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RESEARCH ARTICLE

Judicial review of supermajority rules governing courts' own decision-making: A comparative analysis

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Abstract

This article provides a comparative analysis of how courts have performed judicial review on supermajority rules governing courts' decision-making. Through an empirical approach, covering the cases of the United States, Peru and Poland, the article argues that the supermajority's legal source and the chronology of its establishment may influence the court's ability to review such rules and the case's outcome. Finally, the article addresses the paradox of whether courts must apply the very provision they are tasked to review.

Keywords: Comparative law; constitutional adjudication; constitutional courts; judicial review; supermajorities; transnational law

I. Introduction

In 2015, Poland's constitutional crisis shocked the world. Amidst democratic backsliding, several amendments were introduced to the Act on the Constitutional Court, attempting to shackle the court. The amendments established, among other rules, a high quorum and a supermajority requirement to make decisions. The amendments seemed directly designed to paralyse the court. The new regulations were challenged, and the Constitutional Court was responsible for reviewing them, a genuine question of *nemo iudex in causa sua*. Can the court review its own regulations? Is the court forced to apply the same rules it is set to review? What influenced the court's decision? The case seemed to be unprecedented. However, as it is often said, there is nothing new under the sun. In 1930, the US Supreme Court reviewed the constitutionality of an analogous rule at the state level, and in 1996 the Peruvian Constitutional Court faced a similar question. Poland, Peru and the United States reached different conclusions about a similar problem.

Constitutional review of supermajority rules happened long before Poland and has occurred since, such as in Georgia in 2016. Even now (2022–23), several amendments are being discussed in Israel, including the proposal of a supermajority, that are considered

potential threats to democracy.[1] It might well be that the Supreme Court of Israel itself would be tasked with deciding whether such new rules are constitutional. Thus, understanding why and how Constitutional Courts have reviewed supermajority rules is critical, not only to interpret recent episodes of illiberal attacks on courts but also to determine the validity of supermajorities in constitutional adjudication itself.

Courts performing judicial review solve constitutional challenges by discussing and voting. It is a common belief that constitutional adjudication entails simple majority voting.[2] However, supermajorities are historically embedded in both the American and the Kelsenian models of constitutional review. In the early 1900s, several states (North Dakota, Ohio and Nebraska) adopted supermajorities in the United States. The Czechoslovakian Constitutional Court, arguably the first Constitutional Court in the world, also employed a supermajority as early as 1920. Even though some initial scholarship was developed, particularly in the United States, supermajorities would lay dormant until the twenty-first century. Works by Shugerman, Caminker, and Gersen and Vermeule[3] cast new light on the American debate. A suggestive paper by Waldron[4] undertook the challenge of turning an internal normative feature of constitutional adjudication into a philosophical debate, and many followed the call.[5] The modern debate centres on the philosophical justification of supermajorities and their theoretical feasibility as alternative models to bare majorities. Studies on the existing supermajorities are still scarce.

This article will compare how courts have performed judicial review on supermajority rules to strike down legislation. Through an empirical approach, I will address the cases of the United States, Peru and Poland (while occasionally invoking other cases), focusing on episodes in which apex and constitutional courts were called to review their own legislation establishing supermajorities. For that purpose, I will mainly compare how the supermajority's legal source and the chronology of its establishment may influence the court's ability to review such rules and the case's outcome. Since courts reviewing their

[1]See Joseph Weiler, 'Israel: Cry, the Beloved Country', Blog of the *International Journal of Constitutional Law*, 28 December 2022, available at <http://www.iconnectblog.com/2023/01/red-lines-for-israels-constitutional-reforms>; Glia Stopler, 'The Israeli Government's Proposed Judicial Reforms: An Attack on Israeli Democracy', *ConstitutionNet*, 16 February 2023, available at <https://constitutionnet.org/news/israeli-governments-proposed-judicial-reforms-attack-israeli-democracy>.

[2]In constitutional adjudication, we tend to use the expressions 'bare majority' or 'simple majority' to designate the agreement of 50 per cent of the judges present plus one judge. Cristóbal Caviedes, 'Is Majority Rule Justified in Constitutional Adjudication?' (2021) 41 *Oxford Journal of Legal Studies* 376, 376. Such a judicial notion actually equals that of an 'absolute majority' employed in a parliamentary sense. A simple majority in parliamentary terms (the biggest plurality) is not present in constitutional adjudication regarding agreeing to the ruling's holding. In many systems, it would be possible to have a simple majority regarding the reasoning of the decision (a plurality opinion), but not its outcome.

[3]By order of mentioning Jed Handelsman Shugerman, 'A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court' (2003) 37 *Georgia Law Review* 893; Evan H Caminker, 'Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past' (2003) 78 *Indiana Law Journal* 73; Jacob E Gersen and Adrian Vermeule, 'Chevron as a Voting Rule' (2007) 116(4) *The Yale Law Journal* 676.

[4]Jeremy Waldron, 'Five to Four: Why Do Bare Majorities Rule on Courts?' (2014) 123 *The Yale Law Journal* 1692.

[5]*Inter alia*, Caviedes (n 2); Guha Krishnamurthi, 'For Judicial Majoritarianism' (2019) 22 *University of Pennsylvania Journal of Constitutional Law* 1201; Pablo Castillo-Ortiz, 'The Dilemmas of Constitutional Courts and the Case for a New Design of Kelsenian Institutions' (2020) 39 *Law and Philosophy* 617; Yaniv Roznai, 'Introduction: Constitutional Courts in a 100-Years Perspective and a Proposal for a Hybrid Model of Judicial Review' (2021) 14 *ICL Journal* 355.

legislation may lead to paradoxes regarding the applicable regulations, the article frames the complexities that courts may face when examining the rules they are bound to apply.

The remainder of the article is structured as follows. In Part II, I present a notion of the elements to consider in the debate regarding the constitutionality of supermajorities. I claim that even though some factors will be related explicitly to the provisions of a given constitution, others will be less normative dependent and easier to consider in a comparative analysis. I centred my study on two factors: the legal source and the chronology of its establishment.

I also argue that when courts perform judicial review of a supermajority, in some instances a paradox may arise as to whether they must apply the very provision they are tasked to review. The dilemma may create an infinitive mirror (a circular debate) in which the question of how to decide on the applicable majority lies at its core. In Part III, I analyse episodes of supermajority control in the United States, Peru and Poland that illustrate in practice some of the theoretical challenges addressed. I provide conclusions and future challenges in Part IV.

II. Supermajorities – but when and how?

The debate on the constitutionality of supermajorities

Studies of supermajorities in constitutional adjudication are primarily theoretical or design-centred. Debates on their constitutionality are advanced discussions that occur more rarely. When analysing the constitutionality of a supermajority requirement many factors should be considered. Undoubtedly some factors will be related specifically to the concrete configuration of the provision establishing the supermajority in a given jurisdiction and its constitutional context. For example, article 190.5 of the Polish Constitution states that decisions of the court shall be made by a 'majority of votes'. However, the meaning of 'majority' [*większość*] can be disputed, and national scholarship may discuss whether 'majority' was intended to mean 'simple majority' or secondary law could define the relevant majority.[6] Those questions are important in deciding the supermajority's constitutionality, but pertain to the realm of Polish constitutionalism and thus are harder to compare across jurisdictions.

On the other hand, some factors are less dependent on normative configurations and thus easier to consider in a comparative debate. Among those factors, one could mention the degree of consensus required by a supermajority[7] (often leading to a paralysis

[6]For example, it would be very relevant to assess whether grammatically the word *większość* in Polish could be so ample as to allow the legislator to choose a qualified majority, if other provisions of the Polish Constitution employ *większość* to mean exclusively a simple majority or if references to a concrete majority were made during the Constitution-making process.

[7]For example, Mexico has an eight out of eleven supermajority, which equals 72 per cent of the court. Peru, in turn, requires five out of seven Judges, which is 71 per cent of the Court (Article 5 of the Organic Law on the Constitutional Court), although it used to require 85 per cent of the Court, or six out of seven (Statute 28301). The Czech Republic requires nine out of fifteen judges (60 per cent). See article 13 of the Constitutional Court Act of 16 June 1993. In turn, South Korea requires a six out of three supermajority (66 per cent). Joon Seok Hong, 'Signaling the Turn: The Supermajority Requirement and Judicial Power on the Constitutional Court of Korea' (2019) 67 *The American Journal of Comparative Law* 177. A six out of three supermajority transitorily introduced in Georgia in 2016 was precisely Shugerman's proposal for the Federal Supreme Court of the United States. Shugerman (n 3).

argument), the legal consequences of failing to achieve it[8] or the way the supermajority establishes the degree of consensus required.[9]

This article will focus on comparing the implications of the supermajority's legal source and the moment of its introduction. Considering examples from the United States, Peru, Poland and occasionally other jurisdictions, I argue that these factors seem to influence the outcome of episodes of judicial review of supermajority rules.

Legal nature of the supermajority

When a legal system introduces a supermajority, it must decide how to do so. Three different sources deserve attention: the Constitution, a law and an administrative regulation/internal rule issued by the court. The first two are the usual legal grounds employed, while the latter is uncommon but has been discussed in the scholarship.

Adopting a constitutional supermajority has several advantages. A constitutional supermajority grants a higher degree of consensus/legitimacy and arguable insulation from judicial review. Suppose the constitution (*ab initio* or via constitutional amendment) creates a supermajority. In that case, such a rule seems to enjoy a broader acceptance among the political actors and key players that drafted the Constitution or have the ability to amend it, also providing much-needed legitimacy to the rule.

