

**Embedded Judicial Autonomy:  
How NGOs and Public Opinion Influence Indonesia's  
Constitutional Court**

by

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A dissertation submitted in partial fulfillment  
of the requirements for the degree of  
Doctor of Philosophy  
(Political Science)  
in The University of Michigan  
2018

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For the lawyers advocating on behalf of legal reform and social justice in Indonesia.

## ACKNOWLEDGEMENTS

Despite the popular stereotype of the lonely scholar toiling away in the Ivory Tower, throughout my time at the University of Michigan I found that great scholarship requires the support of a community. I benefitted from the academic insights, financial assistance, and emotional support of numerous people around the world during the past seven years.

First and foremost, I would like to thank the members of my dissertation committee, who have guided and put up with me for almost half a decade. It has been a honor for me to work with such an extraordinary group of scholars.

When I first arrived at the University of Michigan, several students told me that I was fortunate to focus on Southeast Asia because I would have the opportunity to work with Allen Hicken. Allen has been incredibly supportive over the years, both as a dissertation chairman and as a mentor. He helped me navigate the sometimes intimidating world of academia and made me feel I wasn't alone in this endeavor.

Given that we both went to law school before pursuing a Ph.D., I've always viewed John Ciorciari as a role model for making the transition from law to academia. John has a way of asking the right questions about my research to make sure I focused on the most important issues and never got lost in the methodological weeds. He has also reminded me that even though we can't necessarily measure legal doctrine, it still matters.

In many ways, I have Tom Ginsburg to thank for inspiring me to pursue a Ph.D. in political science. I first read Tom's classic *Judicial Review in New Democracies* during my second year at law school. I was captivated by the way he used statistical models to study constitutional courts in Asia. I decided right then and there that I wanted to learn how to

do what Tom did.

Walter Mebane introduced me to natural language processing in his Multivariate Analysis class in 2012. This proved an important intellectual breakthrough as I realized I could use the texts of judicial decisions as data. Walter’s encouragement and feedback on my early attempts to use latent topic models led directly to this dissertation.

In order to code information about litigants in constitutional cases, I needed research assistants. Professor Yance Arizona of President University in Cikarang, Indonesia, kindly asked if any of his students would be interested in working for my project. Muhammad Faiz Aziz, Muhammad Fadhly Dzil Ikram, Miranti (“Mira”) Putri, and Herti Septhiany answered the call and made the task of coding over 500 cases much more manageable. Without their help, I would never have been able to compile such a thorough dataset.

While it is always helpful to know the language of a country you are studying, it was particularly crucial for this dissertation project because so much of my work involves natural language processing. As such, I am indebted to Professor Agustini of the University of Michigan and Professor Nona Kurniani of the Johns Hopkins School of Advanced International Studies (SAIS), who taught me Indonesian and were patient as I struggled to learn the various verb conjugations. I also received assistance translating longer passages of text from the University of Michigan Language Resource Center’s 2016 Translata-Thon.

Over the course of several trips to Indonesia, I met dozens of lawyers, judges, activists, and professors who helped inform my understanding of the Indonesian Constitutional Court. I would like to thank each of them for taking the time to meet with me, especially Fritz Siregar, Yance Arizona, Tomi Suryo Utomo, Danang, Giri, Refly Harun, Kanti, Ridaya Laodengkowe, Maria Lousia, Erwin Oemar, and Wijayanto Samirin. My conversations with them led me to focus on the role of NGOs in constitutional litigation. I am also indebted to Judges Jimly Asshiddiqie, Maruarar Siahaan, and I Dewa Gede Palguna, as well as Hanindyo for helping me to access records in the Constitutional Court library.

Over the years, I have presented chapters of this dissertation at various conferences and

have received invaluable feedback. In particular, I would like to thank the participants of the Fall 2011 University of Michigan Comparative Politics Workshop, the 2011 Southeast Asia: Between the Lines conference, and the 2012 and 2017 Midwest Political Science Association annual meetings. I received funding to travel to these conferences from the University of Michigan Department of Political Science, as well as from the Rackham Graduate School and International Institute. Several of my professors, including Jenna Bednar, Kenneth McElwain, Brian Min, and Mariah Zeisberg, provided feedback on papers I submitted for classes that later informed my dissertation. I also had informative conversations with Simon Butt, Nick Cheesman, Melissa Crouch, Marcus Mietzner, and Dan Slater about my research.

This dissertation would not have been possible without the generous financial support of donors interested in advancing political science and the study of Indonesia. I first went to Indonesia in 2007 for a summer internship with support from the Georgetown University Law Center. I received tuition assistance from the Freeman Foundation to attend SAIS, where I first studied Indonesian politics. When I began my Ph.D. program in 2010, Rackham Graduate School and the International Institute provided me with a Rackham International Research Award in order to work at The Asia Foundation's office in Jakarta. This trip proved instrumental in allowing me to explore potential dissertation topics. The U.S.-Indonesia Society's 2013 Sumitro Fellowship allowed me to complete fieldwork in Jakarta. Upon my return, the UM Department of Political Science generously provided me with a Clark & Robin Chandler Graduate Award, a One-Term Dissertation Fellowship, and multiple tuition-only fellowships so I could focus on writing my dissertation. I also received FLAS Fellowships in 2011 and 2016 from the Department of Education to take Indonesian-language classes.

Finally, I need to thank my parents, Dominic and Frances Nardi. They did more for me than I could possibly know. It is only because of their persistence and love that I had the opportunity to attend college and travel to Southeast Asia.

While I take responsibility for all shortcomings of this dissertation, I could not have accomplished this on my own. It takes a campus to write a dissertation.

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## LIST OF ABBREVIATIONS

- ABPPTSI** Association of Indonesian Private University Implementing Bodies
- CTM** Correlated Topic Model
- DPR** People’s Representative Chamber, or *Dewan Perwakilan Rakyat*
- ELSAM** Institute for Policy Research and Advocacy
- FPI** Islamic Defenders Front, or *Front Pembela Islam*
- Gestapu** Thirtieth of September Movement, or *Gerakan Satu Oktober*
- Golkar** Party of the Functional Groups, or *Partai Golongan Karya*
- HuMa** Community and Ecological Based Society for Law Reform
- ICW** Indonesia Corruption Watch
- IKAHI** Indonesian Judges Association, or *Ikatan Hakim Indonesia*
- IMF** International Monetary Fund
- KAHMI** Islamic Students Alumni Association, or *Korps Alumni Himpunan Mahasiswa Islam*
- KKN** corruption, collusion, and nepotism, or *korupsi, kolusi, dan nepotisme*
- KPAI** Indonesian Child Protection Commission, or *Komisi Perlindungan Anak Indonesia*
- KPI** Indonesian Broadcasting Commission, or *Komisi Penyiaran Indonesia*
- KPK** Corruption Eradication Commission, or *Komisi Pemberantasan Korupsi*
- KPU** General Elections Commission, or *Komisi Pemilihan Umum*
- Komnas HAM** National Commission on Human Rights, or *Komisi Nasional Hak Asasi Manusia*
- KY** Judicial Commission, or *Komisi Yudisial*

**LBH** Legal Aid Organization, or *Lembaga Bantuan Hukum*

**LDA** Latent Dirichlet Allocation

**MA** Supreme Court, or *Mahkamah Agung*

**MK** Constitutional Court, or *Mahkamah Konstitusi*

**MPR** People’s Consultative Assembly, or *Majelis Permusyawaratan Rakyat*

**NGOs** nongovernmental organizations

**NLP** natural language processing

**NU** Nahdlatul Ulama

**PDI-P** Indonesian Democratic Party of Struggle, or *Partai Demokrasi Indonesia Perjuangan*

**PGRI** Indonesian Teacher’s Union, or *Persatuan Guru Republik Indonesia*

**PHPU** disputes over general election results, or *Perselisihan Hasil Pemilihan Umum*

**PHPUD** disputes over regional election results, or *Perselisihan Hasil Pemilihan Umum Daerah*

**Pilkada** regional executive elections, or *Pemilihan Kepala Daerah*

**PKB** National Awakening Party, or *Partai Kebangkitan Bangsa*

**PKI** Indonesian Communist Party, or *Partai Komunis Indonesia*

**PMII** Indonesian Islamic Students’ Movement

**PSI** Indonesian Socialist Party, or *Partai Sosialis Indonesia*

**PTUN** State Administrative Court, or *Pengadilan Tata Usaha Negara*

**PUU** constitutional review of statutes, or *Pengujian Undang-Undang*

**SBI** international standard schools, or *Sekolah Bertaraf Internasional*

**SBY** Susilo Bambang Yudhoyono

**SKLN** disputes over the authority of state institutions, or *Sengketa Kewenangan Lembaga Negara*

**SSLM** support structure for legal mobilization

**STM** Structural Topic Model

**UUD** Constitution, or *Undang-Undang Dasar*

**WALHI** Indonesian Forum for the Environment, or *Wahana Lingkungan Hidup Indonesia*

## ABSTRACT

This dissertation is an empirical attempt to explain how nongovernmental organizations (NGOs) and public opinion influence Indonesia’s Constitutional Court (*Mahkamah Konstitusi*). In doing so, it argues that the extent to which a court interacts with and responds to civil society – its “embeddedness” – is an important indicator of judicial empowerment. Embedded courts are better able to rely upon external stakeholders to bring important policy questions to the court’s attention, provide it with relevant and accurate information, and protect the institution from government reprisals.

The dissertation analyzes three mechanisms through which litigants interact with and influence the Constitutional Court. First, Indonesian citizens and organizations can file petitions for constitutional review. Because the Court can only adjudicate constitutional questions raised in the petitions, petitioners have considerable power to set the Court’s agenda. Using an automated topic model, this dissertation finds that NGOs are significantly more likely to file petitions covering socioeconomic rights, such as education and labor, and human rights. This allows NGOs to not only determine which rights claims reach the Court, but also to frame the legal and policy questions for the justices.

Second, litigants send signals about public opinion. The Indonesian public can empower the Constitutional Court by detecting and punishing government attempts to undermine judicial decisions. Although the justices do not measure public opinion directly, they can observe the size of the coalition supporting or opposing the petition, which acts as a signal of public opinion. This dissertation finds that the Court is significantly more likely to grant a petition if it is supported by a large number of petitioners. By contrast, it is less likely to do



so if it receives a large number of non-litigant briefs opposing the petition. Thus, the justices seem to consider the level of public support for or opposition to petitions when adjudicating cases.

Third, litigants can convince the Constitutional Court justices to quote their briefs in the final decision. Justices are more likely to quote a brief if they view the source as credible. Using plagiarism-detection software, this dissertation finds that the justices are more likely to quote text from briefs submitted by NGOs. NGOs possess the resources and expertise necessary to provide accurate information. They also rely heavily on their moral capital and reputation to advance policy goals. This helps persuade the justices to view their briefs as credible and informative.

The dissertation utilizes an original dataset of 541 petitions for constitutional review submitted during the terms of the first three chief justices (August 13, 2003 – October 2, 2013), as well as 249 statements from the president, 243 statements from the legislature, 62 briefs from third parties supporting of the petition, and 141 briefs from third parties opposing the petition. This dissertation also makes use of dozens of interviews conducted with lawyers, NGO staff, judges, and scholars in Indonesia about litigation strategies, as well as qualitative analysis of several high-profile cases.

## CHAPTER I

### Introduction

Since the end of the Cold War, constitutional courts have become increasingly important political actors. In what Tate and Vallinder (1997, 1) call the “global expansion of judicial power,” judges around the world have proved willing to issue judgments on controversial and politically salient disputes. Moreover, this trend has not been confined to regions with a long tradition of judicial review, such as the United States and Western Europe. Indeed, some of the most active and activist courts are located in new democracies. During the past 20 years, judges have required the South African government to provide retroviral treatments to HIV victims (Sunstein, 2001); ordered the Indian government to convert all buses in Delhi to compressed natural gas (Rosencranz and Jackson, 2003); legalized abortion in Colombia (Cook, 2007); and even annulled the election of Pakistani dictator Pervez Musharraf (International Crisis Group, 2008).

Scholars have studied the political and economic causes of judicial empowerment extensively over the past few decades (see Woods and Hilbink, 2009; Helmke and Rosenbluth, 2009). In particular, they have focused on the question of why a government would design an institution that could potentially constrain the government’s discretion. One strand of the literature argues that political elites empower courts when they anticipate significant political transition as a way to enshrine and protect their policy preferences from opponents (e.g., Ginsburg, 2003; Hirschl, 2004; Finkel, 2008). Another popular theory posits that gov-

ernments grant courts independence in order to encourage investment and economic growth because courts credibly commit the government to protecting property and contract rights (North and Weingast, 1989; Feld and Voigt, 2003; LaPorta, 2004; Wang, 2015). Finally, courts can help governments build and maintain their legitimacy by demonstrating their respect for the rule of law, which is especially important for new and developing countries (Toharia, 1975; Trochev, 2004).<sup>1</sup>

Yet, these theories do not fully explain the behavior of courts once the governments have granted them independence and review powers. As Horowitz (2006, 131) notes, “not even the most careful design of a constitutional court can guarantee that it will become a bulwark of law and guarantor of human rights.” At its core, this dissertation is an attempt to provide an explanation of how and why constitutional courts decide to rule against political elites and in favor of citizens seeking to enforce constitutional rights. In particular, it is a study of how civil society affects case outcomes in Indonesia’s Constitutional Court.

In this chapter, I introduce the dissertation and briefly outline the organization of the following six chapters. I start by presenting the theoretical puzzle about judicial behavior that I attempt to answer. I then explain why I decided to use data from Indonesia’s Constitutional Court to test my theory about the role of litigants. Finally, I discuss my methodological approach and summarize my findings.

## **1.1 The Puzzle: Embedded Autonomy**

The central puzzle that motivates this dissertation is why constitutional courts rule against governments, despite the potential for reprisals and evasion from government actors. When and how can non-state actors succeed in influencing policy debates through constitutional litigation? Does support from civil society enhance the scope and effectiveness of judicial power? As Deinla (2014, 1) asks in her study of the Philippine Supreme Court:

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<sup>1</sup>They can also help governments maintain popular legitimacy by allowing elites to deflect the blame for unpopular decisions (Graber, 1993; Salzberger, 1993).

Why and how does a judiciary mired in political struggle among the elites decide particularly for or against the ruling coalition? What is the motivation of the Court in policing constitutional democracy against the weight of rewards, pressure or threats from a powerful ruling party?

In this section, I briefly explain why the existing literature fails to completely answer these questions, and then present an alternative theoretical approach. I provide a more detailed literature review in Chapter III, as well as at the beginning of each of the empirical chapters (Chapters IV-VI). I then provide a partial explanation that focuses on the role of civil society.

As noted above, institutional design is a necessary but not sufficient condition for judicial empowerment; even if the government grants a court *de jure* and *de facto* independence, the judges will not necessarily use their powers to enforce the constitution. One explanation is that judges rule against the government when doing so aligns with their personal policy preferences (see Segal and Cover, 1989; Segal and Spaeth, 1996). If judges believe ruling in favor of a farmer against the president will lead to a better policy outcome, they can and will do so. However, as U.S. Founding Father Alexander Hamilton famously warned, the judiciary has “no influence over either the sword or the purse” (Hamilton, 1788). Even independent courts face the risk that the legislature will attempt to override an adverse decision or that the executive branch will refuse to comply with it.

This raises the question of when and how judges believe that the rewards of ruling against the government outweigh the risks. One option judges have is to decide cases in a way that minimizes the political risks. In other words, judges try to anticipate the reaction of the government and only rule against it when they believe they can avoid legislative override or noncompliance. The literature has convincingly demonstrated that judges do behave strategically (see Maltzman, Spriggs and Wahlbeck, 1999; Bergara, Richman and Spiller, 2003), but it tends to focus almost exclusively on the influence of state institutions. In particular, it overlooks other important political actors, such as civil society. The literature also tends to test strategic behavior by examining judicial voting outcomes, ignoring other

important steps in the process of constitutional litigation.

In this dissertation, I propose a new theoretical framework called “embedded autonomy” that accounts for the influence of non-state actors on judicial behavior.<sup>2</sup> I argue that judicial empowerment is a function of both autonomy from government and embeddedness in society. By embeddedness, I refer to the extent to which the Court has institutionalized channels to and engages with non-state actors, such as nonprofit organizations, corporations, and the general public. In the dissertation, I focus on explaining embeddedness because the literature has already extensively addressed the importance of autonomy (e.g., Woods and Hilbink, 2009; Helmke and Rosenbluth, 2009). Instead, I examine the ways in which non-state actors can influence judicial behavior. I look at not just judicial voting and case outcomes, but also at other parts in the litigation process.

First, in most constitutional systems, non-state actors can initiate cases by filing petitions. They essentially set the court’s agenda because, with a few exceptions, judges cannot adjudicate policy disputes if they do not receive petitions (Epp, 1998). The distribution of topics on the court’s agenda thus depends upon the distribution of litigants bringing cases. Organizations and individuals can file petitions addressing the policy issues of greatest concern to them, bringing them to the court’s attention. Non-state actors can also assist the court by monitoring and detecting any attempts by the government to avoid complying with court judgments.

