rules in Bosnia and Herzegovina." *Slavic Review* 75, no. 4 (2016): 944–69.

https://doi.org/10.1111/lsi.12335 Published online by Cambridge University Press

Baum, Lawrence. *The Puzzle of Judicial Behavior*. Ann Arbor, MI: University of Michigan Press, 2009.
Bell, Christine. *Peace Agreements and Human Rights*. Oxford: Oxford University Press, 2003.
Bieber, Florian. *Post-War Bosnia: Ethnicity, Inequality and Public Sector Governance*. New York: Palgrave Macmillan, 2006.
Burg, Steven, and Paul S. Shoup. *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention*. London: M. E. Sharpe, 1999.
Caplan, Richard. "International Authority and State Building: The Case of Bosnia and Herzegovina." *Global Governance* 10 (2004): 53–65.
Carrubba, Clifford James. "A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems." *Journal of Politics* 71, no. 1 (2009): 55–69.
Choudhry, Sujit., ed. *Constitutional Design for Divided Societies: Integration or Accommodation?* Oxford: Oxford University Press, 2008.
Choudhry, Sujit, and Richard Stacey. "Independent or Dependent? Constitutional Courts in Divided Societies." In *Rights in Divided Societies*, edited by Colin Harvey and Alex Schwartz, 123–50. Oxford: Hart, 2012.
Delaney, Erin. "Analyzing Avoidance: Judicial Strategy in Comparative Perspective." *Duke Law Journal* 66, no. 1 (2016): 1–67.
Dickinson, Laura A. "The Promise of Hybrid Courts." *American Journal of International Law* 97, no. 2 (2003): 295–310.
Dothan, Shai. *Reputation and Judicial Tactics: A Theory of National and International Courts*. Cambridge: Cambridge University Press, 2015.
Dworkin, Ronald. *Law's Empire*. Cambridge, MA: Harvard University Press, 1986.
Dyevre, Arthur. "Unifying the Field of Comparative Judicial Politics: Towards a General Theory of Judicial Behavior." *European Political Science Review* 2 (2010): 297–327.
Edelman, Paul H., David E. Klein, and Stefanie A. Lindquist. "Consensus, Disorder, and Ideology on the Supreme Court." *Journal of Empirical Legal Studies* 9, no. 1 (2012): 129–48.
Ehrlich, Thomas. "Cyprus, the 'Warlike Isle': Origins and Elements of the Current Crisis." *Stanford Law Review* 18, no. 6 (1966): 1021–98.
Enns, Peter K., and Patrick C. Wohlfarth. "The Swing Justice." *Journal of Politics* 75, no. 4 (2013): 1089–1107.
Epstein, Lee, and Tonja Jacobi. "The Strategic Analysis of Judicial Decisions." *Annual Review of Law and Social Science* 6 (2010): 341–58.
Epstein, Lee, and Jack Knight. *The Choices Justices Make*. Washington, DC: CQ Press, 1998.
Epstein, Lee, Jack Knight, and Olga Shvetsova. "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government." *Law and Society Review* 35, no. 1 (2001): 117–64.
Epstein, Lee, William M. Landes, and Richard A. Posner. *The Behavior of Federal Judges*. Cambridge, MA: Harvard University Press, 2013.
EU Delegation to Bosnia and Herzegovina. *Flash Report: Non-Execution of the BiH Constitutional Court Decisions*. Brussels: European Union, 2015.
Everly, Rebecca. "Assessing the Accountability of the High Representative." In *Deconstructing the Reconstruction: Human Rights and Rule of Law in Postwar Bosnia and Herzegovina*, edited by Dina F. Haynes, 79–114. Aldershot, UK: Ashgate, 2008.
Feldman, David. "The Independence of International Judges in National Courts: Lessons from Bosnia and Herzegovina." In *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges*, edited by Shimon Shetreet and Christopher Forsyth, 215–29. Leiden: Martinus Nijhoff/Brill, 2011.
Ferejohn, John. "Judicializing Politics, Politicizing Law." *Law and Contemporary Problems* 65 (2002): 41–68.
Fischman, Joshua B., and Tonja Jacobi. "The Second Dimension of the Supreme Court." *William and Mary Law Review* 57 (2016): 1671–1715.
Fischman Joshua B., and David S. Law. "What Is Judicial Ideology, and How Should We Measure It?" *Washington University Journal of Law and Policy* 29 (2009): 133–214.
Fukuyama, Francis. "'Stateness' First." *Journal of Democracy* 16, no. 1 (2005): 84–88.