Constitutionalizing the rule makes it rather complicated to strike it down. A rule entrenched in the constitution is part of the constitution itself. Many countries do not have explicit substantive limits to constitutional amendments (eternity clauses) and countries that do usually establish amendment limitations related to broader terms such as democracy, human rights, or the form of government, not specific details such as court voting rules. Many countries lacking substantive limits to constitutional amendments do not follow the doctrine of unconstitutional constitutional amendments, and even those that do would find it rather hard to justify striking down a voting protocol. It would be difficult to argue that a simple majority forms a part of the basic structure doctrine[10] or other theory of supra-constitutional principles.

However, constitutional supermajorities also present challenges. They require a high degree of consensus and constitutional momentum to amend the constitution. Furthermore, they could be pretty hard to change or recalibrate if needed. Examples of constitutionally entrenched supermajorities are those from the Dominican Republic (even though it is a decisional supermajority), South Korea, Costa Rica (until 1989), Chile,[11]

[8]For example, the supermajority may allow the minority to write the court's opinion and issue a decision upholding the supermajority (as happens in Nebraska, Peru, the Czech Republic and South Korea) or the court may be unable to render a decision concerning the merits of the case, as in Mexico and Chile.

[9]A supermajority may require a fixed number of votes (as in South Korea, Mexico and the Czech Republic) or a percentage, as the Polish Act on the Constitutional Court did in 2015 (requiring two out of three). A fixed number of votes provides certainty but increases the majority if any judges are absent. In turn, the percentages/fractions are flexible but still raise doubts about their utility when they do not produce integer numbers.

[10]See Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press, Oxford, 2019) 151. On the theory of unconstitutional constitutional amendments, see Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, Oxford, 2017).

[11]Chile employs a supermajority of 80 per cent. Even the failed draft of the proposed Chilean new constitution maintained the supermajority.

Mexico and, at the state level, all of the US supermajorities (Nebraska, North Dakota, South Carolina and Ohio, even though the last of these was repealed in 1968).

The second usual source is an 'ordinary law', meaning any normative act issued by Congress (an ordinary statute, an organic law, a general law).[12] Can a statute define a voting protocol differently from a simple majority? In the American case, Caminker argues that if 'the constitutional text is silent with respect to judicial voting protocols, the Constitution leaves open the possibility of deviations from majoritarianism rather than implicitly imposes it in rigid fashion'.[13] The remark seems to be true in other jurisdictions. Suppose a constitution does not set a majority, and Congress enjoys the power to regulate the court. In that case, it may be able to modify or determine certain aspects of the court's voting protocol. Furthermore, some voting protocols have features that deviate from simple majorities in comparative law, such as a casting vote or upholding judgments/statutes in case of a tie.[14]

Statutory supermajorities require much less consensus than a constitutional amendment, thus granting Congress relatively greater freedom in their configuration: they are more flexible and easier to recalibrate. When Peru diminished its supermajority from six out of seven to five out of seven, it did not need to amend the constitution.

However, ordinary legislation possesses less consensus than the constitution, and the introduction of a legislative supermajority always produces a legitimacy question. Furthermore, ordinary legislation, being hierarchically inferior to the constitution, is subject to judicial review. Statutory supermajorities may be challenged through constitutional review. That does not mean they will always be found unconstitutional (as proven by the cases of Peru and the Czech Republic). However, it does mean they will undergo very intense scrutiny. Examples of legislative supermajorities are Peru (1995), Taiwan (1958–22), Poland (2015–16), Georgia (2016) and the Czech Republic (1993).

I have covered the usual normative sources. It is true that, theoretically, we could imagine a court self-imposing a supermajority as an internal rule (such as the 'rule of four' in the United States regarding certiorari admission), as Caminker[15] and Shugerman argue.[16] We could also imagine not the court, but individual judges, making an internal rule no Sadurski (n 33) 73t to vote in favour of a statute's unconstitutionality unless a supermajority has been reached. That is an unlikely scenario.

[12]In statutory supermajorities, a relatively common discussion will arise on the power of Congress to issue such legislation and whether or not a supermajority may be deemed constitutional on competence grounds. Even though this discussion is closely linked to actual normative provisions of each constitution, many constitutions are silent on such topics, and the discussion would instead be a general one in which arguments apply across jurisdictions.

[13]Evan H Caminker, 'Playing with Voting Protocols on the Supreme Court [Unpublished Draft]' (2002) 18.

[14]Both cases are examples of non-majoritarian decisions. In Germany, it would be possible to uphold a law without having a majority (article 15 of the *Bundesverfassungsgerichtsgesetz*). In Spain, Belgium or Italy, it would be possible to strike down a law even if the result is a tie (through a casting vote). Since many countries seem to have no problem allowing courts to issue non-majoritarian decisions in some cases, they must deem that majority rule is not an inflexible principle. I understand that those examples constitute impasse-breaking rules. However, they still allow courts in certain cases to issue decisions and doctrine under non-majoritarian conditions.

[15]Caminker (n 13) 20. Caminker makes a very compelling case that, in the United States, the Supreme Court could establish a supermajority under the notion of inherent authority.

[16]Shugerman envisioned that an internal supermajority rule would be the most adequate in the American case. Shugerman (n 3) 966.

Judges may consider supermajorities as constraints on the court's powers, and courts tend to interpret such limitations narrowly.[17] Of all supermajorities, not even one has been self-imposed by the court, although a close example exists in the Peruvian Constitutional Court concerning a type of constitutional complaint *[recurso de agravio constitucional*]. The court's law only requires a supermajority to solve cases concerning the unconstitutionality of a law and says nothing about a supermajority in the *recurso de agravio constitucional.* In the Belmont Sanguesa case,[18] the court faced a complicated challenge as a three-three tie arose after a judge recused himself due to a conflict of interest. Unable to uphold or strike down the ruling, the court resorted to an analogical interpretation of the supermajority with a different type of case and struck out the claim. The Belmont Sanguesa case, which did not entirely create a supermajority but extended a rule applying it broadly to other hypotheses,[19] is a close example of a court's self-imposed supermajority.

Chronology of the amendment

Supermajorities in constitutional adjudication are seen as institutionalized restraints on courts[20] to force deference to the elected branches,[21] often relating to Bickel's[22] countermajoritarian difficulty.[23] Based on the case studies, I argue that a correlation may be observed between the chronology of an amendment and the result of its judicial review by the court itself. In this section, I will first discuss the moments in which a supermajority may be introduced through a comparative analysis of several jurisdictions. I will then briefly relate the possible implications of this comparative research to future studies on strategic judicial behavior.

There are three chronological moments in which a supermajority may be established: (1) the court's creation; (2) a pivotal moment of redefinition; and (3) an ordinary moment ex-post the court's creation.

Establishing a supermajority at the same time as the court itself fosters the least amount of court adverse reaction toward the supermajority. South Korea, the Czech Republic, the Dominican Republic and Peru are examples of constitutional and statutory supermajorities that were introduced with the court itself. Since the rule was imposed before the court functioned, that may have helped its acceptance.

South Korea experienced various forms of judicial review in the past, and even briefly had a Constitutional Court in the Second Republic (1960–62). However, the Constitutional Court was subsequently replaced by a Supreme Court in the Third Republic and a Constitutional Committee in the Fourth (1980–87) and Fifth (1980–87) Republics. The 1987 constitutional revision reinstated the Constitutional Court. It was a moment of

[17]Gersen and Vermeule argue that, 'Perhaps courts are simply hostile to nonmajority voting rules or hold some deep belief that voting rules are not a permissible part of the judiciary tool set.' Gersen and Vermeule (n 3) 726.

[18]Ruling No. 04664-2007-PA/TC, 28 January 2009.

[19]However, the Belmont Sanguesa rule was somewhat problematic, as the court recognized in ruling 00228-2009-PA/TC. The court subsequently amended its internal regulation and introduced a casting-vote rule for such scenarios, returning the supermajority rule to its original scope.

[20]Castillo-Ortiz (n 5) 639.

[21]Shugerman (n 3) 1011; Caminker (n 3).

[22]Alexander M Bickel, *The Least Dangerous Branch* (Yale University Press, New Haven, CT, 1962).

[23]Caviedes (n 2).

democratic transitioning that guaranteed consensus by creating a Constitutional Court vested with a supermajority requirement, which the court promptly accepted. The Dominican Republic traversed a similar path. The 2010 Constitution of the Dominican Republic introduced a Constitutional Court and required a supermajority that became integral and grew into the system.[24]

Statutory supermajorities, being significantly weaker than constitutional supermajorities, substantially increase their chances of acceptance if introduced at the same time as the court itself. Peru and the Czech Republic are good examples. The 1993 Constitution created the Peruvian Constitutional Court; however, under the 1979 Constitution, a similar court existed: the so-called Constitutional Guarantees Tribunal. The 1979 Constitution did not establish the type of required majority. Article 8 of the Organic Law 23385 on the Constitutional Guarantees Tribunal adopted a supermajority of six votes [out of nine members] in cases pertaining to the unconstitutionality of a statute or the rejection of a claim. When the 1993 Constitution established a Constitutional Court, it did not provide for a simple majority. A heavily politicized pro-Fujimori Congress returned to its old statutory tradition and reinstated a six out of seven supermajority in article 4 of the Organic Law 26435 on the Constitutional Court. Even though this provision was challenged, the Constitutional Court confirmed its validity in 005-96-I/TC, and a consensus was formed on the law's constitutionality. Years later, Peru would lower the voting threshold, maintaining a supermajority (five out of seven) without constitutional challenges. Peru has grown past Fujimori, but the supermajority remains.