Second, courts in democratic countries have an incentive to cultivate – or at least not stray too far from – public opinion. The public’s perception of how the court handles individual cases is important to its perception of the court as an institution. This is especially true for new courts that cannot rely upon a historical legacy for its legitimacy (Gibson, Caldeira and Baird, 1998). In turn, the court’s legitimacy can determine the extent to which the public at large and key stakeholders support the institution. Public support raises the audience cost to the government of any attempt to retaliate against the court, providing the

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<sup>2</sup>The term “embedded autonomy” comes from the literature on bureaucracies, particularly the work of Evans (1995).

judges with additional security. Thus, judges are more likely to rule against the government when they believe the public will support their decision, or at least defend it.

Finally, non-state actors involved in litigation can influence the factual information and legal arguments that judges receive through their briefs and other evidence. For the most part, courts cannot and do not conduct their own research into the facts outside of what is presented to them in the briefs. Thus, judges face an information asymmetry problem; they do not know how much they can trust the information contained in a brief. In a low-information environment, judges can better assess the credibility of a brief if they have some prior information about the party that filed it. As such, judges are more likely to trust non-state actors that have gained a reputation for integrity and expertise.

Throughout the dissertation, I focus on one particularly interesting type of litigant: nongovernmental organizations (NGOs). NGOs are nonprofit, formally constituted organizations with the goal of pursuing some collective good or policy change. NGOs engaged in constitutional litigation typically compete against better funded parties, particularly the national government. This is especially true in developing countries, where NGOs often lack financial support from large-scale donors (Epp, 1998). At the same time, NGOs usually possess more policy expertise and legal resources than the average individual; some even engage in constitutional litigation on a regular basis. They also frequently have the capacity to mobilize the public, or at least key stakeholders, to resolve collective action problems and pursue public goods. This dissertation explores how and why NGOs exert policy influence through constitutional litigation.

## **1.2 A Single-Country Approach: Indonesia**

This dissertation uses a single-country approach to test the implications of the embedded autonomy model, relying on data from Indonesia's Constitutional Court. Focusing on a single country improves my ability to make causal claims about the relationship between the court and non-state actors. However, this approach does entail tradeoffs compared to

a cross-national comparison. In this section, I explain why I adopted a single-country approach, as well as why I chose Indonesia. I provide a more detailed history of Indonesia and the Constitutional Court in Chapter II.

A single-country approach reduces the potential number of confounding variables. Judicial behavior is complex, driven by the actions of political actors, institutional design, and historical traditions. A cross-national study comparing judicial behavior across different types of judicial systems would allow me to test embedded autonomy in a wider range of contexts, but it would also exponentially increase the number of variables that I would need to consider. For example, judges in common law systems play a very different role in litigation compared to judges in civil law systems (Rubin, 1977; Shapiro, 1986). A cross-national statistical model would have to account for all potential differences lest it suffer from omitted variable bias. By contrast, limiting the research to a single constitutional system allows me to focus on the independent variables of interest (i.e., litigant identity) and control for historical and institutional design factors. Although this approach sacrifices generalizability, it enables me to draw stronger causal inferences.

In addition, existing cross-national datasets on judicial behavior simply do not have sufficient geographic or temporal coverage to yield truly generalizable results. Although there are a variety of measures for judicial independence (e.g., Keith, 2002; Feld and Voigt, 2003; LaPorta, 2004; Tate and Keith, 2009; Kaufman, Kraay and Mastruzzi, 2010; Linzner and Staton, 2015), conceptual and practical concerns make them ill-suited to the research questions I pursue in this dissertation. For example, some measures rely upon sources, such as surveys, that do not adequately account for cross-national differences (i.e., do Americans define judicial independence the same way as Thais?). More importantly, no cross-national dataset currently includes information about all parties and outcomes in all constitutional cases. The High Courts Judicial Database includes detailed information about constitutional cases and litigants over several years, but it only covers 11 countries (see Haynie et al., 2007). The CompLaw dataset covers over 10,000 cases from 43 countries, but only for single year

(see Carrubba et al., 2013).<sup>3</sup> A single-country approach allowed me to collect and code all the necessary data. Moreover, I managed to capture more refined information about the identity of litigants than anything currently available in the cross-national datasets.

In selecting a constitutional court, I focused on five criteria. First, the court need to have existed for at least several years to give the political system enough time to adapt to the new equilibrium. This means that I treated any questions of institutional design as exogenous or secondary. Second, the court needed to be sufficiently independent such that it could rule against the government in politically salient cases if it so desired. Third, the court must have adjudicated a sufficiently large number of cases to have meaningful variation in case outcomes. Fourth, members of the public must have legal standing to submit constitutional petitions, even if subject to certain requirements. I thus excluded from consideration institutions that only permit government actors to submit constitutional claims.<sup>4</sup> Finally, the court must have publicly available records to allow me to obtain copies of written judgments and briefs.

Indonesia’s Constitutional Court (*Mahkamah Konstitusi*), fits each of these criteria. First, the Constitutional Court was created in 2003, after Indonesia’s transition to democracy. According to the Indonesian Constitution, the Court is the first and final arbiter of constitutional disputes. It can receive petitions challenging the constitutionality of any piece of legislation passed by the national legislature. Second, the Court possesses both *de jure* and *de facto* independence. The president, legislature, and Supreme Court each select three justices to serve on the Court. Each justice serves a five-year term and can be reappointed once. In addition, there is no provision in the constitution for impeachment of a justice; the Court has its own internal mechanism for dealing with ethics violations.

Third, the Constitutional Court has received over a thousand petitions for constitutional review since it was established. The number of decisions has steadily increased each

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<sup>3</sup>As of 2016, the CompLaw dataset was in a pilot phase and only contained decisions published in the year 2003. The authors plan to expand temporal coverage in future versions.

<sup>4</sup>Such as France’s *Conseil Constitutionnel* before 2010.



year, from 31 in 2004 to 108 in 2017 (see Table 2.4). Moreover, it regularly grants petitions; it has declared a law unconstitutional in whole or part in around 26% of cases. Most importantly, the Court regularly rules against the government in high-profile and politically salient disputes (see Section 2.3 of Chapter II for examples). Fourth, although the Court does require petitioners to prove that they have suffered a constitutional harm, in practice it applies this standing test very liberally. The Court has even expanded standing to essentially allow any public interest NGO to file a constitutional petition.

Finally, the Constitutional Court is amongst the most transparent and accessible government institutions in Indonesia. The Court posts its decisions online within hours of reading them in session.<sup>5</sup> It also posts transcripts of hearings for all cases. The Court is open to the public and allows people and the media to observe hearings. I visited the Court's library in Jakarta in November 2013 and obtained digital copies of all the briefs submitted in constitutional review cases between August 13, 2003 to October 2, 2013.

The Constitutional Court's institutional design has the added benefit of facilitating causal inference and limiting the number of potentially confounding variables. As in most civil law systems, the constitutional court is separate from the rest of the judiciary and has exclusive jurisdiction over constitutional issues. As such, we need not worry about appeals or conflicts between different jurisdictions. Moreover, the Court can only review national legislation, not local statutes or administrative regulations. There is almost no chance that the national government would support a petition to challenge its own laws (although the intensity of its preferences might vary across cases). We also do not need to worry about whether the judges might be more deferential to the bureaucracy when reviewing administrative regulations or ministerial orders.

The *Mahkamah Konstitusi* also presents an exciting research opportunity because it has received relatively little attention from American political scientists, despite its activism. A group of Australian legal scholars has produced much of the English-language literature

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<sup>5</sup>Available at <http://www.mahkamahkonstitusi.go.id/>.

on the Court's jurisprudence (see, e.g., Crouch, 2012; Butt, 2015; Butt and Lindsey, 2008; Rosser, 2015a).<sup>6</sup> Meanwhile, a small group of Indonesian scholars educated in Australia and the U.S. have begun to apply political science models to better understand the Court as a political actor (see, e.g., Hendrianto, 2016c; Siregar, 2015). However, as Butt, Crouch and Dixon (2016, 2) note in a recent review of the literature on the Court, "The Court's role in constitutional politics also remains under-studied in a broader comparative context." Moreover, the current scholarship on the Court does little to engage with the broader political science literature on judicial behavior, either in testing older theories or developing new ones. As such, this dissertation not only advances a novel theoretical argument, but it also introduces a rich new case study to American scholars of comparative constitutional law.

### 1.3 Empirical Methods & Findings

This dissertation focuses on the Indonesian Constitutional Court during the terms of its first three chief judges (August 13, 2003 - October 2, 2013). My primary source of data is a collection of case files for constitutional review cases. During this period, the Court received 541 petitions, several of which were withdrawn before the Court reached a decision, resulting in 460 final decisions. For these cases, the Court received 483 petitions, 249 written statements from the president, 243 written statements from the legislature, 62 briefs from related parties (i.e., *amicus curiae*) supporting of the petition, and 141 briefs from related parties opposing the petition. A team of Indonesian law students coded the documents to obtain information about the identity of the litigants in each case.

In addition, during the summer of 2012 and fall of 2013, I conducted over 40 interviews with lawyers, NGO activists, judges, and scholars in Indonesia. In these interviews, I focused on understanding the strategic choices that lawyers face in constitutional litigation. In particular, I wanted to understand how and why petitioners formed coalitions with other

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<sup>6</sup>Almost all of the top Australian scholars studying the Court received their doctorate degrees from the University of Melbourne.

litigants when pursuing constitutional claims. I also obtained background information about the Constitutional Court, the justices, and their relationship with specific NGOs.

In each of the three empirical chapters, I consider one of the ways in which non-state actors can influence judicial behavior. In Chapter IV, I focus on the role of litigants in setting the Constitutional Court's agenda by filing petitions. I use a Structural Topic Model in order to derive information about the topics on the Court's docket from the distribution of words in the petitions. I then use the results to determine if certain types of litigants are more likely to file petitions challenging certain types of laws. I find that NGOs are significantly more likely to file petitions covering socioeconomic topics, such as education and labor, as well as human rights. This allows them to not only determine which issues reach the Court, but also frame the legal and policy debates for the judges. I demonstrate how this agenda-setting power works with a qualitative description of a series of cases in which education NGOs challenged the constitutionality of the national budget.

In Chapter V, I focus on the role of litigants in influencing judicial voting behavior. I use a standard logit model to predict the likelihood that the Constitutional Court will grant a petition. I find that the Court is significantly more likely to grant a petition if it is supported by a larger and more diverse coalition of petitioners. By contrast, the Court is less likely to do so as more related parties file briefs opposing the petition. I argue that the composition of the coalitions for or against a petition sends a signal to the Court about public opinion. I demonstrate how public opinion can influence judges with a qualitative description of a case in which the Court reviewed the constitutionality of the controversial 1965 *Blasphemy Law*. Surprisingly, I find no evidence that president's policy preferences influence the Court.

In Chapter VI, I focus on the role of litigants in convincing the Constitutional Court to quote text from their briefs. I use WCopyfind, a plagiarism-detection software, to measure the similarity between the briefs and the Court's written opinion. I then use a fractional logit model in order to understand the conditions under which the Court adopts text from a brief.

I find that the Court is significantly more likely to adopt text from petitions submitted by NGOs, but not from other types of petitioners, indicating that the Court finds NGOs to be a particularly credible source of information. I demonstrate how litigant credibility works with a qualitative description of a case in which a respected Islamic NGO filed a constitutional challenge to a government plan to privatize the natural gas sector.

Finally, in Chapter VII, I conclude by discussing the major contributions and limitations of this dissertation. Because this dissertation focuses exclusively on Indonesia, I spend considerable time assessing the generalizability of my results. I also discuss the potential for future research, both in Indonesia and elsewhere, to improve our understanding of the ways in which non-state actors influence judicial behavior.

## CHAPTER II

### Background

When Indonesia established a constitutional court in 2003, few observers expected it to become a powerful political actor. Indonesia historically had a weak judiciary and no experience with constitutional review. Moreover, on paper, the new court looked like a weak institution. Yet, the Constitutional Court now regularly exercises its review powers to strike down important pieces of legislation. Political elites have gone from ignoring the Court to fearing it. In this chapter, I explain how this happened and why it makes Indonesia an especially interesting country in which to study the influence of non-state actors on judicial behavior. I begin in Section 2.1 by providing some background on Indonesia and the country's judicial system. Next, in Section 2.2, I introduce the Constitutional Court and its institutional powers. I then explain why the Court presents such a puzzle to the conventional literature on judicial behavior. Finally, in Section 2.3, I conclude by exploring the Court's relationship with non-state actors, focusing on how NGOs and public opinion have influenced and strengthened the Court.

#### 2.1 The Indonesian Judicial System

The Constitutional Court was in many ways a direct response to the failures of Indonesia's courts under authoritarianism. The history of the judicial system is therefore relevant both because it informed the creation of the Constitutional Court and because it serves as

a baseline for any assessment of the Court's performance. In this section, I briefly discuss the state of Indonesia's judiciary under the post-independence governments and the period of democratic transition. As this history makes clear, Indonesian judicial institutions before the formation of the Constitutional Court were at best weak and at worst corrupt. The executive regularly exerted improper influence over judges. Moreover, the public had little faith in the judiciary. With a few exceptions, NGOs did not view the judiciary as a viable forum for policy negotiation. The transition to democracy in the early 2000s eventually led to the creation of new good governance institutions, which encouraged NGOs to participate more actively in public interest litigation.

### **2.1.1 Revolution & Guided Democracy (1945-1965)**

Indonesia has a population of over 260 million people, around 87% of whom are Muslim. However, the country is also very diverse and includes sizable religious and ethnic minority groups spread throughout the 17,000-island archipelago. The majority of the country resides on the island of Java. Indonesia inherited its current civil law system, including its civil and criminal codes, from the Dutch colonial government. The country also inherited a weak judicial system dominated by a strong executive. The colonial legislature controlled both the funding and removal of judges, while the Ministry of Justice handled court administration and the judiciary's civil service (Pompe, 2005, 13). The Dutch governor-general possessed a wide range of extraordinary powers (*exorbitante rechten*) not subject to judicial review, particularly in cases involving native Indonesians.<sup>1</sup>

The country declared independence from the Netherlands in August 1945 and fought a war against Dutch colonial forces until 1949. For several years, the country was a multiparty, parliamentary democracy, but suffered from regional insurgencies and civil wars. Upon independence, Indonesia's 1945 Constitution, or *Undang-Undang Dasar* (UUD), did not grant the judiciary constitutional review powers. Although a member of the Constituent Assem-

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<sup>1</sup>The colonial administration had separate judicial systems for Europeans and Indonesians, with the Indonesian courts (*landraad*) under the direct control of colonial district officers.

bly's preparatory committee, Mohammad Yamin, suggested granting the Supreme Court, or *Mahkamah Agung* (MA), review powers, the committee rejected his proposal (Pompe, 2005, 14). Indonesia's political elites simply did not trust judges. During the revolution against colonial rule (1945-49), many prominent judges publicly supported the Dutch and imprisoned revolutionaries, undermining their credibility in the eyes of the nationalists. In return, revolutionary armed forces and youth militias, the *Pemuda*, often pressured judges to rule in favor of nationalist defendants. With the judiciary's loyalty to the nationalist cause in doubt, the constituent assembly refused to grant it power over major policy decisions.

Indonesia had a relatively liberal parliamentary democracy during the early 1950s, but Parliament refused to empower the courts. In fact, although the judiciary was formally independent, judges suffered repeated abuses to their integrity and autonomy. Members of Parliament would accuse judges of being "*absen dari revolusi*" ("absent from the revolution"). Moreover, political leaders deliberately snubbed judges at official events (Pompe, 2005, 35-48). At one point, the Department of Justice proposed reducing judicial salaries to the same level as prosecutors (*jaksa*). In response to these threats, judges began to organize under the Indonesian Judges Association, or *Ikatan Hakim Indonesia* (IKAHI). In 1956, IKAHI, backed by Supreme Court Chairman Wirjono Prodjodikoro, formally asked Parliament to transfer court administration from the Ministry of Justice to the Court and permit it to exercise constitutional review. While some legislators supported the proposal as a means of checking the executive, President Sukarno short-circuited the debate in 1957 by declaring martial law and introducing Guided Democracy.

Guided Democracy meant the end of even the pretense of judicial autonomy. Sukarno told judges that they should work to further the revolution. The executive and army sought to influence judges in politically salient cases.<sup>2</sup> In 1964, the government passed a law allowing for direct government supervision over cases to promote "revolutionary interests, the state

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<sup>2</sup>In one case, Sukarno asked the Supreme Court to confirm the dissolution of two rival political parties, Masyumi and Indonesian Socialist Party, or *Partai Sosialis Indonesia* (PSI). When it did so, Sukarno claimed the Court had effectively declared that the president could ignore any law at will (Pompe, 2005, 57).

or national honor, or pressing public interest.”<sup>3</sup> Sukarno even demanded that judges swear an oath of personal allegiance to him. Some judges retired, but most remained (Lev, 2007). To symbolize the judiciary’s new role, the government replaced the judges’ distinctive black gowns with military-style uniforms.<sup>4</sup> By the mid-1960s, the judiciary lost what little power it had as an independent political actor.