Ginsburg, Tom. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge: Cambridge University Press, 2003.
——. "In Defense of Imperialism? The Rule of Law and the State-Building Project." In *Nomos: Getting to the Rule of Law*, edited by James E. Fleming, 224–40. New York: New York University Press, 2011.
Graziadei, Stefan. "The Unconstitutional Holiday: Bosnian Constitutional Court Annuls Serb Republic Day." *Verfassungsblog*, December 1, 2015. http://verfassungsblog.de/?p=11973.
——. "Six Models for Reforming the Selection of Judges to the BiH Constitutional Court." 2016. On file with author.
Grewe, Constance, and Michael Riegner. "Internationalized Constitutionalism in Ethnically Divided Societies." *Max Plank Yearbook of United Nations Law* 15 (2011): 1–64.
Grofman, Bernard, and Timothy J. Brazill. "Identifying the Median Justice on the Supreme Court Through Multidimensional Scaling: Analysis of 'Natural Courts' 1953–1991." *Public Choice* 112 (2002): 55–79.
Keil, Soeren. *Multinational Federalism in Bosnia and Herzegovina*. London: Routledge, 2016.
Knaus, Gerhard, and Felix Martin. "Lesson from Bosnia and Herzegovina: Travails of the European Raj." *Journal of Democracy* 14, no. 3 (2003): 60–74.
Kulenović, Nedim. "The Bosnian Constitutional Court as a Policy Maker." 2016. On file with author.
Law, David S. "A Theory of Judicial Power and Judicial Review." *Georgetown Law Journal* 97 (2009): 723–801.
Macfarlane, Emmett. *Governing from the Bench: The Supreme Court of Canada and the Judicial Role*. Vancouver: UBC Press, 2013.
Marko, Joseph. "Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance." *European Diversity and Autonomy Papers* 7 (2004): 1–39.
Martin, Andrew D., and Kevin Quinn. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the US Supreme Court, 1953–1999." *Political Analysis* 10, no. 2 (2002): 134–53.
Martin, Andrew D., Kevin Quinn, and Lee Epstein. "The Median Justice on the United States Supreme Court." *North Carolina Law Review* 83, no. 5 (2005): 1275–1322.
McCrudden, Christopher, and Brendan O'Leary. *Courts and Consociations: Human Rights Versus Power-Sharing*. Oxford: Oxford University Press, 2013.
McGarry, John, and Brendan O'Leary, eds. *The Politics of Ethnic Conflict Regulation: Case Studies of Protracted Ethnic Conflicts*. London: Routledge, 2013.
Office of the High Representative (OHR). *Comprehensive Judicial Reform Strategy for Bosnia and Herzegovina*. Sarajevo: OHR, 1999.
Posner, Eric A., and Miguel F. P. de Figueiredo. "Is the International Court of Justice Biased?" *Journal of Legal Studies* 34 (2005): 599–629.
Posner, Richard A. "Realism About Judges." *Northwestern University Law Review* 105, no. 2 (2011): 577–86.
Qerimi, Donikë. "Kosovo Constitutional Court Debate: Instead of a Reply—Comparing Apples and Oranges." *South East Europe Blog*, September 22, 2014. http://eprints.lse.ac.uk/80466/.
Ramet, Sabrina. *Thinking About Yugoslavia: Scholarly Debates About the Yugoslav Breakup and the Wars in Bosnia and Kosovo*. Cambridge: Cambridge University Press, 2005.
Reilly, Benjamin. *Democracy in Divided Societies: Electoral Engineering for Conflict Management*. Cambridge: Cambridge University Press, 2001.
Schwartz, Alex, and Colin Harvey. "Judicial Empowerment in Divided Societies." In *Rights in Divided Societies*, edited by Colin Harvey and Alex Schwartz, 123–48. Oxford: Hart, 2012.
Schwartz, Alex, and Melanie Murchison. "Judicial Impartiality and Independence in Divided Societies: An Empirical Analysis of the Constitutional Court of Bosnia-Herzegovina." *Law and Society Review* 51, no. 4 (2016): 821–55.
Staton, Jeffery K. *Judicial Power and Strategic Communication in Mexico*. Cambridge: Cambridge University Press, 2010.
Staton Jeffery K., and Georg Vanberg. "The Value of Vagueness: Delegation, Defiance, and Judicial Opinions." *American Journal of Political Science* 52, no. 3 (2008): 504–19.
Stromseth, Jane, David Wippman, and Rosa Brooks. *Can Might Make Rights?: Building the Rule of Law After Military Interventions*. Cambridge: Cambridge University Press, 2006.