The 1993 Constitution of the Czech Republic created a Constitutional Court. Previously, constitutional courts had existed in the distant 1920–39 interwar era (even functioning under a supermajority)[25] and, more recently, in the 1968 Constitutional Act on Czechoslovak Federation, although such a court was never established.[26] The 1993 Constitution instated a fifteen-member Constitutional Court and did not provide a specific majority. The legislator introduced a supermajority to strike down legislation in §13 of the Constitutional Court Act (182/1993 Sb). The supermajority raises doubts about its nature and consequences, but no dispute on its constitutionality emerged before the Constitutional Court. Even though the supermajorities of Peru and the Czech Republic lacked constitutional support, their coetaneous establishment with their Constitutional Courts made them easier to accept and to become a part of their constitutional culture. The result could have been very different if Peru or the Czech Republic had begun operating under simple majorities and then switched to supermajorities via a statute.

A second similar possibility is establishing a supermajority in a pivotal time of court transformation. Mexico is an excellent example of this. From 1917 to 1994, Mexico had a

[24]In 2021, the President of the Dominican Republic presented a constitutional amendment proposal that suggested lowering the majority in individual complaints but maintaining the supermajority in the most important procedures. Even though many agreed with the amendment, even former Constitutional Court judges (such as Judge Katia Miguelina) openly advocated against eliminating the supermajority. In the Dominican discussion, some have defended the supermajority rule as necessary for consensus-building. Eduardo Jorge Prats, Luis Sousa Duvergé and Roberto Medina Reyes, 'Informe Sobre El Anteproyecto de Ley Que Declara La Necesidad de Reforma Constitucional' (Jorge Prats – Abogados & Consultores, Santo Domingo, 2022).

[25]Jana Osterkamp, *Verfassungsgerichtsbarkeit in der Tschechoslowakei (1920–1939): Verfassungsidee, Demokratieverständnis, Nationalitätenproblem* (V Klostermann, 2009) 68.

[26]David Kosař and Ladislav Vyhnánek, 'The Constitutional Court of Czechia' in Armin von Bogdandy, Peter Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions* (Oxford University Press, Oxford, 2020) 126.

system of constitutional review through individual complaints (*amparo*). All rulings, however, had *inter partes* effect.[27] Following a democratizing wave, Mexico transformed the Supreme Court in 1994, reinforced its independence[28] and granted it the ability to strike down legislation with *erga omnes* effects, provided that an eight out of eleven supermajority was reached. The amendment granted pluralistic participation and implied creating an impartial arbiter of political disputes. Legislators immediately passed a new statute regulating the new court proceedings. The statute seemingly expanded the premises that required a supermajority in constitutional controversies. The court was eager to apply the statute even if the constitution did not strictly provide for a supermajority in the cases regulated by law.[29] Afterwards, a robust political consensus emerged on supermajorities. No serious discussion has emerged on changing the voting protocols. The fact that the supermajority was introduced in such a crucial time in which the court was granted new powers and its role was redefined helped the court not only to accept the constitutional curtailment but also to be deferent with the arguable expansion of the supermajority premises. This type of amendment, which redefines a court and enjoys pluralistic participation of the political forces, resembles the constituent moment described in the above hypothesis. If the Mexican Congress were today to introduce a statutory supermajority on the existing *inter-partes* procedures, the court most likely would reach different conclusions.

Finally, the last possible moment is what I call an ordinary moment ex-post the court's creation. Political actors or legislators may alter the court's majority requirement at 'ordinary times'. Such changes rarely come out of a simple theoretical idea. They are often based on conceptions about forcing judicial restraint, judicial deference, or enforcing a Thayerean presumption of constitutionality. They might also be part of political attacks on the courts or abusive constitutional borrowing. Even though it is very likely that ordinary moments feature abusive attacks on the courts (such as the cases of Poland or Georgia), they can also be the product of legitimate debate (as occurred in Ohio). Courts facing such changes in ordinary moments feel constrained. They do have a reference point to look back to when simple majorities reigned. Qualified majorities at non-pivotal times do not come with new powers (as in the case of Mexico). Therefore, courts cannot evaluate such rules as a compromise towards new arrangements. Supermajorities introduced in such times will face not only scrutiny but mistrust from courts.

The Polish (2015) and Georgia (2016) cases are good examples of this. In Poland, a clash between the salient parliamentary majority (Platforma Obywatelska – PO) and the incoming parliamentary majority (Prawo i Sprawiedliwość – PiS) over the appointment of judges to the Constitutional Court resulted in a constitutional crisis.[30] PiS introduced a new law on the Constitutional Court designed to limit its functioning. The supermajority came in a highly politicized moment by a parliamentary majority frontally attacking the court and did not come alone, as other provisions also had a paralysing potential. It can hardly be a surprise that the court was particularly hostile to the amendment and struck down the provision in the K 47/15 judgment.

[27]Mauro Arturo Rivera León, 'An Introduction to '*Amparo*' Theory: A Complex Mexican Constitutional Control Mechanism' (2020) 12 *Krytyka Prawa* 190, 196.

[28]Stephen Zamora and José Ramón Cossío, 'Mexican Constitutionalism After Presidencialismo' (2006) 4 *International Journal of Constitutional Law* 411, 421.

[29]Suprema Corte de Justicia de la Nación [SCJN], Controversia Constitucional [CC] 66/2002.

[30]For a more comprehensive analysis of the context, see section III, subsection C.

Georgia faced a similar scenario in 2016. An extensive amendment was introduced, changing several regulations of the Constitutional Court. As in the Polish case, the amendment modified many aspects, such as the rules of quorum and voting, the election of the court's president and the term of office of its members, among other issues. The president initially vetoed the law,[31] but it was finally approved and published after some changes. The law introduced a six out of three supermajority to declare the unconstitutionality of organic laws. The amendments were hasty,[32] little discussed and widely criticized by civil society. The legislation, supported by the government (Georgian Dream – Democratic Georgia), intended to ensure a broader influence on the Constitutional Court and weaken its constitutional scrutiny capabilities. The court, accustomed to simple majorities, was very sceptical of the supermajority and felt its autonomy was under direct attack. Since the parliamentary majority was allowed through new appointments to substantially change the Constitutional Court's composition in a favourable way, similarly to the Polish case,[33] the political pressure to uphold the law might have faded away. The court struck down the law.[34] The ruling declared that a simple majority was the constitutionally required voting protocol to guarantee the best result in a case (an epistemological argument). The court's reshaping through appointments may explain why the ruling's tone[35] was moderated and cautious,[36] despite striking down the provisions. Due to the new appointments, the court that struck down the law was not the court that was initially destined to be constrained by it.

The chronology of the amendments was relevant in the Polish and Georgian cases. Regardless of their constitutionality, both statutory supermajorities were introduced ex-post the ordinary functioning of the Constitutional Court at times of political conflict. The rulings' tone results from the courts not only analysing normative provisions but also fending off direct attacks against their autonomy. Would the court's analysis have been so aggressive if the Polish legislator had adopted a supermajority in the first Act on the Constitutional Court after the 1993 Constitution? Under remarkable political consensus, could it have even been deferent to the Constitution's broad wording and meanings of 'majority'? Had the Georgian Constitutional Court started functioning under a statutory supermajority, would it have rushed to declare that simple majorities are the only constitutionally admissible mechanism even absent any constitutional provision?

[31]The President petitioned an opinion from the Venice Commission to determine if he should veto the law. Just as in the Polish case, the Commission was highly critical of the supermajority. See Venice Commission, 'Preliminary Opinion 849/2016 on the Amendments to the Organic Law on the Constitutional Court and to the Law on Constitutional Legal Proceedings' (Venice Commission 2016) CDL-PI(2016)005 8.

[32]Eirik Holmøyvik and Anne Sanders, 'A Stress Test for Europe's Judiciaries' (2020) 1 *European Yearbook of Constitutional Law* 289, 296.

[33]In Poland, as soon as PiS was able to achieve a majority of judges in the Constitutional Court, it lost interest in establishing a supermajority. Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, Oxford, 2019) 81. The legislator actually returned to a simple majority itself.

[34]Constitutional Court of Georgia, decision N3/5/768,769,790,792, 26 December 2022.

[35]The decision did not even fully reject supermajorities. It recognized that they could be required for systemic constitutional problems of great importance, but not as a general rule as the statute demanded. See N3/5/768,769,790,792, part II, para. 115.

[36]Georgia's Constitutional Court is composed of nine judges. When the challenge against the amendment was filed (13 June 2016), the court's composition was not favourable to the parliamentary majority. On 30 September 2016, four new judges were appointed to the court by the parliamentary majority. At the time, it was perceived that these appointments allowed the majority to achieve a solid six-judge majority in the Constitutional Court.

Chronology matters even in the case of constitutional supermajorities. Ohio introduced a supermajority in 1912, not through a statute but by a constitutional amendment. The amendment came as a reaction to Ohio's Supreme Court's conservative judicial activism, invalidating workers' legislation and legislation issued to regulate abusive practices.[37] State Supreme Courts can strike down state law for infringing the state's constitution or the federal Constitution. However, state Supreme Courts tend to avoid striking down provisions of their state constitutions, as they are their foundational documents. Given that Ohio's Supreme Court had previously been able to determine a statute's unconstitutionality by a simple majority, unsurprisingly, it heavily opposed the new supermajority. The court could have tried to argue that the state constitutional provision violated the federal Constitution, but it never did. However, it felt so strongly about the matter that *obiter dicta* devoted considerable time to complaining about the requirement in its decisions. The court knew its opinion was irrelevant if the rule was not unconstitutional, but could not hold back. For example, in *Jones v Zangerle*,[38] Ohio's Supreme Court declared that the members of the court 'deplore such a constitutional provision' and deemed that the supermajority 'permits judicial control over grave constitutional questions by a minority vote.' In *Board of Education v Columbus*, the court again attacked the supermajority, saying that it placed the court in 'an unenviable, not to say ridiculous light before courts and lawyers of other states'.[39] The strong wording ensured that everyone knew the court did not just mistrust the rule, it abhorred it, and the court often tried to defy the rule by evading its application.[40]

Ohio shows that even if a supermajority is introduced at a constitutional rather than statutory level, it will likely draw animosity from the court. The amendment was not passed at a pivotal constitutional moment but rather an ordinary one, and the court perceived that it was being attacked and shackled, and so reacted.