### 2.1.2 The New Order (1965-1998)

Indonesia’s leftward tilt ended on September 30, 1965, when a group of leftist military officers allegedly tried to overthrow the government and assassinated six generals. General Suharto led a counterattack against the coup plotters. The military and Islamic groups blamed the Indonesian Communist Party, or *Partai Komunis Indonesia* (PKI), for the attempt, leading to a mass purge that resulted in the deaths of an estimated 500,000 people.<sup>5</sup> Suharto established a right-wing authoritarian regime known as the New Order. He maintained power by using patronage to co-opt the country’s elites. He founded the Party of the Functional Groups, or *Partai Golongan Karya* (Golkar), to act as his political party and limited the number of other parties that could participate in elections. The New Order led to a period of rapid economic growth; between 1967 to 1997, the economy grew at an average of 7% per year (der Eng, 2010). This growth led to the formation of a new middle class, although inequality and poverty remained chronic problems, especially outside Java.

Suharto initially promised that the New Order regime would reinstate the rule of law (*negara hukum*), in contrast to the chaos of Guided Democracy (Gross, 2005, 950). Judges abandoned their military uniforms and donned black robes once again (Lev, 1978, 51). IKAHI even believed it could persuade the new regime to grant the Supreme Court control over court administration and the power of judicial review (Pompe, 2005). How-

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<sup>3</sup>Law No. 19 of 1964, art. 19.

<sup>4</sup>It also replaced the traditional symbol of justice – a blindfolded lady justice bearing sward and scales – with a stylized banyan tree under the word “*pengayoman*,” which means “protection” (Lev, 1965).

<sup>5</sup>There is still much confusion as to precisely what happened during the coup, known in Indonesia as Thirtieth of September Movement, or *Gerakan Satu Oktober* (Gestapu). Some allege that the military staged the coup in order to create an excuse to crack down on the PKI.



ever, it soon became clear that the New Order's version of *negara hukum* did not include strong, autonomous courts. The legislature, the People's Consultative Assembly, or *Majelis Permusyawaratan Rakyat* (MPR), which was dominated by Golkar, did rescind the 1964 law, but also passed the Judicial Authority Law,<sup>6</sup> which confirmed the Justice Department's control over court administration and finance.<sup>7</sup>

The New Order manipulated the judiciary through appointments to the Supreme Court. Suharto asked nominees to promise to protect "political interests in cases arising before the Court" (Pompe, 2005, 354-55). Although the president submitted a list of candidates to the MPR for approval, legislators never dared to reject the president's nominees. This allowed Suharto to appoint loyal allies to the bench and to select retired military officers for leadership positions. These senior justices then aided the regime in holding subordinate judges accountable by issuing Supreme Court circulars promoting the president's interpretation of the law. The justices also took advantage of corruption to enforce discipline, assigning the most lucrative cases to the most obedient judges. In exceptional circumstances, senior justices would even overturn or "de-finalize" Supreme Court decisions that infringed upon elite interests, even though no provision law allowed for such action.<sup>8</sup>

When IKAHI lobbied the government for judicial review in the late 1960s, Secretary

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<sup>6</sup>Law No. 14 of 1970.

<sup>7</sup>I recommend Pompe (2005) for readers who wish to learn more about the Indonesian Supreme Court during the New Order.

<sup>8</sup>The Supreme Court could "de-finalize" a final decision in two ways. The first involved a "special review" in which a senior justice would review the case in response to a complaint. In the *Kedung Ombo* case in the early 1990s, a Supreme Court chamber awarded villagers generous compensation for damages caused by the Kedung Ombo dam in Central Java. The government had offered a mere Rp. 800 to the 5,268 families, whereas the Court's decision offered Rp. 80,000 per square meter. The government worried not just about the financial impact of the decision, but also about the plaintiffs' symbolic victory over a World Bank-funded project (Aditjondro, 1998). After a personal request from Suharto to Chief Justice Purwoto to make "the most just decision" ("*putusan seadil-adilnya*"), a special review overturned the chamber's decision on the dubious grounds that the Court could not award damages in excess of what the parties had claimed (Pompe, 2005, 149-50).

The second mechanism for "de-finalizing" decisions involved an indefinite stay of enforcement. In such cases, a superior court would instruct the responsible district court to not enforce the decision. In 1992, in the *Ohee* case, a Supreme Court chamber granted Papuan tribesmen Rp. 18.6 billion in damages for unlawful occupation of their land by the provincial governor. Rather than retrying the case, Chief Justice Soerjono simply instructed the district court judge to annul enforcement of the judgment since the provincial governor of Irian Jaya was not a legal person. The order elicited much criticism and provoked unrest in Irian Jaya, but also demonstrated the legal extremes the justices took to protect elite interests (Pompe, 2005, 159).

of Justice Oemar Seno Adji responded that the MPR would serve as the arbiter of constitutional interpretation and that Indonesia's civil law heritage did not allow for judicial review. By the early 1980s, political support for judicial review grew, in part because the growing middle class demanded a check against the powerful bureaucracy. In 1986, the MPR passed a law establishing a State Administrative Court, or *Pengadilan Tata Usaha Negara* (PTUN), inspired by the Dutch model.<sup>9</sup> The law granted these courts the power to suspend administrative decisions, but also urged judges to use this power with restraint (Bedner, 2001, 115). As such, administrative courts exercised a low standard of review. Furthermore, noncompliance with judgments posed a significant problem; in the 1990s, Jakarta Administrative Court of Appeals Chairman Soebijanto claimed a noncompliance rate as high as 60% (Bedner, 2001, 231). Judges also complained about the refusal of government officials to appear before the court when summoned.

Despite these challenges, some NGOs found ways to use litigation to advance their goals. The government generally tolerated public interest litigation related to environmental issues, so long as it did not threaten the elite interests. In 1989, the Indonesian Forum for the Environment, or *Wahana Lingkungan Hidup Indonesia* (WALHI), filed a lawsuit with the Central Jakarta District Court against the PT Indorayon corporation for deforestation and pollution in the Asahan River. Although WALHI ultimately lost the case, the court did grant WALHI legal standing, which created an opening for other environmental NGOs (Nicholson, 2009, 123).<sup>10</sup> Even when they didn't win, NGOs and political activists could use the courts to generate attention for their cause. In 1994, an administrative court overturned a government ban on the independent weekly magazine *Tempo*. This was the first time a court had examined and overturned a ministerial decision (see Millie, 1999). Although the

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<sup>9</sup>Law No. 5 of 1986.

<sup>10</sup>Administrative courts also expanded standing for NGOs, but imposed more procedural requirements. In the 1994 *IPTN (Reafforestation Funds)* case, the Jakarta State Administrative Court found that environmental NGOs have standing if they: 1) duly register with the government as legal organizations; 2) have an official mission or goal of environmental protection; 3) demonstrate actual concern for the environment in their activities; and 4) sufficiently represent the public (Nicholson, 2009, 104). This ruling was later codified in Article 37 of the 1997 Environmental Management Act.

Supreme Court subsequently overturned this decision, it inspired other plaintiffs to use to the administrative courts to challenge government officials (Bourchier, 1999, 206).

Overall, NGOs could use litigation to raise awareness for a cause or embarrass the regime, but they seldom managed – or expected – to actually influence policy. According to Pompe (2005, 354-55), “all major political cases until political reforms (*reformasi*) were decided by the Supreme Court in support of the government.” Despite this, public interest litigation during the New Order led to two important innovations. First, it established the principle that NGOs had standing to represent the public interest even without having suffered a concrete harm. Second, after the creation of the administrative courts, public interest litigation showed that a judicial body had the legal authority – if not the political power – to strike down government actions. Ultimately, Suharto’s patrimonial influence over the judiciary did not survive his downfall, but these legal innovations did.

### **2.1.3 *Reformasi* (1998-2002)**

The New Order economic boom did not last, however, and the 1997-98 Asian Financial Crisis led to a rapid devaluation of the *Rupiah* and a 13% contraction in GDP (Pepinsky, 2009). In May 1998, widespread protests forced Suharto out of office. His successor, B.J. Habibie, agreed to new elections and an extensive reform program (known as *Reformasi*). As part of the reforms, the legislature passed four constitutional amendment packages that overhauled the constitution. The amendments reduced the power of the president, decentralized authority to the provinces, and strengthened civil rights. *Reformasi* essentially transformed Indonesia into a multiparty, presidential democracy. In 2004, the country held its first direct presidential election, and has since held hundreds of elections at the national and local levels. The country regularly ranks as the most democratic in Southeast Asia (see Marshall, Gurr and Jagers, 2017) and has a vibrant media and civil society (Mietzner, 2012).

However, *Reformasi* was a highly managed transition to democracy, not a revolution. Horowitz (2013) argues that Indonesian democratization succeeded in large part because

reforms proceeded on the basis of consensus, ensuring that elites bought into the process. After the June 1999 legislative elections, no party held a majority in the MPR. The largest party, the Indonesian Democratic Party of Struggle, or *Partai Demokrasi Indonesia Perjuangan* (PDI-P), won around a third of the seats, while Golkar, Suharto’s party, won just 26%. Eventually, the legislature chose Abdurrahman Wahid (“Gus Dur”) from the National Awakening Party, or *Partai Kebangkitan Bangsa* (PKB) – which won just 11% of the seats – to serve as president, while PDI-P leader Megawati Sukarnoputri was chosen as Vice-President.

Under this new leadership, the MPR adopted four amendment packages that essentially rewrote the 1945 Constitution. The first package transferred power from the executive to the legislature and limited the president to two five-year terms (Suharto had served for over three decades). The second amendments inserted a bill of human rights and decentralized administrative power to the provinces (Ostwald, Tajima and Samphantharak, 2016). The third amendments focused on institutional reforms and created several new “good governance” institutions, including the Corruption Eradication Commission, or *Komisi Pemberantasan Korupsi* (KPK), as a way to fight back against the corruption that had become so prevalent during the New Order. The fourth package dealt with the composition of the MPR, presidential elections, and socioeconomic rights.

In 1999, the lower chamber of the legislature, the People’s Representative Chamber, or *Dewan Perwakilan Rakyat* (DPR), enacted the Judicial Power (*Satu Atap*) Law<sup>11</sup> in order to make the judiciary truly independent of the executive. The law finally transferred court administration and finances from the Department of Justice to the Supreme Court. It then required the president to appoint the judicial candidates chosen by the DPR and allowed the justices to choose their own chief and deputy chief justices. In 2000, the DPR appointed several non-career judges to the Supreme Court in order to infuse the institution with new talent untainted by the New Order (Lindsey, 2007, 14). Meanwhile, Chief Justice Bagir Manan published a strategic plan for judicial reform (Fenwick, 2008, 342). The third package

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<sup>11</sup>Law No. 35 of 1999.

of constitutional amendments also established the Judicial Commission, or *Komisi Yudisial* (KY), to help select candidates for the Supreme Court and monitor judicial conduct.<sup>12</sup>

IKAHI finally achieved its longtime goal of judicial review – to a certain extent. In 2004, the DPR passed amendments to the 1970 Judicial Power Law enabling courts to render regulations null and void without any action on the part of the bureaucracy.<sup>13</sup> However, even after *Reformasi*, courts were still hesitant to exercise judicial review. For example, in 1999, a group of NGOs sued the government for failing to provide migrants returning from Malaysia with basic healthcare, sanitation, nutrition, and housing. Although the Court ordered the government to provide the migrants with assistance, it refused to mandate any legal changes to help migrant workers (Gauri and Brinks, 2015, 93). In short, although judges were more willing to declare government actions illegal after *Reformasi*, they still hesitated to strike down laws.

Despite these reforms, the judiciary still suffers from extensive corruption, collusion, and nepotism, or *korupsi, kolusi, dan nepotisme* (KKN). Buehler (2009) and Ida (2010) have detailed a complex network of patronage and favors in the judiciary that they call the “judicial mafia.” Because the justices choose their own chief, it has been difficult to find truly reformist leadership in the Supreme Court (USAID, 2008). Ironically, in protecting judicial independence, the *Satu Atap* Law had the unintended effect of undermining anticorruption efforts by limiting the ability of external institutions, such as the KY and KPK, to discipline judicial misconduct.<sup>14</sup> When a judge is accused of corruption, the other judges tend to close ranks around their colleague rather than cooperate with investigations (Lindsey, 2002,

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<sup>12</sup>Officially, the Judicial Commission has the authority to guard (*menjaga*) and enforce (*menegakkan*) judicial ethics. However, The Commission has been unable to exercise the enforcement part of its mandate. The Commissioners failed to gain the trust of judges, in part because they came from the the private sector and NGOs rather than from the bench (USAID, 2008, 11). After a confrontation with the Supreme Court, the Commission proposed sacking all of the justices (Davidsen, Juwono and Timberman, 2007, 40). In return, the Supreme Court challenged the commission’s jurisdiction in the Constitutional Court. Ironically, the Constitutional Court ruled that the Commission’s enforcement powers violated the independence of the judiciary, leaving it unable to discipline misconduct (Fenwick, 2008, 347).

<sup>13</sup>Law No. 5 of 2004.

<sup>14</sup>Courts have also resisted audits. For example, litigants who win cases are entitled to their case fees, but in practice they rarely receive the refund. When the State Audit Board tried to audit these funds, the judiciary refused to comply (USAID, 2008, 10).

14). Not surprisingly, public faith in the judiciary has suffered (see, e.g., World Bank, 2003; Wardany, 2009; Indonesia, 2009; Parlina, 2013*b*). NGOs, such as Indonesia Corruption Watch (ICW), regularly criticize judicial corruption and lobby for reforms, but it will likely take decades to completely undo the legacy of the New Order.

## 2.2 The Constitutional Court (*Mahkamah Konstitusi*)

The previous section discussed the political context that led to the creation of the Indonesian Constitutional Court, or *Mahkamah Konstitusi* (MK). In this section, I introduce the Court, the primary focus of my dissertation. I begin by discussing why the MPR decided to create a separate constitutional court to handle constitutional questions. I then summarize the institutional design, powers, and jurisdiction of the Constitutional Court.

### 2.2.1 Why a Constitutional Court?

As noted in the previous section, IKAHI and other groups had been pushing for constitutional review since independence. While *Reformasi* led to a considerable amount of constitutional change, it was not inevitable that the MPR would establish a constitutional court, much less a separate court with exclusive jurisdiction over constitutional claims. Before examining how the Constitutional Court has operated in practice, it is worth discussing why Indonesian political elites decided upon the institutional design of the *Mahkamah Konstitusi* as it exists today.

Although Indonesia did transition from the authoritarianism to democracy, the MPR did not design the Constitutional Court as a insurance mechanism to protect the policy preferences of New Order elites.<sup>15</sup> The MPR passed the third amendment package on November 9, 2001, years after Golkar had lost its monopoly on power. However, *Reformasi* did not entail an abrupt transfer of power from one political coalition to another so much as a dispersion of political power to accommodate a larger group of elites. Constitutional amendments

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<sup>15</sup>For more about the use of constitutional review as a political insurance mechanism, see Ginsburg (2003).

required the consensus of all parties represented in the MPR (Horowitz, 2013). As such, New Order elites did not fear or expect that the democracy would threaten their core interests, much less that a future government would prosecute them for past crimes.

More importantly, the institutional design of the *Mahkamah Konstitusi* does not seem well suited to protecting older policies. The nine Constitutional Court justices only serve for five-year terms, indicating that the constitutional drafters had relatively short time horizons. Even if New Order elites could have selected the first nine justices, a future government could have replaced them just five years later. Had elites wanted political insurance, they could have demanded longer terms for Constitutional Court justices, or even life tenure.<sup>16</sup>

Mietzner (2010) and Siregar (2015) argue that elites saw constitutional review as a partial solution to the fragmentation of political power post-*Reformasi*. After the 1999 elections, no party held a majority in the MPR; PDI-P, the largest party, controlled less than a third of the seats. Moreover, the new government soon became embroiled in a constitutional crisis. On February 1, 2001, the MPR voted to impeach President Wahid for gross corruption and incompetence. Growing desperate, Wahid ordered General Susilo Bambang Yudhoyono, then the Coordinating Minister for Politics and Security, to declare a state of emergency (he refused). Wahid was ultimately forced to step down on July 23 and Vice-President Megawati succeeded him.

Although constitutional review had been raised in the MPR as early as 2000 (Hendrianto, 2010, 158), the impeachment crisis convinced elites of the urgent need for a mechanism to resolve intra-elite disputes (Indrayana, 2008). The constitutional drafters focused largely on creating a court that could review DPR motions to impeach a president or vice-president. In 2003, Yusril Ihza Mahendra, Minister of Justice under Megawati, even tried to delay the creation of the court because he worried that the Constitution's provisions on impeachment were too vague, especially given that some politicians were calling for the

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<sup>16</sup>Ironically, constitutional law professor Yusril Ihza Mahendra, who served as Justice Minister under President Megawati and was reluctant to establish the Constitutional Court, later used it as political insurance when he was later prosecuted for corruption (Hendrianto, 2013).

impeachment of Megawati (Hendrianto, 2013). Ironically, despite the fact that impeachment spurred the creation of the Constitutional Court, no Indonesian president has been impeached since Wahid.