Tolksdorf, Dominik. "The European Union as a Mediator in Constitutional Reform Negotiations in Bosnia and Herzegovina: The Failure of Conditionality in the Context of Intransigent Local Politics." *Nationalism and Ethnic Politics* 21, no. 4 (2015): 401–21.

Tsebelis, George. *Veto Players: How Political Institutions Work*. Princeton, NJ: Princeton University Press, 2002.

Vanberg, Georg. *The Politics of Constitutional Review in Germany*. Cambridge: Cambridge University Press, 2005.

——. "Constitutional Courts in Comparative Perspective: A Theoretical Assessment." *Annual Review of Political Science* 18 (2015): 167–85.

Voeten, Erik. "The Impartiality of International Judges: Evidence from the European Court of Human Rights." *American Political Science Review* 102, no. 4 (2008): 417–33.

Whittington, Keith. "Legislative Sanctions and the Strategic Environment of Judicial Review." *International Journal of Constitutional Law* 1, no. 3 (2003): 446–74.

Yakinthou, Christella. *Political Settlements in Divided Societies: Consociationalism and Cyprus*. London: Palgrave Macmillan, 2009.

Young, Simon N. M., Antonio da Roza, and Yash Ghai. "Genesis of Hong Kong's Court of Final Appeal." In *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong*, edited by S. M. N. Young and Y. Ghai, 121–44. Cambridge: Cambridge University Press, 2014.

CASES CITED

Constitutional Court of Bosnia-Herzegovina

AP-953/05 (July 8, 2006).
U-1/11 (July 13, 2012).
U-3/12 (November 26, 2015).
U-3/13 (November 26, 2015).
U-5/98III (July 1, 2000).
U-5/98IV (August 19, 2000).
U-6/06 (March 29, 2008).
U-9/00 (November 3, 2000).
U-9/09 (November 26, 2010).
U-10/14 (July 4, 2014).
U-14/12 (March 26, 2015).
U-15/08 (July 3, 2009).
U-15/09 (March 27, 2010).
U-16/00 (February 2, 2001).
U-19/01 (November 2, 2001).
U-25/00 (March 23, 2001).
U-26/01 (September 28, 2001).

European Court of Human Rights

Sejdić and Finci v. Bosnia and Herzegovina (application nos. 27996/06 and 34836/06).

Supreme Constitutional Court of Cyprus

The House of Representatives and the Turkish Communal Chamber, 5 R.S.C.C. 123 (1963).
The Turkish Communal Chamber and the Council of Ministers, 5 R.S.C.C. 59 (1963).