In contrast to the legal source of the supermajority, the chronology is a non-normative factor. The fact that case studies seem to show a potential degree of correlation between the chronology of establishing supermajority rules and their constitutionality as solved by courts in concrete cases may also be relevant to theories on strategic accounts of judging. Voting rules are a fertile example for a strategic account of judicial behavior as they modify what Epstein and Knight call the internal and external dimensions of judging.[41] New voting rules may alter the ability of the court's members to interact with other branches (by establishing stronger consensus requirements to strike down legislation). Furthermore, changing voting protocols modifies the court's internal mechanics by requiring superior consensus for decision-making, creating new deliberation dynamics and altering the influence of single votes depending on the judges' preferred outcome.

Since Epstein and Lee published their classic study on the strategical account of decision-making,[42] a rich literature has developed on how judges may behave strategically. Even

[37]Jonathan L Entin, 'Judicial Supermajorities and the Validity of Statutes: How Mapp Became a Fourth Amendment Landmark Instead of a First Amendment Footnote' (2002) 50 *Case Western Law Review* 441, 443.

[38]*State ex rel. Jones v Zangerle*, 117 Ohio ST. 507, 159 N.E. 564 (1923).

[39]60 N.E. 902 (Ohio 1928).

[40]Edwin O Stene, 'Is There Minority Control of Court Decisions in Ohio?' (1935) 9 *University of Cincinnati Law Review* 23, 32.

[41]Robert M Howard and Kirk A Randazzo (eds), 'Strategic Accounts of Judging', in Robert M Howard and Kirk A Randazzo (eds), *The Routledge Handbook of Judicial Behavior* (Routledge, London, 2018) 50.

[42]Lee Epstein and Jack Knight, *The Choices Justices Make* (CQ Press, Washington, DC, 1997).

though initially an attitudinal model mainly accounted for policy preference, more sophisticated discussions of several factors have evolved, such as job satisfaction, external satisfaction, leisure, salary and promotion.[43]

Further analysis of strategic judicial behavior may employ case studies such as this one to assess why (if at all) judicial preferences seemed to align easier with supermajorities in foundational and pivotal moments but not in ordinary moments *ex post* the court's creation. Several explanations could be explored, such as the likelihood of retaliation by elected branches[44] or the fact that political actors may have succeeded in creating a court that is ideologically close to governmental policy in those moments.[45] A possible hypothesis to test in future studies could be that, aside from their objective legal criteria, Constitutional Court judges, feeling that supermajority rules are a reaction to judicial decisions, view them as endangering their chance to maximize policy preference[46] or as threatening the court's position.[47]

A game of mirrors: the reflections of two majorities

Constitutions tend to loosely regulate a court's competences and procedures. Generally, constitutions directly or implicitly delegate authority to Congress to issue legislation regulating the proceedings before the court. Such laws enjoy a special status regarding the court's functioning and are a tool for judicial review. Courts apply not only the constitution but also such legislation while adjudicating. The constitutional court legislation's instrumentality is precisely why its constitutional review presents particular challenges. Supermajorities are no exception, presenting even further complications. Voting rules are not just provisions that the court commonly applies but a systemic feature that affects the outcome of every case. What happens when a supermajority (a decisional tool) has to be analysed through judicial review?[48]

There are two scenarios. The first would be the introduction of a supermajority via statute that amends a simple majority while providing a sufficient *vacatio legi*s for the court to control the supermajority under the salient provisions. In this scenario, a court would be able to analyse whether a supermajority conforms to its constitution without the paradox of having to control and apply the provision simultaneously. I know no scenario in which this has occurred.

[43]Lee Epstein and Jack Knight, 'Reconsidering Judicial Preferences' (2013) 16 *Annual Review of Political Science* 11.

[44]Jeffrey A Segal, Chad Westerland and Stefanie A Lindquist, 'Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model' (2011) 55 *American Journal of Political Science* 89.

[45]A hypothesis explored by several authors, *inter alia*, by Christoph Hönnige, 'The Electoral Connection: How the Pivotal Judge Affects Oppositional Success at European Constitutional Courts' (2009) 32 *West European Politics* 963.

[46]This factor is placed under 'job satisfaction' by Epstein and Knight. See Epstein and Knight (n 43) 19.

[47]Diverging from an attitudinal approach, Tiede claims that one of the many divergent interests of judges might be to strengthen the role of the Court. Lydia Brashear Tiede, *Judicial Vetoes: Decision-Making on Mixed Selection Constitutional Courts* (Cambridge University Press, Cambridge, 2022) 7, available at <http://www.cambridge.org/core/product/identifier/9781009058254/type/book>.

[48]As I argued in previous sections, submitting a constitutional supermajority to judicial review is difficult. In this section, I consider only challenges to statutory supermajorities.

The introduction via amendment of a statutory supermajority lacking *vacatio legis* or an *ab initio* introduction of a statutory supermajority constitutes a second scenario that is much harder than the previous one. In both cases, the court faces the seemingly unavoidable paradox of having to apply the statute it is tasked to control. Introducing the supermajority by an amendment without *vacatio legis* might indeed be a direct attempt to prevent the court from effectively performing a constitutional review of the provision, or at least guaranteeing that the revision would already face a stronger majority standard (as it was perceived in Poland in 2015 and Georgia in 2016). The paradox arises in even a purer form when the supermajority is introduced statutorily at the very creation of the constitutional court, as in the cases of Czechoslovakia (1920), Peru (1994) and the Czech Republic (1993) before the court had even used any majority at all. Since introducing a supermajority at the beginning of the court's functioning is a legitimate option, one must conclude that the fact that a court is unable to analyse new supermajority rules through simple majority rules does not always constitute instances of abusive attacks on courts. It can be a genuine consensus on the requirement or can stem from the way a court was created.

In this hypothesis, a court seemingly faces two possibilities: it determines that the supermajority must be applied (such as Peru concluded) or concludes that the court may refrain from applying such provision even though it is binding law enjoying a presumption of constitutionality. Applying the supermajority (as Peru did) is not unreasonable. The court confirms it is bound by its legislation, and issuing a supermajority decision striking down the statute or a simple majority decision upholding it will render a robust legitimate decision according to the new consensus standards. The risk, nonetheless, is that failing to reach the supermajority will result in a questionable ruling, particularly in cases in which political forces made evident that the supermajority was a form of abusive constitutional borrowing calculated to paralyse the court. Likewise, in the case of a frontal attack on courts, even successfully striking down a supermajority while deeming it applicable might hint to political actors that the bar was set too low, encouraging further constraints.

The second possibility would be to consider the supermajority non-applicable (as Poland did). However, which majority should the court employ then? A simple majority?[49] And if so, why? Should the court presume that a simple majority is embedded in the constitution? Should the court temporarily bring the old statute back to life? In the case where a supermajority was statutorily established *ab initio* at the same time as the court itself (as in the Czech Republic or Peru), there is not even a previous majority to resort to. In such a case, refraining from applying the supermajority would imply that the court would have to create its own rule.

The paradoxes continue. Determining the applicable rule is not a minor procedural decision: it can change the case's outcome. The matter might cause internal disputes among the judges. How should they solve which majority to apply while refraining from applying the current rule? By a simple majority or by a supermajority? The non-application of the supermajority might seem like the most natural option but may create an infinity mirror (a circular debate), in which the matter of which majority to use replicates itself *ad perpetuam*. If the court finds unanimously (or by a supermajority) that

[49]Perhaps this was Shugerman's idea. He concluded that if Congress were to introduce a supermajority in the American case 'the Supreme Court might strike it down, perhaps with poetic justice by a vote of five-to-four'. Shugerman (n 3).

the decisional rule for the case should be a simple majority, the case will be settled. But it may also occur that there is substantial disagreement among the court members as to the method itself of choosing a decisional majority. In such a case, it could even happen that both positions hold enough votes to validly assert they constitute a decisional group (a simple majority could argue they are entitled to decide while a minority relevant enough to block the challenged supermajority could claim that they hold the votes necessary not to allow a simple majority to circumvent the supermajority decisional rule). Deciding on the method to solve the challenge is probably deciding the challenge itself.

There is one last option that could be considered. If a unanimous or very strong majority decision is reached (surpassing the supermajority), a constitutional court could decide to be silent on the matter. If the voting makes it irrelevant whether or not the controlled provision was applicable, why issue a broad rather than a narrow decision? A court could merely decide the case without referring to the rule's applicability and delegate such question to the necessary occasion in which the rule itself would alter the case's outcome. In the Georgian case, the plaintiff asked the court to refrain from applying the supermajority when challenging the supermajority. Parliament replied that, given the presumption of unconstitutionality, the court should solve the constitutional challenge by employing the supermajority.[50] Even though the Georgian Constitutional Court narrated both arguments, it did not address the matter but unanimously struck down the provision by a nine-to-nil vote.

Of course, such an option is only available in the best scenario in which a strong consensus emerged in a court to strike down the provision or uphold it. Although this position seems possible, only the Georgian Constitutional Court employed it. The Peruvian Constitutional Court had the option but could not refrain from determining that the rule was applicable, even though a majority upheld it. The Polish Constitutional Court categorically stated that it would refrain from applying the supermajority, even though a supermajority of its members voted to strike it down.[51]

III. The experiences in the United States, Peru and Poland

The United States experience: Ohio v Akron Park District[52]

The United States is the birthplace of supermajorities in judicial review. At the beginning of the twentieth century, South Carolina (1895, although in a hybrid variation), Ohio (1912), North Dakota (1919) and Nebraska (1920) adopted supermajority rules.[53] Of those supermajorities, only Ohio's faced judicial review.