Given the need for constitutional review, the MPR could have simply expanded the Supreme Court's jurisdiction. It did briefly consider this option, but ultimately concluded that the Court had become too corrupt and incompetent under the New Order (Lindsey, 2002, 261). It already had a backlog of tens of thousands of cases on its docket. Moreover, legislators worried that the Court would prove unwilling to exercise constitutional review. After all, it already had the authority to review government regulations and presidential decrees, but rarely did so; of the 26 petitions for review filed between 1992-99, only five had received a final decision (Widjojanto, 2004, 40). Jimly Asshidiqie – a legal advisor to the MPR and later first chief of the MK – presciently pointed out that the Supreme Court itself could become a party to a constitutional dispute, and thus should not have the final word on constitutional interpretation (Mahkamah Konstitusi, 2010, 495).<sup>17</sup> Ultimately, the MPR chose to sidestep these problems with the Supreme Court by creating an entirely new constitutional court.<sup>18</sup>

The Constitutional Court was originally intended as a mechanism to resolve disputes *between* political elites rather than *against* elites. The MPR pointedly did not view the Court primarily as a means for individuals to check government power. According to Hendrianto (2010, 165-66), “the issue of individual rights never featured during the debate on the formation of the Constitutional Court” and “there was no extensive discussion on how those rights could be defended in the Constitutional Court.” Instead, the Court's original jurisdiction focuses on areas of potential elite contestation. In addition to constitutional review, it also has jurisdiction over elections disputes, disputes between state institutions, impeachment

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<sup>17</sup>As happened when the Supreme Court challenged the authority of the Judicial Commission to enforce ethics rules against sitting justices in 2006 (see Butt, 2007).

<sup>18</sup>Activists and NGOs under the banner of NGO Coalition for a New Constitution pushed for the creation of a democratically elected Constitutional Commission with review powers (Lindsey, 2002, 266), but failed to convince the MPR.



proceedings against the president, and the dissolution of political parties. Moreover, the short five-year term for justices makes more sense if the MPR merely expected the Court to resolve elite disputes that arose during a given legislative or presidential term (both serve concurrent five-year terms).

### 2.2.2 Institution & Powers

According to Article 24 of the Indonesian Constitution, the Constitutional Court (*Mahkamah Konstitusi*) is independent of the other branches of government and enjoys full control over its budget. It has nine members, three each appointed by the president, the DPR, and the Supreme Court.<sup>19</sup> Each justice serves for five years, but can be reappointed to a second five-year term.<sup>20</sup> The justices elect a chief and deputy chief for a 30-month term, both of whom can be reelected to additional terms.<sup>21</sup> The Constitution itself says little about the qualifications for MK justices other than that they must possess integrity “beyond reproach, be just, statesmanlike...” and not hold any other position in government.<sup>22</sup> Article 16 of the 2003 Constitutional Court Law further stipulates that MK justices must be at least 40 years old and no older than 67; never have been convicted of a crime punishable by more than five years imprisonment; never have filed for bankruptcy; and possess at least 10 years of legal experience.<sup>23</sup>

Neither the Constitution nor the Constitutional Court Law created an external mechanism for investigating or disciplining justices accused of ethics violations. Instead, the MK has discretion regarding the “establishment, composition and procedures” of the Court’s Honour Council.<sup>24</sup> Any justice accused of violating judicial ethics must be given an opportunity to defend him or herself before the Honour Council. If the Council finds that the

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<sup>19</sup>Const., Art. 24C(3).

<sup>20</sup>All nine justices originally served concurrent terms, but because of retirements and resignations the terms are now staggered.

<sup>21</sup>Const., Article 24C(4).

<sup>22</sup>Const., Article 24C(5).

<sup>23</sup>Law on the Constitutional Court, Law No. 24 of 2003, Art. 16.

<sup>24</sup>Article 23(5).

complaint has merit, the president can then formally dismiss the justice. This procedure has been criticized because it permits the justices to police themselves. In 2011 and 2013, the DPR and the president tried to compel the appointment of external parties to the Honour Council, but the MK struck down both attempts for unconstitutionally violating the Court's independence (Butt, 2015, 88-92). In 2014, after the KPK arrested Chief Justice Akil Mochtar for corruption (see Chapter VII), the Court agreed to include a member of the Judicial Commission on the Honour Council, although the MK still selects the other four members – a current MK justice, a former MK justice, a prominent member of the community, and a law professor – in a closed plenary meeting.<sup>25</sup>

According to Article 24C(1) and (2) of the Constitution, the Constitutional Court has jurisdiction over the following types of cases:

1. constitutional review of statutes, or *Pengujian Undang-Undang* (PUU);
2. disputes over the authority of state institutions, or *Sengketa Kewenangan Lembaga Negara* (SKLN);
3. disputes over general election results, or *Perselisihan Hasil Pemilihan Umum* (PHPU);<sup>26</sup>
4. the dissolution of political parties; and
5. investigate and adjudicate DPR motions to impeach the president or vice-president.

Elections disputes constitute the vast majority of the Court's docket, particularly during election years (2004, 2009, & 2014). As seen in Table 2.1, the Court received 636 PHPU cases in 2009 alone.<sup>27</sup> Most of these cases ask the Court to check that the votes were counted correctly. The Court has declared that it can annul election results if it finds “massive and systematic fraud,” but it seldom exercises this power (Butt, 2015). After the 2009 and 2014 presidential elections, the losing candidates claimed that the winners had stolen millions

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<sup>25</sup>MK Regulation on the Honour Council, Reg. No. 2 of 2014, Art. 5.

<sup>26</sup>Horowitz (2013, footnote 125) believes that the MPR was inspired to grant the MK jurisdiction over elections disputes after members of the MPR drafting committee had visited South Korea, whose Constitutional Court also has jurisdiction over election disputes.

<sup>27</sup>Data available from MK website at <http://www.mahkamahkonstitusi.go.id/index.php?page=web.RekapPHPU>.

of votes. In both cases, the MK heard the complaints and concluded that the petitioners had not presented sufficient evidence to support their claims (Warat, 2014). Dressel and Mietzner (2012) and Butt (2015) credit the Court’s prompt and impartial adjudication of these disputes with deescalating post-election tensions.

	Granted	Rejected	Not accepted	Withdrawn	Aborted
Presidential	68	398	107	27	6
DPR	0	2	0	0	0
DPD	2	16	7	0	3
Total	70	416	114	27	9

**Table 2.1:** General Elections Cases (PHPU) in the Constitutional Court (2009)

Note: Includes all cases decided through December 1, 2017. Data available from MK website at <http://www.mahkamahkonstitusi.go.id/index.php?page=web.RekapPHPU>.

In 2008, the DPR transferred cases dealing with disputes over regional election results, or *Perselisihan Hasil Pemilihan Umum Daerah* (PHPUD) and regional executive elections, or *Pemilihan Kepala Daerah* (Pilkada), from the Supreme Court to the Constitutional Court. The decision came after the public lost confidence in the judiciary’s ability to handle election cases. The courts faced widespread criticism for issuing poorly reasoned decisions and exceeding their jurisdiction (Butt, 2015, 254-56).<sup>28</sup> However, these cases, especially the *Pilkada*, became a major irritant to the Constitutional Court. The Court received so many petitions that they overwhelmed the docket and impeded the justices’ other work (see Table 2.2).<sup>29</sup> Regional elections cases also increased the risk of corruption as politicians tried to bribe justices for favorable decisions (see Chapter VII). The Court has tried several times to relinquish authority over PHPUD cases, but in the meantime has promised to continue adjudicating regional elections disputes until the DPR decides upon an alternative (Parlina, 2016).

SKLN cases involve disputes between Indonesian government institutions about the scope of their authority and powers. The constitutional drafters realized that *Reformasi*

<sup>28</sup>In the 2005 *Depok case*, the High Court of West Java decided to count the votes of individuals who claimed that they could not vote, and also went beyond its jurisdiction to investigate allegations of vote rigging.

<sup>29</sup>Data available from MK website at <http://www.mahkamahkonstitusi.go.id/index.php?page=web.RekapPHPUD>.

	Granted	Rejected	Not accepted	Withdrawn
2008	3	12	3	0
2009	1	10	1	0
2010	26	149	45	4
2011	13	87	29	2
2012	11	57	27	8
2013	14	132	42	6
2014	0	9	4	0
2015	-	-	-	-
2016	3	5	138	6
2017	3	7	50	0
Total	74	468	339	26

**Table 2.2:** Regional Elections Cases (PHPUD) in the Constitutional Court (2008-2016)

Note: Includes all cases decided through December 1, 2017. Data available from MK website at <http://www.mahkamahkonstitusi.go.id/index.php?page=web.RekapPHPUD>.

would lead to considerable institutional change, as well as the creation of several new institutions, all of which would lead to jurisdictional questions. Through the Constitutional Court, government institutions can now check each other and hold each other accountable. As seen in Table 2.3, the Court has received around two dozen SKLN cases, mostly during the early 2000s in the immediate aftermath of *Reformasi*.<sup>30</sup> The Court also has jurisdiction over the impeachment of the president or vice-president and over the dissolution of political parties, but it has yet to adjudicate any such cases as of late 2017.

Petitions for constitutional review comprise the second largest item on the docket, consisting of over a thousand cases. The MK serves as the court of first and last instance for constitutional interpretation. Its decisions are final and binding on other government actors.<sup>31</sup> Moreover, its decisions do not require legislative or executive action to implement them, meaning that any laws declared unconstitutional by the Court are immediately rendered null and void. The Court only handles actual legal disputes; it cannot issue advisory opinions on draft legislation. It does not have discretion over its docket and must dispose of all petitions it receives. As seen in Table 2.4, the number of PUU cases has steadily increased

<sup>30</sup>Data available from MK website at <http://www.mahkamahkonstitusi.go.id/index.php?page=web.RekapSKLN>.

<sup>31</sup>Const., Article 24C(1).

	Granted	Rejected	Not accepted	Withdrawn
2003	0	0	0	0
2004	0	1	0	0
2005	0	0	0	0
2006	0	0	2	1
2007	0	1	1	0
2008	0	0	2	2
2009	0	0	1	0
2010	0	0	0	0
2011	0	0	4	0
2012	1	1	3	1
2013	0	0	2	0
2014	0	0	1	0
2015	0	0	1	0
Total	1	3	17	4

**Table 2.3:** Institutional Dispute Cases (SKLN) in the Constitutional Court (2003-2015)

Note: Includes all cases decided through December 1, 2017. Data available from MK website at <http://www.mahkamahkonstitusi.go.id/index.php?page=web.RekapSKLN>.

over time.<sup>32</sup>

The Constitutional Court only has jurisdiction over national statutes; challenges to administrative regulations or local laws, as well as judicial decisions, must be brought to the Supreme Court or to Administrative Courts. This can create confusion if and when the Supreme Court and Constitutional Court disagree.<sup>33</sup> In addition, the MK has held that it lacks jurisdiction over how public officials exercise their discretion under a statute.<sup>34</sup> Some scholars worried that the government could use this loophole to reinstate laws that the Court had already declared unconstitutional through regulation (Butt and Lindsey, 2008). Fortunately, Butt (2015, 6) concludes that this seldom occurs in practice.

Another limitation on the Constitutional Court's review powers is that its decisions only apply prospectively. Declaring a statute unconstitutional only prevents the government from applying the law in the future; MK decisions cannot overturn or remedy past constitutional

<sup>32</sup>Data available from MK website at <http://www.mahkamahkonstitusi.go.id/index.php?page=web.RekapPUU>.

<sup>33</sup>For example, in a 2007 case, the Supreme Court interpreted an article of the 1999 Anti-Corruption Law even though the MK had issued a binding interpretation of that provision a year before (Bedner, 2016).

<sup>34</sup>See *Land and Building Tax case*, MK Decision No. 77/PUU-VIII/2010.

	Granted	Rejected	Not accepted	Withdrawn
2003	0	0	3	1
2004	11	8	12	4
2005	10	14	4	0
2006	8	8	11	2
2007	4	11	7	5
2008	10	12	7	5
2009	15	18	11	7
2010	18	22	16	5
2011	21	29	35	9
2012	30	31	28	5
2013	22	52	22	12
2014	29	41	37	17
2015	25	50	61	15
2016	19	34	30	9
2017	21	40	37	11
Total	243	370	321	107

**Table 2.4:** Constitutional Review Cases in the *Mahkamah Konstitusi* (2003-2017)

Note: Includes all cases decided through November 28, 2017. Data available from MK website at <http://www.mahkamahkonstitusi.go.id/index.php?page=web.RekapPUU>.

harms. In the 2004 *Bali Bombing case*, the Court held that the government could not prosecute terrorist suspects under a law that applied retroactively (*ex post facto*).<sup>35</sup> However, Chief Justice Jimly Asshiddiqie and Justice Minister Yusril Ihza Mahendra announced in a press conference that the decision did not overturn the petitioner’s conviction because MK decisions did not apply retroactively (Butt and Hansell, 2004, 181). In other words, the Court can only address ongoing or anticipated harms. This doctrine could disincentivize constitutional litigation because fewer potential petitioners would be willing to invest the time and resources necessary to pursue constitutional claims if they cannot recover damages for past harms. In effect, it increases the barriers to collective action for constitutional change.

These constraints have not prevented the Constitutional Court from becoming involved in major policy disputes. In fact, the Court has proven adept at expanding its jurisdiction beyond statutory constraints. Initially, Article 50 of the Constitutional Court Law prevented

<sup>35</sup>MK Decision No. 13/PUU-I/2003.

the Court from reviewing laws passed before October 19, 1999 (the date the constitutional reform process began). However, in a 2004 decision, the Court declared this provision unconstitutional because the Constitution itself contained no such limit on its jurisdiction.<sup>36</sup> This exposed even more laws to constitutional challenge – likely against the wishes of the politicians who created the Court in the first place. Since then, the Court has heard challenges to dozens of pre-*Reformasi* laws, including to New Order laws on censorship<sup>37</sup> and marriage.<sup>38</sup>

The Constitutional Court has also expanded standing and access to the court. Under Article 51(1) of the Constitutional Court Law, standing is limited to Indonesian citizens, customary law communities, public or private legal entities, and state institutions. In theory, any party filing a petition before the MK must prove that:

1. the statute being challenged violates the constitution;
2. the petitioner's rights or powers are impaired because of the violation;
3. the constitutional harm is specific or actual (or at least reasonably certain to occur);
4. there is a causal connection between the alleged harm and the statute; and
5. a favorable decision will prevent and/or redress the damage.

In practice, the Court seldom denies standing for individuals challenging a constitutional harm. If the Court does deny standing, it almost invariably does so because the petitioner did not suffer a constitutional harm, rendering the other prongs of the standing test moot (see Butt, 2015, 49). In one of its earliest decisions, the Court declared that generalized harm to the public welfare constituted a sufficient constitutional harm for the purpose of standing.<sup>39</sup> In subsequent cases, it expanded on this holding to grant standing based on the

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<sup>36</sup> *Chamber of Commerce & Industry case*, MK Decision No. 66/PUU-II/2004

<sup>37</sup> *Film Law case*, MK Decision No. 29/PUU-V/2007.

<sup>38</sup> *Marriage Law case*, MK Decision No. 12/PUU-V/2007.

<sup>39</sup> *Electricity Law case*, MK Decision No. 1-21-22/PUU-I/2003, p. 327.

petitioner's interest in good governance<sup>40</sup> and status as a taxpayer.<sup>41</sup> In some cases, the MK has even ignored standing completely in order to address the merits of the petition (Butt, 2015, 59).<sup>42</sup>

## 2.3 Embedded & Autonomous

When the Constitutional Court officially opened its doors on August 13, 2003, it seemed destined to the margins of Indonesian politics. As noted above, Indonesia had no prior experience with constitutional review. Moreover, because of the appointment process and jurisdictional limits, the Court appears relatively weak on paper. As such, the Court surprised many when it not only exercised its review powers, but also become an important political actor. The Court has even thwarted multiple government attempts to circumscribe its independence. How did the MK succeed in challenging political elites while maintaining its independence? In this section, I show how the Court's relationships with NGOs helped empower the institution. I begin by recounting the Court's battles with political elites. I then discuss possible alternative explanations for the Court's political strength. Finally, I argue that NGOs and public opinion helped mobilize support for the Court.

### 2.3.1 Defying Political Elites

According to Jimly Asshiddiqie, the first chief justice (see Table 2.5), the *Mahkamah Konstitusi* started from scratch (“*mulai dari nol*”), with just the 1945 Constitution, the 2003 Constitutional Court Law, and almost no budget or staff (Asshiddiqie, 2008, 10). The Court did not even have its own building. Eventually, the Court did receive more resources and staff. In 2007, the justices moved into a new building equipped with modern IT facilities and

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<sup>40</sup> *KPK Law case*, MK Decision No. 6/PUU-I/2003.