[50]See N3/5/768,769,790,792, Part I, parr. 80 (for the Parliament) and Part II, parr. 93 and 95 (for the plaintiff).

[51]Several factors account for this decision, mainly the way in which the majority and quorum rule were related and established in a single provision (making it harder for the court to isolate the provision). See section II subsection C).

[52]281 U.S. 74 (1930).

[53]At the federal level there were several unsuccessful proposals. As Caminker showed, historically, more than 60 legal and constitutional amendments have been proposed to the Supreme Court. Caminker (n 3) 117–22. Recently, Biden's Presidential Commission also considered the issue. Presidential Commission on the Supreme Court of the United States, *Final Report* (2021) 169–82, available from <https://www.whitehouse.gov/pcscotus>.

A peculiar supermajority

The 1912 Ohio supermajority[54] required six out of seven justices (85 per cent) to determine the unconstitutionality of a statute. However, a simple majority sufficed to uphold a judgment of an appeals court that determined a statute's unconstitutionality. Stene argued that the problems of Ohio's majority 'have arisen primarily, if not entirely, out of the incidental provision which increased the power of the courts of appeal to invalidate acts of the legislature'.[55] Many years later, Zellmer and Miller concurred by stating that 'many of the problems were a result of Ohio's unique court structure and how the lower courts of appeal ruled on challenged statutes'.[56] The rule's design created a peculiar imbalance where the majority changed *vis-à-vis* the appeal ruling. The mobile configuration and not only the supermajority itself were seen as problematic.

Given that the state Supreme Court made clear that it detested the rule and considered it 'unenviable' and 'ridiculous,' as it wrote in some opinions, it is curious why the court never attempted to invalidate it. In *Marbury v Madison* (1803),[57] the federal Supreme Court struck down section 13 of the Judiciary Act of 1789, a procedural rule, bringing the constitutional question itself to the analysis. Why did Ohio's Supreme Court not do so? There are two possibilities. The first is that the justices may have considered the statute flawed or even ridiculous, but not contrary to the federal Constitution. Given the constitutional nature of the provision, a high degree of deference could be expected from the court. However, certainly if the court believed that the statute created such an unfair and unbalanced result, it could have created an argument for its unconstitutionality. The second possibility is that the court was divided on the issue. If not all justices agreed on the unconstitutionality of the supermajority, a crisis could have arisen. Supposing that more than one justice dissented, could a simple majority have struck down the supermajority? Ohio's Supreme Court might have tried to avoid a game of mirrors in which the debate about which majority was required to strike down the rule was even sharper than the debate about its constitutionality.

Constitutionality of the supermajority under the Federal Constitution

Notwithstanding Ohio's peculiar mobile design, the US Supreme Court found it constitutional. Not being bound by the rule, the federal Supreme Court did not have the passion of its Ohio counterpart while analysing the provision.[58] The *Akron Park District* case arose after a Court of Appeals in Ohio upheld the validity of the Park District Act. After an appeal, Ohio's Supreme Court had a divided opinion voting five to two for the statute's unconstitutionality. Given the supermajority provision, the Supreme Court had to affirm the appeals judgment. The litigants claimed that section 2 of article IV of the Ohio Constitution conflicted with the Fourteenth Amendment as it denied citizens the due process of law and equal protection.

[54]Article IV, section 2 of the Ohio Constitution stated: 'No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of the judgment of the court of appeals declaring a law unconstitutional and void.'

[55]Stene (n 40) 40.

[56]Sandra Zellmer and Kathleen Miller, 'The Fallacy of Judicial Supermajority Clauses in State Constitutions' (2015) 47 *University of Toledo Law Review* 73, 79.

[57]5 U.S. (1 Cranch) 137 (1803).

[58]*Ohio v Akron Park District* 281 U.S. 74 (1930).

The Supreme Court ruled in favour of the validity of the supermajority. The opinion, delivered by Chief Justice Hughes, claimed that the right to appeal 'is not essential to due process, provided that due process has already been accorded in the tribunal of the first instance'. Regarding the different voting thresholds that arise depending on the court's appeal decision, the Supreme Court said it did not affect the Act's validity under the federal Constitution. The federal Supreme Court noted that the state court had previously regarded the provision as 'deplorable', but affirmed the state's broad discretion 'in respect to establishing its systems of courts and distributing their jurisdiction'.

The opinion devoted only a few paragraphs to the challenge and did not analyse other aspects, such as the common challenge that a supermajority obstructs the court's functioning. The Supreme Court never again reviewed a state supermajority.[59] *Ohio v Akron Park District* created a consensus that state supermajorities might not be unconstitutional. However, dissidents[60] claim that the *Akron* case should not be built into a general rule as supermajorities remained unchallenged from a supreme clause perspective[61] and the Supreme Court has expanded its view of the due process clause and the equal protection clause.[62] On the other hand, Gersen and Vermeule[63] and Shugerman[64] argue that such a rule would even be constitutional if introduced at the federal level, where it would face heavy scrutiny.[65]

In a comparative conversation, *Ohio v Akron Park* should be viewed carefully. Unlike the cases of Peru and Poland, Ohio was a state supermajority and thus not subject to the Supreme Court reviewing its unconstitutionality. Its legal source is state and not federal law. In the *Akron* case, the Supreme Court was unconstrained by the provision since it was not reviewing a rule modifying its own decisional rules. However, Ohio's case may indeed hint at some considerations the US Supreme Court could face upon a similar rule at the federal level, at least regarding its intrusion on the right to appeal (which was explicitly addressed by the *Akron* case).

[59]In 2001, Entin had concluded that no other case was heard involving a supermajority. A revision of Supreme Court cases from 2001 to 2022 offers no different conclusion. Entin (n 37) 460.

[60]Hausser claims that the Supreme Court's decision left unanswered different constitutional challenges, namely, if the equal protection clause has been violated given the different majorities required depending on the Appeal Court's decision, and if the restriction on the voting power of the court violates due process under the federal Constitution due to the inability to fully contest all constitutional questions. Robert L Hausser, 'Limiting the Voting Power of the Supreme Court: Procedure in the States' (1939) 5 *Ohio State University Law Journal* 54, 73. From the issues raised by Hausser, the first does not pertain strictly to the validity of supermajorities but rather to the peculiar mobile voting design specific to Ohio. In contrast, the second, as Hausser admits, got an answer in the *Akron* case, although one with which he disagrees.

[61]Madgett argued that the *Akron* decision did not mean the constitutionality of Nebraska's supermajority because a challenge may be brought under the supremacy clause (i.e., that the supermajority applies equally to state and federal law and thus prevents a citizen from obtaining the recognition of a right under the federal Constitution by a state voting threshold). However, even Madgett considered this challenge unconvincing. Paul W Madgett, 'The Five-Judge Rule in Nebraska' (1968) 2 *Creighton Law Review* 329, 336. Madgett also tried to build an argument proving that a supermajority 'discriminates against constitutional law, whether state or federal', although it is hardly decisive.

[62]William Jay Riley, 'To Require That a Majority of the Supreme Court Determine the Outcome of Any Case Before It' (1970) 50 *Nebraska Law Review* 622, 629.

[63]Gersen and Vermeule (n 3) 727–30.

[64]Shugerman (n 3) 981–97.

[65]Caminker suggests that the constitutional challenges such a rule could face at the federal level explain why many 'supermajority proposals introduced since 1968 were couched as constitutional amendments rather than statutory dictates'. Caminker (n 3) 77.

Peru and supermajority control in the origins of constitutional review: Judgment 005-96-I/TC

The supermajority has deep roots in the Peruvian constitutional system and has been at centre stage of both judicial review and constitutional politics. Judicial review was foreseen in 1936 in the Civil Code and then explicitly included in the Organic Law of the Judicial Power in 1963. However, the first approach to a modern constitutional court occurred under the 1979 Constitution, which created the Constitutional Guarantees Court (CGC). The CGC's Act required a six-to-three supermajority to decide cases pertaining to the unconstitutionality of a statute or the inadmissibility of a claim (article 8 of the Law 23385). The CGC was dismissed after Fujimori's self-*coup d'état* (known as Fujimorazo) alongside Congress and the Supreme Court.[66]

Internal Peruvian politics, as well as international pressure, forced democratic concessions. In 1992, the Democratic Constituent Congress was elected and produced the current 1993 Constitution, which adopted a Constitutional Court. Several authors have discussed why a pro-governmental majority opted for a robust model of a Constitutional Court instead of a weaker model.[67] The 1995 Organic Law of the Constitutional Court imposed a six-to-one supermajority on striking down statutes. Given the controversial nature of the supermajority imposed,[68] a parliamentary minority challenged article 4 of the Organic Law of the Constitutional Court. The plea argued that the supermajority obstructed the exercise of judicial review, that the legislator lacks the competence to regulate the court's voting protocols and may only issue acts pertaining to the structure and functioning of the court. The plea emphasized that the supermajority leads to an absurd result, as a minority of magistrates may prevail over a majority and that no single Constitutional Court required a similar supermajority.

The parliamentary minority, anticipating a divided opinion, even provided an argument on how to elude the qualified majority (converting it to a simple majority). Given that the Peruvian Constitutional Court created by the 1993 Constitution had never functioned with any majority other than a qualified one in determining a statute's constitutionality, the plea had to presuppose that a simple majority is a default rule of any court, even absent legislation that establishes this.[69] The applicant was aware of the infinity mirror problem but thought the Court could ignore the supermajority and validly presuppose the supermajority's unconstitutionality even before voting on its unconstitutionality, creating a voting paradox.

[66]Eduardo Dargent, 'Determinants of Judicial Independence: Lessons from Three "Cases" of Constitutional Courts in Peru (1982–2007)' (2009) 41 *Journal of Latin American Studies* 251, 252.

[67]Ibid 267.

[68]Noguera depicts the supermajority as 'widely criticized by the scholarship'. Albert Noguera, *Los Derechos Sociales En Las Nuevas Constituciones Latinoamericanas* (Tirant lo Blanch, Mexico City, 2010) 65.

[69]The minority, however, never said where the court would draw a simple majority rule. Similar arguments have been raised in comparative law. For example, Riley claimed in the American context that, 'Majority rule itself is a traditional Anglo-American concept, and from the inception of this nation, majority rule has been the fundamental principle in court declarations as the constitutionality of legislative acts.' Riley's argument may be classified as a 'simple majority default argument', as it draws from tradition or the nature of courts to argue that a simple majority is an implicitly embedded principle in judicial review. The plaintiff in 005-96-I/TC made a similar argument. See Riley (n 62) 630. Caminker seems to swiftly refute the claim. See Caminker (n 13) 17–18.

Substantive constitutionality and minority opinion

The Constitutional Court upheld the statute. The court noted that the Constitution did not specifically determine the voting rules of plural bodies or the court. Since determining the unconstitutionality of a statute is an *ultima ratio* decision, the supermajority was justified given the effects of determining the unconstitutionality of a statute. The Peruvian Constitutional Court stated that, given the principle of the presumption of constitutionality, it 'is evident that a supermajority requirement cannot be deemed an arbitrary imposition, but a logical consequence of such a practice'.

The court also noted the existence of models in which a supermajority is required (explicitly mentioning the Mexican model and the French model of the Constitutional Council, although only pertaining to preventive constitutional review) and countries requiring an absolute majority. Regarding the argument that the supermajority allows a minority of the court to prevail over a majority, the ruling reminded us that 'it is the Court –and not the majority of any group of Magistrates – that may issue a ruling'.[70] The court claimed that the majority of the court (a conglomerate of individuals) is not precisely the court as an abstract body entitled to say what the law is under the procedure prescribed by its statute. By presupposing that any restriction on majoritarian court decisions is a restriction on the court, the plaintiff confused the court as an institution with the majority of its magistrates.[71]

Magistrates Aguirre Roca, Rey Terry and Revoredo dissented. They claimed that voting thresholds and even supermajorities were not unconstitutional as long as they were required for all plaintiffs (and not, as in the present case, only for the plaintiff). On the other hand, the dissenting opinion argued that the supermajority should not be confused with the presumption of constitutionality. The vote said that 'the presumption of constitutionality, in procedural matters, has no other effect but to reverse the burden of proof'. At the same time, the supermajority imposed a rule that gave primacy to the minoritarian opinion. Furthermore, the vote stated that the court's decision confused the concepts of 'majority,' 'absolute majority' and 'supermajority'[72] and that, while there are supermajorities in comparative law, they do not hold a differentiated standard for the plaintiff and for the defendant. The dissenting opinion concluded that article 4 of the Organic Law of the Constitutional Court violated article 2 of the Constitution (equality under the law) and general principles of law as it heavily obstructed the functioning of the court.

The majority and minority both made interesting claims. In the first place, the dissenting opinion correctly differentiates the presumption of constitutionality from the supermajority itself. The Thayerian presumption of constitutionality roughly

[70]This argument is sophisticated. It reveals that a common argument against supermajorities (hindrance of the court) requires the *petito princii* of presupposing that the court is the majority of its members, rather than a judicial method for arriving at a decision. The fact that such a method is commonly bare majority voting does not change the fact that it is the method and not the majority that is the essence of judicial activity.

[71]In 1969, Madgett raised an argument similar to the Nebraska case: 'Moreover, it is clear that courts, not judges, make law … It seems clear that the source of the grant of power to the Supreme Court can dictate the manner in which the power can be exercised.' Madgett claimed that we could not argue that a supermajority hinders 'the Court' because the court does not equal a majority of its members but a decisional procedure stated by law. Madgett (n 61) 336–37.

[72]The observation is correct. The 'absolute majority' that the decision quoted in some countries corresponds directly to what we call 'simple majority' in a judicial sense (more votes in favour of a proposal than against it, provided more than half of the judges present agree).

means the judiciary should only declare a statute unconstitutional when its unconstitutionality is beyond any doubt. Any constitutional doubts should be solved by favouring the statute's constitutionality.[73] The presumption of constitutionality is an internal deferential mechanism, while the supermajority is an external one. Gersen and Vermeule[74] argued that supermajorities turned 'Thayerian deference into judicial decision-making at an aggregate level of the whole Court'. Therefore, even though both are deferential mechanisms, they are not quite the same and work at different levels. A presumption of constitutionality does not get stronger or weaker by requiring a supermajority: judges are required the same degree of internal deference before externalizing their vote, but the voting rule may tilt the scales in favour of the statute's constitutionality as an aggregate mechanism.

In the second place, the dissenting opinion supported its argumentation in a fallacy. The minoritarian argument was that the supermajority selectively operated only for the applicant and not for the defendant.[75] Peru's Constitutional Court is an example of a Kelsenian concentrated model. Contrary to Ohio or Nebraska, where judicial review has normal plaintiffs in ordinary procedures, Peru's 'action of unconstitutionality' is an abstract control. Constitutional theory has already classically concluded that there is no contention nor a defendant party in such abstract procedures, as the review is performed abstractly.[76] The plaintiff is not defending a right, nor is Congress on trial. The argument of inequality and due process of law may be considered in Nebraska or Ohio, but not in Peru. Furthermore, while arguing this, the dissent claimed that comparative law showed that supermajorities could be required to issue court decisions in general, but not only to strike down legislation. That is a false statement. By the year in which Peru's Constitutional Court issued its ruling, at least Nebraska (1920), Ohio (1912 until 1968), North Dakota (1919), Korea (1987), the Czech Republic (1993), Mexico (1994) and Costa Rica (until 1989)[77] employed supermajorities only to declare the unconstitutionality of a statute. The Peruvian case proves a widespread feature of the debate on supermajorities: very often, systems do not know the existence or functioning of other supermajorities.

An unnecessary answer: Which majority to apply?

After analysing the substantive debate, I consider it relevant to make a regression. The applicant claimed that the court could solve the case by a simple majority. Given that only three magistrates dissented, the supermajority played no role in the decision. The court

[73]James B Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 *Harvard Law Review* 129, 144.

[74]Gersen and Vermeule (n 3) 682.

[75]A similar argument was raised in Georgia. In suit N769, the applicant argued that the double standard of the supermajority creates an asymmetrical procedural situation for the parties. The analysis in Georgia took into account the right to a fair trial, centring itself more on individual claims. See N3/5/768,769,790,792, part II, para. 112-118. Still, the court's decision was based on an epistemic argument: that supermajorities are epistemically inadequate to provide the right answer to the content of constitutional rights.

[76]The concept is rather well known in Germany's Kelsenian model. Christoph Gröpl, Kay Windthorst and Christian Coelln, *Grundgesetz: Studienkommentar* (CH Beck, Warsaw, 2013) 642; Roland Fleury, *Verfassungsprozessrecht* (9., neu bearb Aufl, Vahlen 2012) 20.

[77]Bruce Wilson, 'Constitutional Rights in the Age of Assertive Superior Courts: An Evaluation of Costa Rica's Constitutional Chamber of the Supreme Court' (2012) 48 *Willamette Law Review* 451, 457.

could have evaded the argument as the four-magistrates majority was enough to uphold the law. Nevertheless, it did not. Both the minority and the majority of the court considered the issue.

The majority claimed that the court could not refrain from applying the statute by diffuse control as such control is reserved 'to matters in which there is an evident incompatibility and not simple interpretations regarding a legal and a constitutional provision'. For the Peruvian Constitutional Court, it was necessary to find a blatant contradiction to control the provision. In turn, the minority replied that the Constitutional Court's primary competence was precisely to control legislation's constitutionality and find subtle contradictions. The dissenting opinion sustained that the ruling presupposed that the Constitutional Court might only act within its regulations (applying the supermajority prescribed by Organic Law) while forgetting that the Organic Law of the Constitutional Court, just as any other statute, is subject to constitutional review. Even though the majority seemed to confuse diffuse control with 'evident unconstitutionality', the minority did not offer a satisfactory answer as to why the court could apply a simple majority that did not exist in the Constitution or any statute.

Some academic debate ensued. Sagües claimed that the supermajority was unconstitutional as it was normatively, technically and axiologically unreasonable. Arguing in favour of an 'implicit' competence of the court, he defended the position that 'the decision, as well, can be taken by a simple majority of Magistrates of the Constitutional Court. Since the majority established by article 4 of the Act 26.435 is unconstitutional, it would be absurd to submit to it while erasing it from the legal order.'[78] The argument oversimplifies the question. Why should the court conclude that article 4 is unconstitutional by a simple majority? A simple majority is expressed neither in the Constitution nor in any statute existent or previous to the 1993 Constitution as a decisional procedure of the court. The court would be 'inventing' a new type of majority to determine the unconstitutionality of a qualified majority. The absence of a previous simple majority in Peru complicated matters as there was no 'previous simple majority' to return to. It could even be argued that given the fact that the former 'Tribunal de Garantías' (an ancestor of the Constitutional Court) already employed a supermajority introduced via statute, an established constitutional custom existed on the usage of a supermajority in judicial review. Even if the court decided to refrain from applying the supermajority to solve the supermajority's constitutionality, which majority should the court apply on deciding which majority to apply after dismissing the supermajority?