<sup>41</sup> “Every taxpaying citizen has the constitutional right to challenge every statute.” *Police and Army Voting case*, MK Decision No. 22/PUU-XII/2014, p. 22.

<sup>42</sup> For example, in the *Death Penalty case*, the Court acknowledged that petitioners lacked standing because they were foreign citizens, but proceeded to discuss the constitutionality of the death penalty. MK Decision No. 2-3/PUU-V/2007.



a large library.<sup>43</sup> The Court’s budget also increased to the point where it could offer staff and judges salaries larger than those at other judicial institutions (Mietzner, 2010, 405).<sup>44</sup> In short, the Constitutional Court went from “*nol*” to one of the most modern and professional government institutions in the country.

Name	Term Start	Term End	Reason for Departure
Jimly Asshiddiqie	Aug. 22, 2003	Aug. 19, 2008	lost reelection for chief
Mohammad Mahfud	Aug. 19, 2008	Apr. 3, 2013	run for president
Akil Mochtar	Apr. 3, 2013	Oct. 5, 2013	arrested for corruption
Hamdan Zoelva	Nov. 6, 2013	Jan. 7, 2015	term expired
Arief Hidayat	Jan. 14, 2015	present	n/a

**Table 2.5:** Chief Justices of the Constitutional Court

Despite its inauspicious beginnings, the Constitutional Court proved willing and able to confront the other branches of government. During its first term, the MK revised 74 laws, annulled four completely, and nullified portions of another 23 (Mahfud, 2009). Overall, the Court has granted around 26% of the petitions it received for constitutional review (see Table 2.4),<sup>45</sup> a rate comparable to courts in Western democracies. It has also intervened in several highly controversial political disputes. In its very first decision, the justices invalidated a major legislative program that would have partially privatized the electricity sector.<sup>46</sup> In subsequent decisions, the Court legalized the Communist Party,<sup>47</sup> stripped the Judicial Commission of its enforcement powers,<sup>48</sup> mandated an open party-list election system,<sup>49</sup> and even invalidated government budgets when they failed to allocate sufficient funds

<sup>43</sup>The Court initially operated out of the same building as the Supreme Court. It then relocated to a hotel, and, after obtaining funding from the Ministry of Finance, moved staff to an office complex. Even at that point, it had to hold sessions in other government buildings, including the DPR building and the National Police headquarters. Only in January 2004 did the Court move all of its operations into a single building, one owned by the Ministry of Communications & Information. In mid-2005, work began on a new building specifically for the Constitutional Court. Construction was finally completed in late 2007.

<sup>44</sup>Indeed, one former justice, believes the Supreme Court initially selected him to serve on the MK because it saw him as troublesome and wanted to exile him from the judiciary. Now, judges view an appointment to the MK as a reward. Subject #11, interview with former justice, Jakarta, Indonesia, July 17, 2012.

<sup>45</sup>Excluding cases that were withdrawn before the Court could issue a final decision.

<sup>46</sup>*Electricity Law case*, MK Decision No. 1-21-22/PUU-I/2003.

<sup>47</sup>*PKI case*, MK Decision No. 11-17/PUU-I/2003.

<sup>48</sup>*Judicial Commission case*, MK Decision No. 5/PUU-IV/2006.

<sup>49</sup>*Open List case*, MK Decision No. 22-24/PUU-VI/2008.

for education (Rosser, 2015*b*; Susanti, 2008).<sup>50</sup> Ironically, many lawyers believed that the constitutional provision on education funding (Article 31) was merely aspirational (see Ellis, 2002, 146), so the Court’s decision to enforce it indicates just how expansively the justices interpreted their powers.

The Constitutional Court’s boldness seems to have come as an unwelcome surprise to political elites. Politicians soon began to view the Constitutional Court as a threat to their policies and frequently complained that the justices had usurped the DPR’s legislative functions. Former Justice Harjono (2007) acknowledged that “the challenges of this Court initially come from members of parliament who are unhappy [that its decisions have] curtailed Parliament authority to make a law [sic].” As Butt (2012, 111) notes, DPR members must now at least “flick through the Constitution” before voting on legislation. DPR committees produce verbatim transcripts in order to preemptively defend laws against legal challenges. Former DPR member Alvine Lie even claimed that the DPR is “frightened of the Constitutional Court” (Sherlock, 2010, 172). In short, whatever their initial motivations for creating the MK, elites now had an incentive to override or refuse to comply with its decisions.

Some political elites tried to pressure the justices, but to little avail. When interviewing Mukthie Fadjar for a position on the Court, President Susilo Bambang Yudhoyono (SBY) (2004-2014) asked him to “coordinate” with the cabinet before promulgating decisions; Fadjar rebuked the president, but was appointed anyways (Mietzner, 2010, 416). Vice-President Jusuf Kalla (2004-2009, 2014-) called justices to vent his anger over their decisions, but did not succeed in having them overturned. After the Court legalized the Communist Party, senior military commanders called the justices to lament that they had not “coordinated” with the armed forces (Mietzner, 2010, 413). In some cases, elites seemed to threaten the justices’ physical safety. After the 2004 election, Asshiddiqie claimed that thugs affiliated with former general and failed presidential candidate Wiranto demanded that he be allowed

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<sup>50</sup> 2008 *Budget Law case*, MK Decision No. 13/PUU-VI/2008. I discuss this case in greater detail in Chapter IV of the dissertation.

to compete in the runoff election (Mietzner, 2010, 407). Despite this subtle – and not-so-subtle – intimidation, thus far no government institution or political actor has ever openly attacked the justices.

Some observers worried that justices’ short terms would make them susceptible to political pressures. In theory, judges who only serve five years and are eligible for reappointment should have an incentive to behave like agents for the institution that appointed them. Even amongst constitutional courts in new democracies, five years is a relatively short term.<sup>51</sup> However, reappointment has thus far played a surprisingly limited role in shaping judicial behavior. Butt (2015, 38) finds no evidence that justices systematically exhibit partiality or bias on behalf of their appointing institution. Mietzner (2010, 415) argues that dividing appointment authority between the president, DPR, and Supreme Court mitigates any political pressure; if a justice displeases one principal, he or she has two other avenues for reappointment. For example, when President Yudhoyono refused to reappoint Justice Harjono in 2008, he successfully petitioned the DPR to reappoint him.<sup>52</sup>

The president, DPR, and Supreme Court have tried to better screen Constitutional Court nominees during the selection process. All candidates must undergo a “fit and proper” test, which in theory ensures that they meet the minimum criteria set out in the 2003 Constitutional Court Law. In practice, lawmakers have used these sessions to ascertain the ideological fitness of nominees – to mixed success.<sup>53</sup> When the DPR interviewed former cabinet minister and legislator Mohammad Mahfud in August 2008 for a vacancy on the Court, DPR members asked him about the Court’s relationship with the legislature. Mahfud initially campaigned as the anti-Jimly, and his disavowal of judicial activism helped convince the DPR to appoint him (Hendrianto, 2016*c*, 525-27). However, once on the bench, Mahfud

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<sup>51</sup>The modal term length for constitutional courts established between 1986-2002 is nine years (see Ginsburg, 2003, Table 2.2). The possibility of reelection is not even permitted in most countries, with the exception of Hungary and a few international tribunals (Vanberg, 2005, 85).

<sup>52</sup>Hendrianto (2015*b*) argues that a more important problem with the term length is that it has been difficult to find qualified candidates to fill vacancies every five years. Indonesia has a relatively small pool of constitutional law scholars qualified to serve on the Court.

<sup>53</sup>Later efforts to screen judicial nominees appear to have been more successful, especially when elites select a known political ally or crony as opposed to an outsider (see Chapter VII).

led the Constitutional Court in an increasingly activist direction.

Soon after his appointment, the other justices elected Mahfud as their next chief and Jimly resigned. Under Mahfud's leadership, the Court increasingly emphasized "substantive justice" or policy outcomes over "procedural justice" (Budiarti, 2012, 83-84). The Mahfud Court also proved more willing to use a controversial doctrine known as conditional constitutionality. In civil law systems, constitutional courts generally act as "negative legislators" in that their authority is restricted to annulling statutes that conflict with the constitution (see Kelsen, 1945). However, under conditional constitutionality, the Court can define the conditions under which it considers a law unconstitutional without striking it down. For example, in a 2007 case, the Court declared that a 1992 censorship law could only be considered constitutional if the Film Censorship Institute (LSF) enforced it in a manner consistent with democratic principles.<sup>54</sup> In effect, this allows the MK to act as a "positive legislator" by rewriting statutes and issuing guidelines for how other branches of government should interpret the law (Butt, 2012). Overall, 55% of the petitions the Mahfud Court granted involved conditional constitutionality, compared to just 34% under Asshiddiqie (Roux and Siregar, 2016, footnote 24). The Mahfud Court also began issuing *ultra petita* verdicts, which issue relief beyond what the petitioners had requested in their briefs.

The DPR viewed conditional constitutionality and *ultra petita* verdicts as particularly egregious forms of judicial activism because they encroached upon legislative functions. Both the legislature and the president tried to restrict the Court's powers and jurisdiction, but failed each time. In 2011, the DPR passed amendments to the 2003 Constitutional Court Law that would have forbidden the Court from using conditional constitutionality.<sup>55</sup> In 2013, the President issued an Interim Emergency Law (*Perpu*) that would have mandated outside participation in the MK Honour Council (see Section 2.2.2). The MK declared both

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<sup>54</sup> *Film Law case*, MK Decision No. 29/PUU-V/2007.

<sup>55</sup> Article 57(2) of the amendments stated: "If the Constitutional Court declares that requirements, based on the Constitution, for the enactment of the statute were not fulfilled, then that statute no longer has binding force."

laws unconstitutional.<sup>56</sup> The Court justified its decisions by arguing that “[i]f the Court is prohibited from reviewing the statute governing the Court, then the Court will be an easy target for paralysis by a statute enacted to further the interests of [political power], in which the position of the President is strongly supported by the DPR or vice versa.”<sup>57</sup> This led some politicians to complain that the Court had become untouchable because it could strike down any attempts to restrain the institution.

Despite the fact that the Constitutional Court has declared so many laws unconstitutional, it has suffered from remarkably few instances of noncompliance or override. As noted above, the Court can only review statutes, not administrative regulations or decisions, so in theory the president could reenact some constitutionally voided policies via ministerial regulation (Butt and Lindsey, 2008). Indeed, when the MK declared a World Bank sponsored electricity privatization program unconstitutional in 2003, the government revived parts of the program through administrative action. The risk of noncompliance should have forced the Court to take into account the president’s policy preferences before deciding cases. However, for the most part, it seems the government cannot or has not tried to avail itself of this loophole. Moreover, the DPR seldom attempts to override MK decisions. In a review of legislation passed by the DPR, Butt (2015, 73, footnote 71) found only one instance of new legislation that directly responded to a Constitutional Court decision.<sup>58</sup> In theory, legislators could also amend the Constitution. According to Article 37(4), amendments only require an absolute majority in the MPR, or 50% plus 1 of at least 2/3 of all members. However, despite the low amendment threshold, the Constitution has not been amended since *Reformasi*.

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<sup>56</sup>See *MK Law Amendment case 1*, MK Decision No. 48/PUU-IX/2011; *MK Law Amendment case 2*, MK Decision No. 49/PUU-IX/2011, and *MK Perpu case*, MK Decision No. 1-2/PUU-XII/2014.

<sup>57</sup>MK Decision No. 1-2/PUU-XII/2014, p. 97

<sup>58</sup>The preamble of the 2008 Amendment to 2004 Regional Government Law mentions that the purpose of law is to respond to the Court’s ruling in the 2007 *Independent Pimilukada Candidates case* (MK Decision No. 5/PUU-V/2007). For comparison, (Hettinger and Zorn, 2005) find that the U.S. Congress overrode around 7% of Supreme Court decisions in matters of statutory interpretation between 1967-89.

### 2.3.2 Alternative Explanations

The emergence of the *Mahkamah Konstitusi* as a powerful institution despite resistance from political elites is surprising in the context of both Indonesian history and the academic literature on judicial empowerment. Before attempting to explain why this happened, it is worth confirming that the frustration of political elites seems genuine. In other words, there is little evidence that elites simply rely on the Court to deflect blame for unpopular decisions that they privately prefer.<sup>59</sup> Not only have elites publicly denounced many of the Court's decisions, but, as recounted above, they have also attempted to restrict its jurisdiction several times. Moreover, many of the Court's decisions, especially in the realm of socioeconomic rights, have shifted policy away from conservative elites and towards progressive/leftist groups.<sup>60</sup>

The Constitutional Court's first two chief justices undoubtedly deserve much of the credit for the Court's success. Both Jimly Asshidiqie and Mohammad Mahfud were charismatic figures and savvy political operators with experience in government. Asshidiqie came to the Court with deep ties to civil society groups (see Section 2.3.3) and firm convictions about the role of constitutional review in a democratic Indonesia (e.g., Asshiddiqie, 2004). He also played a key role in professionalizing the Court. He discouraged corruption and insisted that all judges participate in professional development activities (Butt, 2015, 5). Mahfud, as a former professor at the Islamic University of Indonesia and PKB politician, had close ties to Islamic groups. By the end of his term, he also had presidential aspirations (see Figure 2.1 for an example of how the media sometimes lionized Mahfud). Both chief justices regularly spoke to the media and universities about legal and political issues, much more so than their successors.

Hendrianto (2016*c*) cites the “visionary” leadership of these two justices as the primary

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<sup>59</sup>Compare with Graber (1993), who claims that Congress sometimes prefers to let the U.S. Supreme Court take responsibility for decisions on contentious issues like abortion.

<sup>60</sup>For more on how Indonesian elites have opposed democratic or progressive reforms, see (Sukma, 2010; Mietzner, 2012).



**Figure 2.1:** Cartoon of Chief Justice Mahfud as Superman  
source: Kick Andy TV show.

reason for the Constitutional Court's activism and ability to defy elites. However, while bold leadership helps explain the Court's initial willingness to exercise constitutional review, it does not adequately explain why they succeeded over the long term. Had political elites responded more forcefully to the Court's earlier decisions, the justices might have been forced to back down. Moreover, the chief justices' leadership does not adequately explain why the other branches of government so seldom attempted to override or avoid complying with the Court's decisions. In short, the leadership of Asshidiqie and Mahfud was a necessary but not sufficient cause of the MK's empowerment.

Butt (2012, 107-09) argues that the Court engages in strategic behavior in order to anticipate or forestall a response from the government. He identifies four ways in which the MK tries to "soften the effect of its decisions on the legislature." First, the Court's decisions only apply prospectively, meaning that they do not undo past government actions. As discussed above, this helped mitigate the political fallout from the *Bali bombing* decision. Second, the Court does consider the practical effects of its decisions and has sometimes refused to declare a law unconstitutional because the consequences of doing so would lead to an economic or political crisis. For example, on several occasions, the Court instructed the DPR to allocate

20% of the budget to education, but did not declare the existing budget null and void for fear of shutting down the government. Third, the Court could declare a statute unconstitutional, but set a deadline for the DPR to replace it. Finally, conditional constitutionality allows the Court to air its constitutional objections without actually declaring a law null and void.

To the extent that the Constitutional Court does engage in strategic behavior, it has not entirely succeeded in minimizing the risk of backlash. In fact, DPR members view conditional constitutionality as especially egregious; as noted above, the DPR even tried to amend the Constitutional Court Law to prevent the Court from using that doctrine. Moreover, strategic behavior has not prevented the justices from issuing decisions with far-reaching policy consequences. Even the Court's pragmatism has limits. Although the justices refused to declare the national budget null and void for not sufficiently funding education, they did imply that their patience with the DPR would not last forever (discussed in Chapter IV). Strategic behavior might have prevented constitutional conflicts from escalating, but does not entirely account for the scope of the Court's success.

The Constitutional Court's institutional design does insulate justices from government reprisals, at least in the short term. As noted above, neither the Judicial Commission nor the other branches of government can remove justices, even for cause. The MK's Honour Council must first make a recommendation finding that a justice has violated judicial ethics.<sup>61</sup> That said, the justices are not completely free from concerns about job security. Each justice's term only lasts for five years, and justices undoubtedly have time horizons longer than five years. Although the president, DPR, and Supreme cannot sack a justice immediately after an adverse decision, the justices know that reappointment is not guaranteed. Even justices serving in their second term will undoubtedly be concerned about career and patronage opportunities after they leave the bench. As such, although the Court's institutional design

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<sup>61</sup>There are unconfirmed rumors that President Yudhoyono orchestrated Asshiddiqie's ouster as chief justice in August 2008 (Hendrianto, 2015*b*). Mahfud admitted that Vice-President Kalla asked him to run against Asshiddiqie (Budiarti, 2010, 54). Ultimately, however, the justices themselves selected Mahfud, and there is no evidence the government used promises or threats to coerce them to do so. Although Asshiddiqie could have continued to serve on the Court, he chose to resign.



protects the justices against immediate retaliation, it does not guarantee long-term protection that would truly free judges from political constraints.