Fernández Segado agreed with Sagües that the supermajority was unconstitutional, but he considered that the court would be taking legislative attributions if it were to create a new type of majority not previously existing.[79] Furthermore, he claimed that the potential unconstitutionality of the provision must be declared 'by the vote of six of the Magistrates, that is, according to the provision which is legally binding on the Court until declared unconstitutional'. The Fernández–Sagües debate was one of the first on the applicability of a challenged supermajority.

[78]Nestor Sagües, 'Los Poderes Implícitos e Inherentes Del Tribunal Constitucional Del Perú y El Quórum Para Sus Votaciones' in Francisco Fernández (ed), *La Constitución de 1993. Análisis y comentarios*, vol 3 (Comisión Andina de Juristas/Konrad Adenauer Stiftung 1996) 111.

[79]Francisco Fernández, 'El Control Normativo de La Constitucionalidad En Perú: Crónica de Un Fracaso Anunciado' (1999) 32 *Boletín Mexicano de Derecho Comparado* 765, 793.

A controversial amendment: The Polish supermajority

Supermajority theory or abusive constitutional borrowing?

Poland made a democratic transition following the 1989 Round Table Agreement after being under heavy Soviet influence. The new 1997 Constitution instated a Constitutional Court, which even specified (article 189) that its decisions are taken by 'a majority' of the votes. However, it did not define which type of majority. The first Act on the Constitutional Court established a simple majority.

The crisis that led to a brief supermajority began in 2015 in a partisan clash. PiS had recently gained control of both the Sejm and the presidency, as Andrzej Duda defeated the incumbent Komorowski in the presidential elections. The term of five judges of the Constitutional Court was due to expire, three in early November and two in December 2015. PO passed legislation allowing it to illegitimately appoint all five judges, attempting to deprive the incoming parliamentary majority of its appointments. The manoevre backfired as PiS made a full-scale retort. Even though PiS had challenged the legislation before the Constitutional Court, President Duda refused to swear in all new judges. When the PiS-dominated Sejm entered, it cancelled the five appointments of the judges (those appropriately made and those made illegally). The new Sejm proceeded to appoint five judges. Subsequently, the Constitutional Court found in K 34/15 that the election of three judges was constitutional, while the election of the last two judges was deemed unconstitutional. President Duda did not publish the court's judgment and continued to refuse to swear in the three judges lawfully elected by the previous Sejm.[80] In December 2015, the PiS-controlled Sejm passed heavy amendments to the Act on the Constitutional Court as a reprimand to the Polish Constitutional Court's refusal to allow illegally appointed PiS Judges to hear cases. As Sadurski argued, the failure to provide a *vacatio legis* on the amendments was an attempt to 'effectively immunizing them from review'[81] The changes imposed an obligation to solve cases on a filing sequence basis, created an elevated 13/15 quorum, and introduced a two out of three supermajority. The changes could not only constrain the court's functioning but paralyse it.[82]

Even though supermajorities are legitimate models in constitutional adjudication, it was clear that, in the Polish constitutional crisis, the introduced supermajority was not a mere switch in the model. The combination of the supermajority with other provisions and an understanding of Polish constitutional politics led to the conclusion that it was an attempt to paralyse the court. The changes attracted worldwide criticism and were considered an attack on the rule of law by the Venice Commission.[83] The statutory supermajority introduced was decisional, not deferential.[84] It required the court to reach a

[80]Adam Ploszka, 'It Never Rains but It Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional' [2022] *Hague Journal on the Rule of Law*, available from <https://link.springer.com/10.1007/s40803-022-00174-w>.

[81]Sadurski (n 33) 73.

[82]For example, as Sadurski notes, the court had only twelve sitting judges at the time. If the Court were to apply the thirteen-judges quorum, 'it would not have been able to consider a case if it were to apply the amendment in reviewing the amendment itself'. Sadurski (n 33) 73.

[83]Venice Commission, 'Opinion No. 833/2015 On Amendments to the Act of 25 June 2015 on the Constitutional Tribunal (CDL-AD(2016)001' (Venice Commission 2016) CDL-AD(2016)001.

[84]I deem as 'deferential supermajorities' those in which qualified voting is only required to determine the statute's unconstitutionality, but a simple majority suffices to uphold the law (such as those in Nebraska, Chile, Mexico, South Korea and the Czech Republic). In turn, I deem decisional supermajorities those that require a qualified vote to strike down a law and uphold it.

supermajority to take any decision in a similar fashion to the supermajority of the Dominican Republic,[85] and the one in Taiwan recently amended in 2022.[86] It could be argued that it was an instance of abusive constitutional borrowing.

Dixon and Landau define abusive constitutional borrowing as 'the use of designs, concepts, and principles taken from core aspects of liberal democratic constitutionalism, but which are turned into attacks on the minimum core of electoral democracy'.[87] Even though supermajorities are not the prevalent model of most liberal democracies, several do feature supermajorities (the United States, the Czech Republic and South Korea). These examples, in which the supermajority forms part of a broader system that still ensures proper functioning of constitutional review, may be used to emphasize the anti-democratic impact of a democratic idea.[88] Sadurski agrees with this notion by claiming that the changes introduced by Poland may even exist in different democracies. However, it is the way in which the amendments were introduced and the impact that they have together on the system that shows their illiberal nature.[89] In the Polish case, the supermajority did not have the sole effect of granting deference to parliament as in the liberal democracies in which it exists, but rather paralysed the court, as proven by the set of provisions that accompanied it.

The Constitutional Tribunal: Unconstitutionality decided ad limine

The Polish Constitutional Tribunal struck down the constitutionality of the changes in K 47/2015. In doing so, it addressed first, as a previous matter, the applicability of its own law. As Radziewicz noted, it was the first time in Polish constitutional history that the court faced the paradox of having to apply the very law that was challenged.[90]

In contrast with the Peruvian case, where both majority and minority seemingly needlessly analysed the applicability of the supermajority, the Polish case may have required addressing the issue. Indeed the two out of three supermajority would have been reached in the 12-judges composition. It was a 10–2 vote, with only Judges Przyłębska and Pszczółkowski dissenting. Had the supermajority been the only obstacle, the court may well have avoided the issue, but it was not. Alongside the two out of

[85]Leiv Marsteintredet, Eduardo Jorge Prats and Emmanuel Cedeño-Brea, 'Dominican Republic' in Richard Albert et al. (eds), *2019 Global Review of Constitutional Law* (I•CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, Boston, 2020).

[86]Kuo Ming-Suo and Chen Hui-Wen, 'Constitutional Review 3.0 in Taiwan: A Very Short Introduction of Taiwan's New Constitutional Court' (*I·CONnect: Blog of the International Journal of Constitutional Law*, 1 July 2022) <https://bit.ly/3oxXmmE>. Initially, a three-quarters decisional supermajority was introduced in 1958 as a retaliation for the Courts Interpretation 76 of 1957. Subsequently, the 1993 Constitutional Interpretation Procedural Act lowered the threshold to two out of three. In 2022, Taiwan returned to a simple majority. Tzu-Ti Lin, Ming-Sung Kuo and Hui-Wen Chen, 'Seventy Years On: The Taiwan Constitutional Court and Judicial Activism in a Changing Constitutional Landscape' (2018) 48 *Hong Kong Law Journal* 995, 1013.

[87]Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press, Oxford, 2021) 36.

[88]Ibid 37.

[89]Sadurski claimed that 'the fact that some individual legal provisions may exist in isolation from other problematic arrangements and practices in some unimpeachably democratic states is a powerful rhetorical instrument … and also imposes constraints upon critics, including those abroad'. Sadurski (n 33) 5.

[90]Piotr Radziewicz, 'Refusal of the Polish Constitutional Tribunal to Apply the Act Stipulating the Constitutional Review Procedure' (2017) 28 *Review of Comparative Law* 27, 26.

three supermajority, the Act introduced an obligation to analyse cases sequentially and reach a high thirteen out of fifteen decision quorum in the same provision. Given that, at the time, the court only had twelve legally appointed judges, and there were several cases to solve before K 47/2015, applying the law would effectively have precluded the court from solving the challenge. Of the three obstacles, the supermajority was salvable, while the others were not. The tribunal probably felt it would have been methodologically mistaken to separate procedural regulations and only refrain from applying those that posed a decisional threat to the court (furthermore, the law regulated both quorum and a supermajority in article 10, making it harder to make a distinction).

The court recognized that the situation was paradoxical. The controlled provisions were still entitled to a presumption of constitutionality. Therefore, even though it was deemed unacceptable to control provisions on the basis of said provisions, the ruling recognized that it could also not apply the old provisions as they had lost normative force with the amendment. The tribunal concluded that the only solution was to apply the Constitution directly regarding the challenged provisions and the law in force in those provisions that had not been challenged. The court claimed that applying the challenged statute would imply that, if found unconstitutional, the court would undermine its judgment's very basis.[91] That argument may appear strong, but it is twofold as it works both ways. If the court refrains from applying the challenged provisions and rules that they are constitutional, wouldn't the same paradox arise? It could be argued that the ruling would have violated the supermajority,[92] the sequential order for issuing judgments and the quorum it declared unconstitutional, and thus undermined the ruling that upheld them. Refraining from applying the law can only result in striking down the provisions. Their upholding would lead back to the initial paradox. For this method to work, the members of the court must agree beforehand that they consider the law unconstitutional. It does not work as a proper methodological precaution.

In deciding which majority to apply, the court laconically concluded that the Constitution stipulates a simple judicial majority.[93] That is not an uncontroversial statement. Article 190.5 only states that the decisions of the Constitutional Court are taken by a 'majority of votes.'[94] The Constitution does not specify which type of majority nor if such majority should be counted of the total Judges or of those present. The word majority in Polish (*większość*) might be ample enough to accommodate a simple, absolute, and qualified majority.

[91]Some agreed with the argument. Radziewicz (n 90) 33.

[92]This would not have been the case in Peru. Since the Peruvian law only required the supermajority to strike down statutes, a simple majority would have been able to uphold it, even if deciding not to apply the provisions. Since the Polish supermajority was decisional (like the one from the Dominican Republic), a qualified voting was required regardless of the court's decision. Thus a 7–4 decision upholding the law would violate the provision by not reaching the required a two out of three supermajority.

[93]The court understood that this meant an absolute majority of the judges present. Why could it not require the biggest plurality (truly a simple majority) if only the word 'majority' appears in the Constitution? Why does it have to mean 'of the judges present' and not the court's total? Why are the other three types of 'majorities' that we could think of constitutionally excluded? Even in the case of Poland, where the Constitution provides some guidelines regarding the court's majority, the Constitutional Court created a rule (which casually matches the previous rule), rather than applying a provision.

[94]Art. 190.5 'Orzeczenia Trybunału Konstytucyjnego zapadają większością głosów' [Judgments of the Constitutional Court shall be made by a majority of votes].

Throughout history, the Polish Constitutional Court made decisions based on an absolute majority of the Judges present.[95] Although some scholars claimed that the word *większość* in the Constitution meant a simple majority in the judicial sense, others held that it provided ambiguity. Hence, the legislator had the power to indicate which majority.[96] Even further arguments could be drawn. For example, while regulating concrete attributions of the Sejm, the Polish Constitution is quite specific in stating whether it refers to a 'simple majority' (art. 120), an absolute majority (art. 113) or a supermajority (art. 98.3). It is interesting that the Constitution is very specific in establishing types of majorities, but quite laconic when referring to the majority of the Constitutional Tribunal. The previous statute actually clarified[97] that decisions are made by a 'simple majority' (*zwykła większość*) instead of using the isolated term 'majority' employed in the Constitution.

The decision to refrain from applying the law gathered academic acceptance in Poland.[98] However, it entails serious shortcomings. In the first place, it is quite complicated to imagine that the Constitution provides a guideline for reconstructing normative provisions of constitutional procedures. Here the Tribunal will necessarily end up 'applying directly' a non-existent constitutional provision whose content would be whatever the court deems adequate. In the second place, while the opinion's solution (reconstruct the series of articles challenged through a constitutional application) may have produced an acceptable result here, it would suffice, as Radziewicz claims, to challenge all the law (all provisions) to make it virtually impossible for the court to fill the gaps[99] without simply inventing the type of procedure the court desires rather than that which the Constitution ambiguously envisages.

For purposes of the supermajority, the analysis of the court could have ended in the methodological section. Once the court identified in a preliminary section that the Constitution 'forces' employing a bare judicial majority, it was evident that the court needed to strike down the provision. Nonetheless, the court further analysed the constitutionality of the rule.

[95]The court called it a 'simple majority' (*zwykła* większość). See K47/15. In a judicial sense, the term 'simple majority' is meant to be an absolute majority. Simple majorities (to decide a case's outcome), understood as the biggest plurality regardless if it surpasses half of the court members, did not exist in the Polish Constitutional Court. Caminker explains the simple majority protocol in the nine-member Supreme Court, imagining an affirming rule: 'if 4 Justices vote to affirm, 3 Justices vote to reverse, and 2 Justices vote to dismiss for lack of jurisdiction, such a protocol would dictate that the Court as a corporate entity affirm the judgment below.' Caminker (n 13) 3. The example clearly shows the implications of a simple majority (as the biggest plurality).

[96]Banaszak argues that the requirement of 'majority' from article 190.5 may only lead to the conclusion that some sort of majority is required and does not predetermine a concrete type of majority. Bogusław Banaszak, *Konstytucja Rzerzypospolitej Polskiej: Komentarz* (2nd ed., CH Beck, Warsaw, 2012) 951. Szymanek considers that even if the legislator's choice indeed departed from a practice of employing absolute majority, the Constitution nonetheless did not define the type of majority, and thus entitled the legislator to legitimately define a supermajority. Jarosław Szymanek, 'Opinie w Sprawie Uwag Do Nowelizacji Ustawy z Dnia 25 Czerwca 2015 r. o Trybunale Konstytucyjnym Przegotowanych Przez Komisję Wenecką' (2016) 136 *Przegląd Sejmowy* 81, 87.

[97]The Constitutional Court did not address this argument in K 47/2015. Why would the Act need to clarify that the majority was 'simple' if the word majority (*większość*) can only mean a simple majority?

[98]Sadurski (n 33) 74–75.

[99]Radziewicz (n 90) 40.

In its decision, the Polish Tribunal noted that the provision raised not only the majority but also the quorum, thus increasing the risk of the court being unable to reach a decision. For the Constitutional Court, given the fact its functions are similar to those of ordinary courts, it 'is inadmissible to regulate the same matters in a different way, when it is not justified by a specificity of the judiciary'. The remarks are of policy. Obviously, there is no constitutional principle in the Polish Constitution mandating that the legislator must regulate Constitutional Courts and ordinary courts in the same way.[100]

Finally, the court pointed out that the double qualified majority rule would deprive citizens of their right to solve the constitutional question concerning procedures such as the constitutional question (*pytanie konstytucyjne*) and constitutional complaint (*skarga konstytucyjna*). The court, in its analysis, constantly deviated from constitutional arguments to show its dislike of the provision.[101]

The second analysis of the Constitutional Tribunal was unnecessary from a legal point of view. If the court had already found that the Constitution unquestionably provided for a simple majority, arguments such as the way other bodies are regulated, the coherence of the system, the absence of arguments in the legislator's proposal, and the newly found 'same topics–same regulation' principle that the court *discovered* are less convincing. Rather than performing only a constitutional analysis, the court felt it had to use the ruling to fend off an attack, to send a message. In doing so, the court thought it was best not only to show the supermajority was unconstitutional, but also (according to the court) incoherent and wrong as a policy matter.

IV. Conclusions

Supermajorities are rare guests in modern constitutionalism, but there is an extensive ongoing discussion on their validity and the way they may foster consensus and legitimacy. Regardless of their aims, supermajorities are perceived as mechanisms constraining courts. Political opposition will be prone to challenging supermajorities and courts eager to strike them down. Not many supermajorities exist; nonetheless, they have provided several episodes of constitutional review.

Employing examples from the United States, Peru and Poland, I tried to show that the supermajority's legal status and chronology are important factors that may decisively influence the court's analysis. Constitutional supermajorities are difficult to strike down, while statutory supermajorities may come under fire. All successful constitutional challenges against supermajorities pertain to statutory ones. I argued that the chronology is also relevant. Supermajorities established at the beginning of the court's functioning or in pivotal moments are granted more deference by courts. In contrast, courts facing a supermajority after years of being able to resolve under simple majorities see them with mistrust, even if reasonable arguments could exist for their constitutionality, as the cases of Poland and Georgia proved, where illiberal regimes intended to use supermajorities

[100]Had the ordinary legislator required a supermajority in ordinary courts that would not mean that the supermajority of the Constitutional Court would automatically become constitutional. The uniqueness of the regulation is not an argument *per se*. Even if we would accept the 'similar regulation' principle, it could easily be claimed that, unlike any other bodies in the Polish constitutional system, only the Constitutional Court can strike down legislation, thus justifying a different practice.

[101]For example, it devoted considerable space to showing that other courts or bodies do not have a 'double qualified majority' (quorum and decisional majority) or how currently certain decisions which could be deemed 'more important' could still be taken by a simple majority.

through abusive constitutional borrowing. By analysing these very specific cases, as comparatists, we might help to contribute to a dialogue with political scientists regarding strategic accounts of judicial behavior.[102] Even though some examples of literature concerning strategic behavior on supermajority rules have emerged,[103] the strategic behavior of judges faced with the task of reviewing supermajority rules imposed on them has not been analysed.

The courts face a double challenge while performing judicial review of supermajorities since they constitute a decisional method. Not only are they seen as confronting political power directly, but in many cases they are undermining their procedural regulations. As I have proven, introducing a statutory supermajority absent *vacatio legis* puts courts in a dilemma regarding which supermajority to apply. In some cases, the courts may find constitutional provisions that allow them to 'discover' a majority to apply, although, in the process, they may end up creating their own rules, as arguably happened in the Polish case. In other cases, the absence of any constitutional provision regarding the majority complicates the task. The cases of Peru and the Czech Republic (an unchallenged supermajority) are clear examples of the latter. Not only do the Constitutions of Peru and the Czech Republic lack any mention of decisional methods in their constitutions, but they did not even previously have a simple majority, as the statutory supermajority was introduced at the very beginning of the Constitutional Court.

Constitutional scholarship has paid little attention to these episodes of constitutional review. Constitutional courts reviewing their decision-making rules is a challenge to judges' capacity for impartiality and may tell us more about how judges believe courts should function and what the courts think of supermajorities rather than what their constitutions actually mean.

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[102]As Tiede argues, comparative law is required for political scientists to correlate variations in rules and procedures defining courts with variations in judicial behavior (explicitly mentioning supermajority voting rules to strike down legislation). Lydia Brashear Tiede, 'The Role of Comparative Law in Political Science' (2021) 69 *The American Journal of Comparative Law* 720, 737. For a more general framework, see also Lee Epstein, Urška Šadl and Keren Weinshall, 'The Role of Comparative Law in the Analysis of Judicial Behavior' (2021) 69 *The American Journal of Comparative Law* 689.

[103]Dargent (n 66). Recently Tiede also analysed the functioning of the Chilean Constitutional Court under a supermajority. Tiede (n 47).

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