The fragmented nature of Indonesian politics after *Reformasi* has probably contributed to the lack of a unified elite response against the Court. Since 1999, no single political leader or party has come close to dominating Indonesian politics the way Suharto and Golkar did during the New Order. Since 2004, the largest party in the DPR controlled between 13-22% of the seats – far short of a governing majority. As such, even though the Constitution only requires an absolute majority for amendments, no single party ever reached that threshold. Horowitz (2013, 236-37) goes so far as to argue that:

The result [of *Reformasi*] was a factional equilibrium, in which courts, especially the newly created Constitutional Court, had room to operate with independence, even thwarting government policy on constitutional grounds. No one considered disobeying inconvenient judicial judgments.

However, it is important not to overstate the extent to which elite fragmentation protects the Court. Elections results risk overstating fragmentation and do not always reflect clear policy divisions. After each election almost all of the major parties in the DPR have formed oversized governing coalitions, far larger than the minimum needed to pass legislation (Slater, 2014). Indeed, as noted above, both the DPR and president have shown that they could overcome fragmentation and coordination obstacles to enact laws aimed at constraining the Court, but still failed (see 2.3.1). Elite fragmentation makes coordination more difficult, but not impossible.

Charismatic leadership, strategic behavior, institutional design, and political fragmentation all contribute to our understanding of how the Constitutional Court managed to become a powerful political actor. However, they are at best incomplete explanations. The first two chief justices pushed the Court to take more risks, but a political backlash could have deterred other justices. Elite fragmentation and the Court's institutional design provide some protection for justices, but cannot alone explain how the Court survived unscathed after ruling against so many elite interests. Nor can the Court's success be attributed to elites'

belief in good governance; in late 2009, a conspiracy between a former Attorney General, members of the National Police, and a businessman attempted to bring down the Corruption Eradication Commission (Platzdasch, 2011, 74), another one of the *Reformasi* good governance institutions. In the next section, I describe how the Court’s embeddedness in society, particularly its relationships with NGOs, created a network of stakeholders that bolstered the institution and defended it from political attacks.

### 2.3.3 Courting Interest Groups

Historically, Indonesian civil society has tended to distrust state institutions. During the New Order, anti-Suharto, pro-poor NGOs preferred to stay out of party politics and pursue their policy agendas outside of the legislature (Nordholt, 2005; Lane, 2008; Mietzner, 2013). This was especially true for leftists, such as former members of the Communist Party, who pursued their goals through NGOs after the 1965 crackdown (Lane, 2008). Even after *Reformasi*, many NGOs have refused to align with any of the major political parties.<sup>62</sup> Civil society generally has a strong commitment to democratic ideals,<sup>63</sup> but many left-leaning NGOs view the current system as hopelessly corrupt and captured by elite interests (Mietzner, 2013; Rosser and van Diermen, 2016). Instead, they have tended to focus their efforts to influence policy and government behavior on the *Reformasi* “good governance” institutions, including the Corruption Eradication Commission, the Judicial Commission, and the Constitutional Court (Bedner, 2014, 565).<sup>64</sup>

Indonesia’s civil society sector is relatively strong for a developing democracy, especially given its resource constraints. Although progressive/leftist NGOs lack direct influence in the legislature, they have been effective at generating awareness for their causes and preventing elites from enacting policies detrimental to their goals. The media greatly amplifies their

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<sup>62</sup>Although they might lobby individual DPR members (Mietzner, 2013).

<sup>63</sup>With some notable exceptions like the Islamic Defenders Front, or *Front Pembela Islam* (FPI), a hardline Islamic group that has incited religious-related violence.

<sup>64</sup>As well as the National Commission on Human Rights, or *Komisi Nasional Hak Asasi Manusia* (Komnas HAM), which was established by the Suharto regime in 1993.

political power by giving activists a platform to voice their grievances (Aspinall, 2004). Newspaper articles about politics often feature commentary from NGO experts. Mietzner (2012, 209) goes so far as to call Indonesian civil society “democracy’s most important defender.”

The Constitutional Court is one of the more accessible state institutions for non-elite actors, especially progressive interest groups, that want to influence policy. Bedner (2014, 565) argues that Indonesian NGOs are more comfortable framing their arguments in terms of legal rights than as political tradeoffs, which better fits the mode of policy debate in a court of law than a legislature. Moreover, the *Reformasi* constitutional amendments dramatically expanded the scope of topics covered by the 1945 Constitution, meaning that access to the Court lets NGOs challenge the government on a wide range of policy issues. NGOs have succeeded in invalidating government policies on everything from wiretapping<sup>65</sup> to the composition of the General Elections Commission, or *Komisi Pemilihan Umum* (KPU).<sup>66</sup>

Soon after its establishment in 2003, the Constitutional Court gained the respect of civil society groups and the broader public. While most Indonesians do not follow the Court closely, 68% of those who had at least heard of it in 2005 were satisfied with its performance (International Foundation for Election Systems, 2005). In addition to helping legitimize the institution, civil society has rewarded justices for popular decisions. After the Court helped protect Anticorruption Commissioners Chandra Hamzah and Bibit Samad from a conspiracy to oust them in 2009,<sup>67</sup> several NGOs and universities presented Chief Justice Mohammad Mahfud with awards for bravery (Mietzner, 2010, 416). Meanwhile, a 2011 *Jakarta Post* editorial described Mahfud as “one of the most popular figures in the country” (The Jakarta Post, 2011). He even polled well as a candidate for president before the 2014 election and was later elected chair of the influential Islamic Students Alumni Association, or *Korps Alumni*

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<sup>65</sup> *Wire-Tapping case*, MK Decision No. 5/PUU-VIII/2010 (finding constitutional right to privacy).

<sup>66</sup> *KPU case*, MK Decision No. 81/PUU-IX/2011 (prohibiting political party members from joining the KPU for at least five years after leaving the party).

<sup>67</sup> *Bibit and Chandra case*, MK Decision No. 133/PUU-VII/2009

*Himpunan Mahasiswa Islam (KAHMI)*.<sup>68</sup>

NGOs have played an important role in expanding the Constitutional Court's policy-making role by filing petitions for constitutional review (Rosser, 2015*a*; Rosser and Curnow, 2014; Rosser and van Diermen, 2016; Curnow, 2015). Because the justices cannot initiate cases on their own initiative, there is a real risk that they will not have the opportunity to rule on many constitutional violations because Indonesian citizens do not know how or cannot afford to engage in constitutional litigation. This problem was especially acute during the Court's first few years when it received few petitions because relatively few Indonesians were even aware of the Court (see Table 2.4). The willingness of NGOs to use constitutional litigation expanded the range of policy issues that reached the Court.

NGOs also help solve the problems imposed by the prospectivity doctrine. As noted in Section 2.2.2, it will be more difficult to find litigants willing to invest the resources necessary to challenge constitutional violations if they can only prevent future violations rather than remedy past harms (see Butt, 2012, 107-08). Instead, people will be tempted to free ride on the efforts of others. Fortunately, NGOs help overcome this collective action problem. Many Indonesian NGOs were founded to pursue a set of policy goals, such as religious education or environmental protection. As such, they have an interest in the application of policy in the future. Indeed, NGOs regularly engage in public interest litigation despite the fact that the NGO itself has not suffered a specific harm; for NGOs, litigation is simply one means to pursue policy change.<sup>69</sup>

The Constitutional Court did not wait passively for NGOs to submit cases. Chief Justice Asshiddiqie took several steps to encourage NGOs to file constitutional claims (Hendrianto, 2016*c*, 518). First, through his personal network he invited the Indonesian Legal

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<sup>68</sup>Although popular, Mahfud was not nominated by any other major parties. He eventually became a campaign manager for Prabowo Subianto of the Gerindra Party.

<sup>69</sup>Butt (2012, 107-08) raises the possibility that the DPR might take advantage of the Court's prospectivity doctrine by passing laws that violate rights constitutional rights, knowing that any actions committed under the law would not be reversed by a subsequent MK decision striking the law down. One of the reasons this has not happened is that the government knows NGO watchdogs would promptly challenge any such law in Court.

Aid Organization, or *Lembaga Bantuan Hukum* (LBH), and other NGOs to check new legislation for constitutional defects, and then to file challenges with the Court.<sup>70</sup> Second, the Court abolished filing and other fees to reduce the costs of litigation.<sup>71</sup> Third, and most important, the Court lowered barriers to standing for NGOs engaged in public interest litigation (Hendrianto, 2015*a*, 35). The Court expanded its already liberal standing doctrine (see Section 2.2.2) to allow NGOs to file constitutional claims so long as their charters or articles of association have some connection to the substance of their petition.<sup>72</sup> In short, the justices saw NGO litigation as beneficial and strategically facilitated access to the court.

The Constitutional Court's relationship with NGOs goes beyond its role as a receptacle for constitutional petitions. During its first year, when the Court lacked funding to hire full-time research staff, Jimly Asshidiqie appealed to lawyers and activists from NGOs to volunteer at the Court, sometimes going several months without a salary.<sup>73</sup> Many of them ended up working at the Court for years and influenced its jurisprudence from the inside. The early Court's close relationship with civil society had the added benefit of reducing its dependence on political elites. When the Court could not rely upon the government for resources, civil society actors provided an alternate option. Had the justices not had access to these resources, they might have felt more compelled to become more subservient to the government in exchange for funding and patronage.<sup>74</sup>

Public support for the Constitutional Court increased the audience cost to the government for defying its judgments or retaliating against the justices. According to Horowitz (2013, 243), the MK "built up a stock of political capital because of its apparent integrity and good faith..." For example, when the DPR attempted to amend the 2003 Constitutional

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<sup>70</sup>Subject #19, Interview with attorney at Indonesian NGO, Jakarta, Indonesia, July 20, 2012.

<sup>71</sup>Art. 6(7) of MK Reg 06/PMK/2005 on *Procedural Guidelines in Judicial Review Cases*.

<sup>72</sup>*Migas Law case*, MK Decision No. 2/PUU-I/2003 (finding that a human rights NGO had standing to challenge the privatization of the state oil company because its mission was to advocate on behalf of the public interest).

<sup>73</sup>Subject #15, interview with former justice, Jakarta, Indonesia, November 21, 2013.

<sup>74</sup>The KPK has also found itself the beneficiary of close relationships with NGOs. For example, in 2012, when the DPR sought to block funds for the construction of a new KPK headquarters, the commission turned to NGOs and ordinary citizens for donations and support (Schonhardt, 2012).

Court Law in order circumscribe the Court's jurisdiction in 2011, a coalition of NGOs lobbied the DPR against the changes.<sup>75</sup> Moreover, a group of activists and law professors promptly challenged the amendments by filing a petition with the MK.<sup>76</sup> The case received significant media coverage, letting other interest groups know about the threat to the Court.<sup>77</sup> Without the mobilization of the Court's external stakeholders, the DPR and president might have had more success in constraining the justices.

Overall, civil society and public opinion helped the Constitutional Court in three ways. First, the willingness and ability of NGOs to file constitutional claims expanded the scope of constitutional disputes that reached the Court. Second, activist lawyers provided an alternate source of legal resources when the justices could not rely upon government funding. Third, public opinion and NGO mobilization increased the audience cost of government attempts to retaliate against the justices. The MK was able to take advantage of these developments in large part because both the Court as an institution and individual justices had developed relationships with civil society. Moreover, public outreach was part of a deliberate strategy to empower and protect the Court as an institution. In becoming embedded in Indonesian society, the Court became autonomous and empowered.

## 2.4 Concluding Remarks

In this chapter, I explained the historical context and institutional powers of the Indonesian Constitutional Court. *Reformasi* led to political liberalization and the creation of the *Mahkamah Konstitusi*, but did not guarantee the institution's success. The justices only served for five-year terms and the Court initially lacked sufficient funding to cover operating costs. Political elites have vigorously opposed some of the Court's decisions. Despite these

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<sup>75</sup>Subject #2, Interview with staff at Indonesian NGO, Jakarta, Indonesia, July 5, 2012. On the other hand, civil society opinions about the 2013 *Perpu* were mixed. Some believed the president's attempt to impose stronger ethics requirements on the MK was necessary to combat corruption. Subject #13, Interview with attorney at Indonesian NGO, Jakarta, Indonesia, November 6, 2013.

<sup>76</sup>*MK Law Amendment case 2*, MK Decision No. 49/PUU-IX/2011.

<sup>77</sup>Subject #33, Interview with attorney at Indonesian NGO, Jakarta, Indonesia, November 1, 2013.

constraints, the Court has become an important actor in Indonesia's political landscape. I ascribe much of the Court's success to its relationship with civil society. NGOs pursued constitutional litigation and helped the justices realize their policy goals. They also mobilized to deter government retaliation against the justices.

This multifaceted relationship between judges and civil society makes the Indonesian Constitutional Court ideal for the purposes of my dissertation. In the next chapter of this dissertation (Chapter III), I review the academic literature on judicial behavior and explain my embedded autonomy model of judicial behavior. In the subsequent chapters, I conduct empirical tests of three specific mechanisms through which Indonesian interest groups influence the Constitutional Court: setting the agenda (Chapters IV); sending signals about public opinion (Chapters V); and providing information in briefs (Chapters VI).

## CHAPTER III

### Theory

Judges generally try to depict themselves as neutral arbiters of the law, weighing the legal merits of each petition on a case by case basis. They claim that political and ideological factors do not enter into their decisions. Yet, decades of political science research suggests that this is at best an oversimplification. We have considerable evidence that judges take the preferences of other government actors into account, especially when adjudicating politically controversial claims. Even judicial independence cannot completely insulate judges from political and societal pressures. In short, judges are political actors who often respond strategically to external opportunities and threats.

In this chapter, I review the political science scholarship on judicial behavior. I begin in Section 3.1 by looking at the extent to which legal and political institutions constrain judges. Although this debate has tended to dominate the literature on judicial behavior, I point out several important limitations. In Section 3.2, I propose an alternative theoretical framework for understanding judicial behavior that I call “embedded autonomy.” This model focuses on the role of interest groups and the general public in influencing courts.

#### 3.1 Legal-Political Models

In this section, I summarize the literature on the formalist, attitudinal, historical-institutionalist, and strategic-institutionalist models of judicial behavior. Each of these



theories focuses on the extent to which legal and political factors constrain constitutional courts. Although these models have improved our overall understanding of judicial behavior, I focus on several important limitations that reduce their generalizability. Scholars generally developed these theories while studying the U.S. Supreme Court, and as such make implicit assumptions that do not always hold true for new constitutional courts in developing democracies like Indonesia's Constitutional Court. Moreover, these studies tend to overlook the role of litigants and other nongovernmental stakeholders in the judicial system.

### 3.1.1 Formalist Model

The formalist model of judicial behavior argues that the law itself has meaning and prevents judges from simply deciding cases based on their policy preferences. The plain text of a constitution limits the scope of plausible or permissible legal interpretations because judges must frame their arguments in reference to the text. In common law systems, where judicial precedent (*stare decisis*) constitutes a source of law, judges must explain why their current decisions are consistent with previous ones, or alternatively why they decided to overturn binding precedent. In some civil law systems, judges will even cite scholarship on legal norms as a source of law (see Shapiro, 1986).

Judges themselves seem to view adjudication primarily through a formalist framework. They invest considerable time and effort in crafting legal arguments, suggesting that they believe legal doctrine has inherent value. Judges publicly promote the formalist model as the most appropriate way to understand the judiciary's role – or lack thereof – in politics. During his confirmation hearings, U.S. Chief Justice John Roberts famously compared judges to umpires, implying that judges should adjudicate cases impartially and not push their policy preferences (Rosen, 2015). There is also empirical evidence that standards of review matter; judges are less likely to rule against the government if the law requires a more deferential standard (Bartels, 2009; Hazelton, Hickman and Tiller, 2011).

In the 1930s, political scientists and legal realists began to question the extent to

which law could constrain judges, especially when legal text and judicial precedent are often indeterminate. If law limits judicial discretion, then why do judges interpreting the same law frequently reach different conclusions? For example, the U.S. Supreme Court regularly decides cases on a 5-4 vote in large part because different justices utilize different methods of constitutional interpretation. Originalists look to the intent of the Founding Fathers (Scalia, 1998), whereas adherents of active liberty “update” the constitution to account for changes in social and political norms (Breyer, 2006).

The release of documents from several U.S. Supreme Court justices’ personal archives – often posthumously – has helped reshape our view of judicial behavior. Several justices have admitted in private diaries that non-legal factors, such as the effect of the law on marginalized groups, influenced their decisions (see, e.g., Greenhouse, 2005; Urofsky, 2009). Internal memos also reveal that the justices would rewrite draft opinions in order to appease their colleagues and obtain a majority of votes (see, e.g., Woodward and Armstrong, 1979; Stern and Wermiel, 2010; Toobin, 2008). In short, while most judges profess a belief in formalism, in practice they seem to accept that legal doctrine is malleable, at least to a certain extent.

The recent increase in comparative judicial scholarship, especially on courts in developing countries, presents another challenge to formalism. Formalism assumes both a preexisting body of law and political institutions that respect the law, as has generally been the case throughout U.S. history. However, newer constitutional courts often operate without any precedent, much less the U.S. Supreme Court’s extensive body of jurisprudence. Moreover, not all governments respect judicial independence. In such situations, it is easier to observe judges issuing decisions that achieve policy or political goals, but do not necessarily adhere to the letter of the law.

### 3.1.2 Attitudinal Model

The attitudinal model, one of the earlier strains of legal realism, posits that judges adjudicate cases based on their policy preferences, not the law (e.g., Segal and Cover, 1989; Segal and Spaeth, 1996). This model treats judges as insulated and unaccountable political actors able to decide cases however they see fit. In other words, judges are not constrained by *stare decisis*, popular opinion, or other government institutions. The attitudinal model has performed better at predicting the votes of U.S. Supreme Court justices than formalist models (Ruger et al., 2004). Judges appointed by Republican presidents tend to support conservative policies, whereas Democratic appointees support liberal policies, especially in politically controversial cases.

Many of the assumptions built into the attitudinal model are unique to the U.S. and thus do not translate well to other countries. First, the model assumes a high level of judicial independence. U.S. Supreme Court justices possess life tenure, and as such can afford to ignore political and social pressures. By contrast, judges in most other countries are appointed for a limited term or face a mandatory retirement age (see Ginsburg, 2003, Table 2.2, for a table of constitutional court terms). The obstacles to attitudinal voting become even more serious in countries with weak courts and no respect for the rule of law (see section 3.1.4 below). None but the bravest of judges will decide cases based on their policy preferences if doing so would risk retaliation from the government (see Helmke, 2002).

Second, the social and political cleavages that arise in constitutional cases might not necessarily reflect those of the country. The distribution of policy preferences on the bench depends upon the appointment mechanism and the types of political disputes that have become constitutionalized.<sup>1</sup> In the U.S., the president initiates appointments to the federal judiciary, so potential candidates have an incentive to advertise their ideological preferences in order to win appointment (Black and Owens, 2016). Moreover, political debates tend to

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<sup>1</sup>This is analogous to the literature on how electoral institutions and social cleavages affect the number and diversity of political parties in a country (Clark and Golder, 2006).

be framed exclusively along a unidimensional left-right/liberal-conservative spectrum. By contrast, a different appointment mechanism, such as selection by independent judicial commissions (see Garoupa and Ginsburg, 2009), might favor non-partisan judges. Meanwhile, higher standing thresholds might prevent politically salient disputes from reaching the court.

Scholars have found little evidence for regular ideological voting outside the U.S., even in other common law countries, such as Canada (Ostberg and Wetstein, 2008), the United Kingdom (Hanretty, 2013*a*), and Australia (Robinson, 2011). Carroll and Tiede (2012) find some ideological voting on the Chilean Constitutional Tribunal, but qualify their findings by noting that the justices had not formed firm “political” blocs. In exceptional cases dealing with core interests, courts do issue clearly partisan decisions, such as the Thai Constitutional Court’s rulings against populist politicians (Ginsburg, 2009; Méribeau, 2016). However, overall, clear and consistent ideological voting seems to be the exception rather than the rule.

### **3.1.3 Historical-Institutionalist Model**

Historical institutionalists posit that constitutional courts are embedded in and constrained by the political context in which they operate. The elected branches of government pass laws affecting courts and appoint judges, effectively ensuring that their views shape constitutional interpretation. For example, New Deal/Great Society liberals dominated U.S. politics between 1932 to 1968, allowing them to appoint and confirm liberal justices to the Supreme Court (Gillman, Graber and Whittington, 2013, 17-18). Indeed, as Dahl (1957, 285) argues, “the policy views dominant on the [Supreme] Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States” (see also Bergara, Richman and Spiller, 2003; Harvey and Friedman, 2006).

Historical institutionalism depends upon several assumptions rooted in U.S. history. First, the model takes a cyclical view of U.S. politics, in which distinct ideological factions gain power for limited periods of time (see Schlesinger, 1986). That theory of political change, debatable for the U.S., probably does not hold true for other countries. Political

parties in many developing democracies form around charismatic leaders or ethnic identities, not ideology (Hicken and Kuhonta, 2011). In such circumstances, politicians will use judicial appointments as patronage opportunities to satisfy key constituencies rather than to pursue ideological goals (Gatmaytan and Magno, 2011).

Moreover, institutional design matters. Dahl (1957, 285) notes that the U.S. Supreme Court’s policy preferences have historically converged with those of lawmakers because a vacancy on the bench opened up on average once every two years. Almost every governing majority had a chance to appoint at least one justice and shape the Court’s ideological composition. However, some constitutions provide courts with more insulation from historical cycles by having all judges serve long, concurrent terms (see Ginsburg, 2003, Table 2.2). Governing majorities might rise and fall before the judges’ terms expire. Other countries establish independent judicial commissions to appoint judges with minimal input from elected lawmakers (see Garoupa and Ginsburg, 2009). In short, historical institutionalism only explains judicial behavior under a certain set of political and institutional circumstances.

#### **3.1.4 Strategic-Institutionalist Model**

The strategic-institutionalist model argues that the institutional power of the executive and legislature prevent judges from deciding cases based solely on either their policy preferences or interpretations of the law (e.g., Maltzman, Spriggs and Wahlbeck, 1999; Wahlbeck, 1997). As Alexander Hamilton warned, the judiciary has “no influence over either the sword or the purse” (Hamilton, 1788), and thus cannot reshape policy in the face of aggressive opposition from the government. Courts rely upon the other branches to enforce their decisions. As Rosenberg (1991) points out, Southern states avoided complying with the U.S. Supreme Court’s *Brown v. Board of Education* decision for years until the federal government sent marshals to forcibly integrate schools. Meanwhile, if the legislature disagrees with the court’s ruling, it could attempt to simply amend the constitution or impeach the judges. As such, judges must moderate their decisions in order to preempt legislative override or

executive noncompliance.

Scholars of judicial politics have found considerable evidence that judges behave strategically. U.S. Supreme Court opinions tend to fall in between the ideal points of Congress and the president, which suggests that the justices avoid issuing decisions that will provoke a backlash from either branch (Bergara, Richman and Spiller, 2003; Harvey and Friedman, 2006). The model also fares well as an explanation of judicial behavior in other countries, partly because it accounts for the types of *de facto* and *de jure* restrictions on judicial independence common in authoritarian regimes and developing democracies (see VonDoepp and Ellet, 2011; Carroll and Tiede, 2011). In an extreme case, Helmke (2004) finds that Argentine judges are more likely to rule against the incumbent government if they believe that it will lose the next election because they wish to avoid reprisals from the next administration.

The strategic-institutionalist model is most relevant in countries where judges face clear strategic threats or opportunities from other government actors. As judicial independence increases, judges should respond less to strategic considerations. Indeed, as the number of veto players in a political system increases, the government's ability to act decreases, and judges become more empowered and activist (Santoni and Zucchini, 2004; Cooter and Ginsburg, 1996). As Tushnet (2006, 915) says, "in periods of divided government, courts can do whatever they want."

The strategic-institutionalist model is limited less by what it includes and more by what it omits. Too often, scholars only consider the executive and legislative branches as potential factors shaping judges' strategic environment. Even when they do consider non-state actors, such as NGOs or the general public, they model them as influencing judges indirectly through government institutions. For example, Vanberg (2005) finds that amicus curiae briefs influence the German Constitutional Court because they act as signals of public opinion, but concludes that judges heed public opinion because it influences elected officials. In other words, Vanberg does not explore alternative means through which public opinion might have influenced the court. As discussed in the next section, courts do have incentives

to engage directly with non-state actors.

## **3.2 Embedded Judicial Autonomy**

In this section, I build upon the existing literature to argue that non-state actors, particularly organized interest groups or NGOs, play an important role in influencing judicial behavior. I argue that, under certain conditions, judges have an incentive to engage strategically with interest groups and to cultivate public opinion. I begin by presenting a typology of judicial institutions and a game theoretic model in order to explain how “embedded autonomy” differs from other models of judicial behavior. I then focus on the role of NGOs as one of the most important types of nongovernmental actors involved in litigation. Finally, I discuss why this theoretical framework is especially appropriate for explaining the behavior of new constitutional courts in civil law systems.

### **3.2.1 Typology**

The logic of embedded judicial autonomy comes in part from the literature on bureaucracies. Evans (1995) argues that in order for bureaucracies in developmentalist states to achieve transformative policy outcomes, they must be both autonomous from the state apparatus and embedded within society. The literature on principal-agent relationships has convincingly explained why politicians delegate authority to independent bureaucrats (e.g., McCubbins, Noll and Weingast, 1987; Ferejohn and Shipan, 1990; Huber and Lupia, 2001). Scholars have paid far less attention to Evans’ concept of embeddedness, which he defines as having “institutionalized channels for the continual negotiation and renegotiation of policies” with society (Evans, 1995, 59). In other words, the most empowered and effective bureaucracies are not completely insulated from society, but rather interact with non-state actors in order to receive information about the implementation of policies. Doing so reduces resistance from interest groups and recruits them as stakeholders.

Building off Evans’ work, I present a typology for the relationship between judicial

autonomy and embeddedness in Table 3.1.<sup>2</sup> Without control over their budget and without the means to enforce their judgements, courts face two broad threats to their institutional authority: retaliation and noncompliance. A government that disagrees with the court’s decision might try to retaliate against the judges, either through formal mechanisms, such as impeachment, or informal mechanisms, such as removing patronage opportunities. Alternatively, the losing party might simply refuse to comply with the decision in the belief that no other government actor will enforce it in the face of active resistance.

		<b>Judicial Independence</b>	
		<i>Low</i>	<i>High</i>
<b>Public Support</b>	<i>Low</i>	I. Subservience	II. Autonomy
	<i>High</i>	III. Embeddedness	IV. Embedded Autonomy

**Table 3.1:** Typology of Public Support and Constitutional Court Strength

One equilibrium for judges is to insulate themselves from society and become subservient to the government, exchanging institutional power for patronage (I). However, in order to extract meaningful concessions from the government, the court must have the ability to bargain with a mixture of threats and rewards. Judges cannot credibly threaten to rule against the government if the government could simply replace them at will. As such, subservient courts have extremely limited influence over policy. Moreover, in many developing countries, courts find themselves subject to benign – or malign – neglect because they cannot pressure the government to fulfill the judiciary’s budgetary and staffing needs.

Judicial independence (II) is a necessary but not sufficient condition for judicial empowerment. Institutional mechanisms such as life tenure for judges and high barriers to impeachment can protect judges from retaliation by other government actors. However, in-

<sup>2</sup>I loosely adapted this table from Deinla (2014, 150). However, where Deinla compares public support for a court with levels of democratization, I use judicial independence, which is more relevant to judicial behavior than democratization. Although democracy and judicial independence are correlated, one can find examples of relatively independent courts in authoritarian regimes (e.g., Toharia, 1975; Brown, 1997; Shapiro, 2008), as well as subservient courts in democracies (e.g., Helmke, 2004).



dependence does not guarantee that other branches of government will respect and comply with judicial decisions. At the opposite extreme, an embedded court (III) engages with the public, but lacks independence. Courts in this situation might try to gain public support through popular rulings in nonpolitical or less controversial cases (Toharia, 1975; Haynie, 1994). However, judges risk backlash if their policy preferences do not align with those of the public. If the court supports the government in an unpopular decision, it risks losing public support. On the other hand, if the court issues an unpopular ruling against the government, the public itself might call for restrictions on the court. Over the long run, this type of court is unstable; the court will either lose public support and become subservient, or it will gain independence.

Embedded autonomy (IV) is a solution to both the noncompliance and retaliation problems. An embedded and autonomous court can cultivate non-state actors so that they have an incentive to defend the judiciary against the government. If the public holds the court in sufficiently high esteem, it will have an incentive to monitor and punish government noncompliance with court orders (see Epp, 1998; Vanberg, 2001). In democracies, members of the public can also use their power as voters and lobbyists to directly pressure the government to respect the court's decision. On the other hand, if the judges decide to issue an unpopular decision, their institutional independence will protect them from public backlash. Over time, the court can build an independent base of political support, which gives it more leverage in bargaining with the government.

The literature has developed several theories for why governments tolerate and even protect judicial autonomy. One branch of the literature focuses on how courts serve as a credible commitment that the government will adhere to its stated policies. This reassures economic elites that the government will respect their property rights, which in turn encourages investment (see, e.g., North and Weingast, 1989; Feld and Voigt, 2003; Wang, 2015). Another prominent theory posits that constitutional courts act as political insurance for elites who expect to lose power, insulating their policy preferences against future attempts

to overturn them (see, e.g., Ginsburg, 2003; Hirschl, 2004; Finkel, 2008; Stephenson, 2004). In any case, because the literature has extensively explored both the causes and effects of judicial independence (see, e.g., Knight and Epstein, 1996; Friedman, 2005; Helmke and Rosenbluth, 2009), I do not focus on this aspect of embedded autonomy in my dissertation. Instead, I focus on how embeddedness affects the court's strategic behavior.

Courts can open institutionalized channels to society in several ways. First, the court can signal its willingness to receive legal claims from the public, providing non-state actors with a forum through which to influence policy. This is especially important for political minorities or marginalized members of society, who cannot otherwise affect policy through the majoritarian branches of government. Second, the court must demonstrate a willingness to rule against the government in at least enough cases to persuade the public that the court's ability to check the government credible.<sup>3</sup>

For their part, non-state actors can utilize these channels to engage with the court and influence policy. First, because courts cannot initiate cases *sua sponte*, they must wait for external parties to submit cases for adjudication. This gives non-state actors considerable power to set the court's agenda. Non-state litigants can also attempt to send signals to the court about public opinion as it relates to their legal claims. Moreover, because most courts do not possess the capability to investigate the facts of a case or evaluate policy, they rely heavily upon the information presented to them in briefs. In short, embeddedness allows non-state actors to both influence the types of policy disputes the court addresses and the information it uses to adjudicate those disputes.

### 3.2.2 Game Theoretic Model

In Figure 3.1, I present a game theoretic model to illustrate the implications of the embedded autonomy model. The game has three actors, each with its own ideal point: the

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<sup>3</sup>It is worth noting that embeddedness is not an unadulterated good. In fact, close ties between the court and society can lead to corruption, improper bias, and a lack of accountability (see Voigt, 2008). I discuss several examples of these problems later in the dissertation, especially in Chapter VII.

judiciary ( $x_J$ ), the legislature ( $x_L$ ), and the executive ( $x_E$ ) (the public also has an ideal point,  $x_P$ , but it does not make any strategic moves). I start the game by allowing Nature to set policy at some status quo point  $x_{SQ}$ . I make no assumptions about the status quo except that all parties know its location and have a complete set of preferences relative to it. Each actor maximizes ideological utility  $I_i$ , with  $i \in [J, L, E]$  when the final policy outcome is equal to its ideal point ( $\max\{I_i\}$  when  $-|x_i - x| = 0$ ). Importantly, I assume that the executive and legislature had attempted to shift policy as close to their ideal points as possible before the game begins, but fail because they face institutional and/or resource constraints.

Following Vanberg (2001) and Carrubba and Zorn (2010), public support can modify the payoffs to each player. Nature sets the political environment as one in which popular mobilization is either costless or costly, with prior probabilities of  $p$  and  $1 - p$ , respectively. In a “costless” environment ( $\tau$ ), transparency is high, the public can readily evaluate court rulings and detect evasions, and barriers collective action are low. By contrast, in a “costly” environment ( $-\tau$ ), citizens cannot mobilize and cannot detect the impact of government evasion. None of the actors know with certainty *ex ante* whether any particular evasion attempt will succeed. The beliefs at each information node are captured by the parameter  $q_i \in (0, 1)$ , with  $i \in [J, L, E]$ .

I account for the direction of public support by making it a function of whether or not the court’s ruling moved policy closer to the public’s ideal. If the court shifts policy towards the public’s ideal point ( $|x_E - x_J| < |x_E - x_{SQ}|$ ), then the public will support the judiciary and oppose any government evasion ( $\beta_J > 0, \beta_L, \beta_E < 0$ ). On the other hand, if the public preferred the status quo ( $|x_E - x_J| > |x_E - x_{SQ}|$ ), it will oppose the court and acquiesce to government evasion ( $\beta_J < 0, \beta_L, \beta_E > 0$ ). If the public is indifferent between the the status quo and the court’s ideal point ( $|x_E - x_J| = |x_E - x_{SQ}|$ ), then there is no public reaction and the game is the same as in a “costly” environment ( $-\tau$ ). Here I assume that all players know the direction of the public’s ideal point, if not its exact location, because the public

provides information about itself through polls, elections, and amicus briefs to the court.<sup>4</sup>

The court's overall utility consists of four variables: ideological preferences, institutional integrity, patronage concerns, and popularity. The court's ideological preferences are represented by  $I_J$ , the distance between the court's ideal point and the final policy outcome. When the final outcome is the status quo,  $I_J = -|x_J - x_{SQ}|$ . By contrast, when the court succeeds in exercising review, its utility becomes  $I_J^* = -|x_J - x_J| = 0$ . The court's institutional concerns are represented by a payoff  $C > 0$ , which represents the reputation cost of being unable to prevent the government from reverting policy back to the status quo. As discussed above, the public response to the court ( $\beta_J$ ) can either be positive or negative. If the government disagrees with the court's decision, it can attempt to impose sanctions ( $S$ ) on the judges. Because I am primarily interested in independent courts, I assume the government can only impose sanctions if both the executive and legislature agree to do so.

For both the executive and legislature, ideological utility is conditioned upon the distance between the final policy outcome and their ideal point.<sup>5</sup> If the court succeeds in its exercise of constitutional review, the utilities for the legislature and executive are  $I_L = -|x_L - x_J|$  and  $I_E = -|x_E - x_J|$ , respectively. By contrast, if either branch succeeds in reversing the court's decision, policy reverts back to the status quo and utilities are calculated with respect to  $x_{SQ}$  ( $I_L = -|x_L - x_{SQ}|$ ,  $I_E = -|x_E - x_{SQ}|$ ). If, however, there is public response, then the legislature suffers  $\beta_L$  while the executive suffers  $\beta_E$ . I assume the court has complete information about the government's preferences through its briefs or other sources of information (Helmke, 2004, 35).

In the game, the court moves first and can either exercise review and strike the law down (*review*) or refrain from exercising review (*-review*). In the latter case, the game

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<sup>4</sup>Note that in Figure 3.1 I portray  $\beta_J$  as positive and  $\beta_L$ ,  $\beta_E$  as negative. I do this simply to emphasize that these variables go in opposite directions. If there is negative public reaction to the court's decision, the public response is calculated using  $-(\beta_J)$ ,  $-(-\beta_L)$ , and  $-(-\beta_E)$ , respectively. Moreover, because of the nature of the threshold equations below,  $\beta \neq 0$  in this model.

<sup>5</sup>I assume that both the executive and legislature know the court's type. First, governments can learn much about judges during the appointment and confirmation process. Second, governments have teams of lawyers scouring judicial opinions in order to learn the court's preferences on certain issues. Finally, in this model the legislature and executive only move *after* the court.

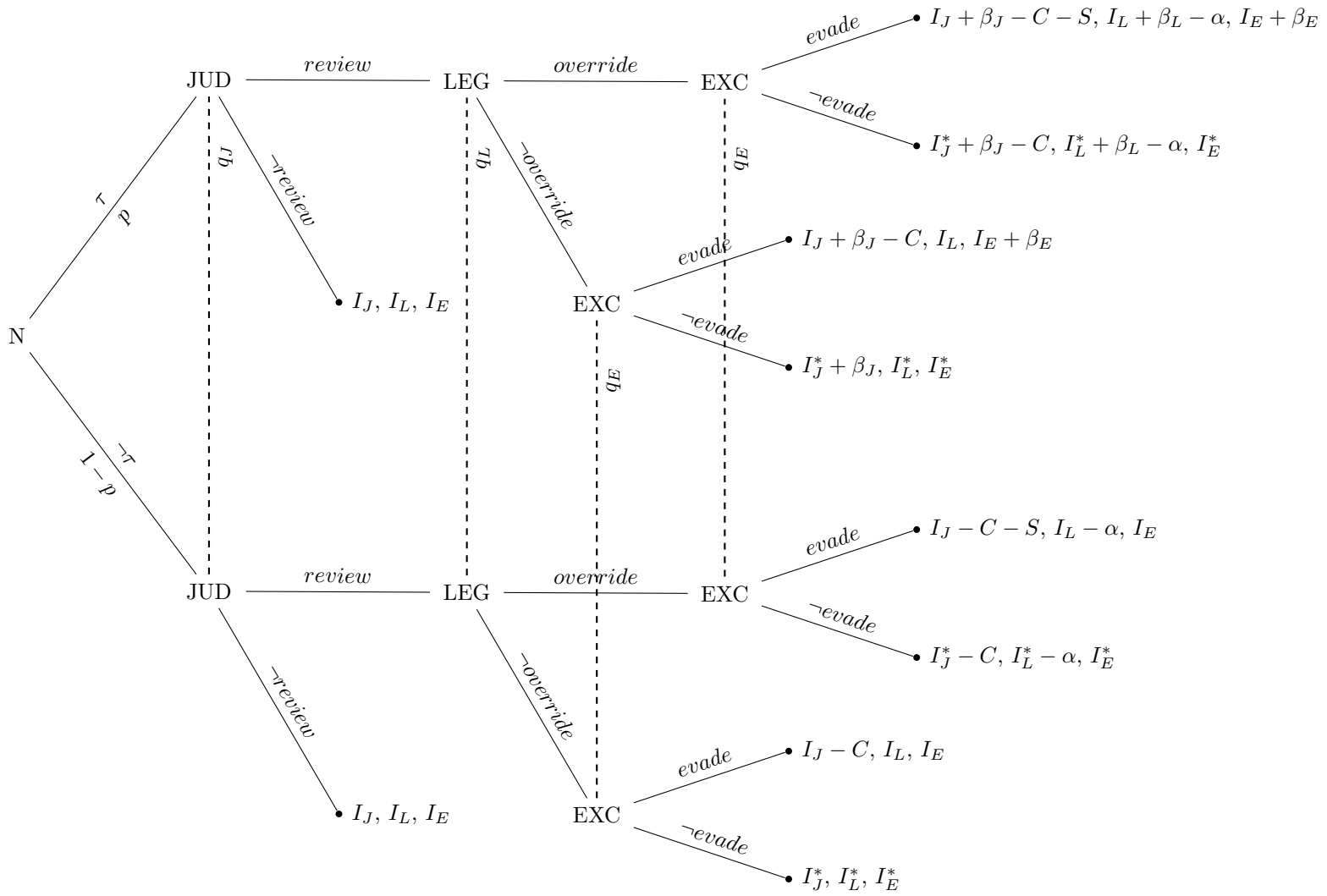
simply ends as each player receives the same utility as under the status quo. Next, the legislature can either accept the decision (*-override*) or attempt to override it with new legislation (*override*), reinstating the status quo.<sup>6</sup> Overriding the decision entails some cost  $\alpha$  ( $\alpha > 0$ ) that reflects the legislature's internal coordination problem and opportunity costs. In either case, the executive moves. If the legislature overrode the court's decision, the executive can either join the legislature (*evade*) or refuse to implement the legislature's new law (*support*). On the other hand, if the legislature did not override the court's decision, the executive can decide to evade it (*evade*) or accept it (*support*).

When the legislature and executive disagree, I follow Carrubba and Zorn (2010) in finding that the executive has an effective veto over legislative action, but for different reasons. First, while relatively few countries grant their executives formal veto power (Watson, 1988), Tsebelis and Aleman (2005) show that presidents can significantly influence the policy agenda even when they can only remit comments back to the legislature. Second, executive evasion is harder to detect and punish than legislative override. Third, the executive possess resources, such as control over patronage, that enable it to influence legislators (Helmke, 2004, 28). As such, when the executive supports the court's decision, the final policy will reflect the court's ideal point, whereas executive evasion reverts policy back to the status quo. However, after any evasion attempt, the court still suffers the institutional cost  $C$ , even when its policy is ultimately implemented.<sup>7</sup>

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<sup>6</sup>I allow the legislature to move first for several reasons. First, legislative override will likely occur soon after the court issues the decision. Such attempts are relatively easy to detect. By contrast, the executive can openly promise to adhere to the court's decision, but delay or obfuscate implementation, making detection of noncompliance more difficult. Moreover, executive noncompliance can occur over an indefinite timeline, whereas a legislative override is a discrete event.

<sup>7</sup>This assumption is debatable as an ultimate victory for the court might enhance its reputation. However, I count any evasion attempt as imposing a cost because it exposes the court's relative impotence. Further research should be done to determine exactly when courts suffer institutional damage due to noncompliance.



**Figure 3.1:** Game Theoretic Model: Embedded Autonomy

I solve this game for eight unique political environments, varying the direction of the court's decision and the direction of public support. Without a loss of generality, I specify that the court can move in four directions. A court sympathetic to the legislature moves policy towards the legislature's ideal point and away from the executive's ( $|x_L - x_J| > |x_L - x_{SQ}| \cap |x_E - x_J| < |x_E - x_{SQ}|$ ). Second, a court sympathetic to the executive shifts policy towards the executive's ideal point and away from the legislature's ( $|x_E - x_J| < |x_E - x_{SQ}| \cap |x_L - x_J| > |x_L - x_{SQ}|$ ). In a one-dimensional policy space, these scenarios only occur when the status quo is located between the other two branches. Third, a court sympathetic to both branches moves policy closer to both the legislature and executive's ideal points ( $|x_L - x_J| < |x_L - x_{SQ}| \cap |x_E - x_J| < |x_E - x_{SQ}|$ ). Finally, a court sympathetic to neither branch can move policy away from their ideal points ( $|x_L - x_J| > |x_L - x_{SQ}| \cap |x_E - x_J| > |x_E - x_{SQ}|$ ). These last two occur when the status quo is to either the left or right of both branches. In each scenario, the public can either support the court ( $\beta_J > 0 \cap \beta_L, \beta_E < 0$ ) or oppose it ( $\beta_J < 0 \cap \beta_L, \beta_E > 0$ ).

Because the legislature's decision to override a court's decision is not determinative and subject to executive "veto," I condense these eight political environments into four scenarios. The Perfect Bayesian Equilibria (PBE) solutions to the game are provided below, where I compare the beliefs at each information set ( $q_i$ ) with the common prior ( $p$ ).

### 3.2.2.1 Subservience

In this scenario, the court moves policy away from the executive's ideal point ( $|x_E - x_J| > |x_E - x_{SQ}|$ ), while its effect on the legislature is irrelevant. Public opinion does *not* support the court ( $\beta_J < 0 \cap \beta_L, \beta_E > 0$ ). The following represent PBE strategies for each player:

**Legislature:**  $S_L = [(override; p \geq \frac{\alpha}{\beta_L}); (\neg override; p < \frac{\alpha}{\beta_L})]$

**Executive:**  $S_E = [(evade; p \geq \frac{|x_E - x_{SQ}| - |x_E - x_J|}{\beta_E})]$

**Judiciary:**  $S_J = [(\neg review; p \geq \max\{-\frac{C+S}{\beta_J}, -\frac{C}{\beta_J}\})]$

The court is at its weakest when confronted with both a hostile executive and public. The court faces a serious risk of sanctions in addition to any institutional cost of legislative override ( $p > -\frac{C+S}{\beta_J}$ ). Even if the legislature does not override the court, the executive will attempt to evade the court's policy decision. In such cases, judges conclude that judicial review would always be detrimental to their interests ( $p > -\frac{C}{\beta_J}$ ) and never exercise review. Judges will sometimes develop legal doctrines, such as political question doctrine in U.S. constitutional law, to discourage petitioners from even bringing such cases to the courts.

This equilibrium helps explain why courts that lack independence tend to be so subservient. However, it also explains situations in which judges collectively have policy preferences outside of the country's mainstream. During wartime or national emergencies, courts tend to grant the government more deference as popular support for restricting civil rights increases. For example, during World War II, the U.S. Supreme Court did not declare the internment of Japanese-Americans<sup>8</sup> or military tribunals to prosecute German-American saboteurs unconstitutional.<sup>9</sup>

### 3.2.2.2 Autonomy

In this scenario, the court moves policy towards the executive's ideal point ( $|x_E - x_J| < |x_E - x_{SQ}|$ ), while its effect on the legislature is irrelevant. In theory, the court's opinion could benefit both branches. However, public opinion does *not* support the court ( $\beta_J < 0 \cap \beta_L, \beta_E > 0$ ). The following represent PBE strategies for each player:

**Legislature:**  $S_L = [(override; p \geq \frac{\alpha}{\beta_L}); (\neg override; p < \frac{\alpha}{\beta_L})]$

**Executive:**  $S_E = [(evade; p \geq \frac{|x_E - x_{SQ}| - |x_E - x_J|}{\beta_E}); (\neg evade; p < \frac{|x_E - x_{SQ}| - |x_E - x_J|}{\beta_E})]$

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<sup>8</sup>In its infamous *Korematsu v. U.S.*, the Court agreed with the government's proposition that it had a necessary and compelling interest in interning Japanese-Americans.

<sup>9</sup>In his memoirs, Justice William O. Douglas claims that the Court did not rule against the government in *Ex part Quirin* because Attorney General told the justice that "the Army is going to go ahead and execute the [saboteurs] whatever the Court did" (Douglas, 1980, 138-39).



$$\begin{aligned} \textbf{Judiciary: } S_J = & [(review; p \leq \frac{|x_J - x_{SQ}|}{\beta_J} \text{ and } p \leq \min\{\frac{\alpha}{\beta_L}, \frac{|x_E - x_{SQ}| - |x_E - x_J|}{\beta_E}\}); \\ & (mix \text{ review}, \neg review; \frac{|x_J - x_{SQ}| - C}{\beta_J} < p < \frac{|x_J - x_{SQ}|}{\beta_J} \text{ and } \frac{\alpha}{\beta_L} < p < \frac{|x_E - x_{SQ}| - |x_E - x_J|}{\beta_E}\}); \\ & (\neg review; p > \frac{|x_J - x_{SQ}| - C}{\beta_J} \text{ and } p > \frac{|x_E - x_{SQ}| - |x_E - x_J|}{\beta_E}\})] \end{aligned}$$

Despite the fact that the decision might benefit the legislature, the legislature attempts to override the decision in order to appease the public so long as the cost of legislating is small. Likewise, if the public backlash against the court is large relative to the decision's policy benefits, the executive might feel compelled to evade the court's opinion. The court's response depends primarily upon the extent to which it believes the executive will attempt to evade its decision ( $p < \frac{|x_E - x_{SQ}| - |x_E - x_J|}{\beta_E}$ ). When this condition is not satisfied, the court will never exercise review. Next, the court must balance the policy gains from judicial review against the threat of public backlash and institutional damage ( $p < \frac{|x_J - x_{SQ}| - C}{\beta_J}$ ). If the court believes that neither branch will evade the decision and it is faced only with public backlash, the court will exercise review if the backlash and institutional costs are sufficiently low. The court will feel less constrained when it believes it is in a low transparency environment ( $p$  is low).

This equilibrium allows political elites to blame courts for unpopular or anti-majoritarian policies. Because the government selects judges, it can screen for candidates who share its preferences (Salzberger, 1993, 361-64). In Western democracies, this equilibrium has proven useful in resolving controversial policy disputes, such as abortion, flag burning, hate speech, and busing (Whittington, 2009). In former socialist countries, neoliberal elites have encouraged judges to dismantle popular social welfare policies (Moustafa, 2007; Hirschl, 2004). As shown in the model, judges reap all of the political backlash for their policy decision while the other branches of government can gain public support by posturing against the court. For its part, when the executive decides to support an unpopular court decision, it often does so by emphasizing its lack of discretion and duty to uphold the "law of the land."<sup>10</sup>

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<sup>10</sup>For example, in 1957, President Dwight Eisenhower justified his decision to send federal troops to integrate Little Rock public schools by claiming he had a duty to enforce *Brown v. Board*, even though

### 3.2.2.3 Embeddedness

In this scenario, the court moves policy towards the executive's ideal point ( $|x_E - x_J| < |x_E - x_{SQ}|$ ), while its effect on the legislature is irrelevant. Moreover, public opinion *does* support the court ( $\beta_J > 0 \cap \beta_L, \beta_E < 0$ ). The following represent PBE strategies for each player:

**Legislature:**  $S_L = [(\neg \text{override}; p \geq -\frac{\alpha}{\beta_L})]$

**Executive:**  $S_E = [(\neg \text{evade}; p > \frac{|x_E - x_J| - |x_E - x_{SQ}|}{\beta_E})]$

**Judiciary:**  $S_J = [(\text{review}; p > -\frac{|x_J - x_{SQ}|}{\beta_J})]$

With the executive and public on its side, the court is in one sense at its strongest. As expected, the legislature will never contradict the popular will by attempting an override. More importantly, the executive will never evade the court's decision because in doing so it gains the policy benefit and avoids public backlash. Not only can the court exercise review under these circumstances, but it will *always* exercise review ( $p > -\frac{|x_J - x_{SQ}|}{\beta_J}$ ). There is no risk of either sanctions or institutional costs because neither branch will evade the decision. The only question is how much added benefit public support will provide the court.

This equilibrium describes situations in which the government cannot achieve its policy objectives without the aid of judicial review. For example, governments can allow citizens to file lawsuits against bureaucrats who violate their rights (Shapiro, 1986; Staton, 2010). Likewise, governments seeking to stimulate economic growth will often empower courts with the power to enforce property and contract rights (LaPorta, 2004; Feld and Voigt, 2003; Smith and Farrales, 2010). These outcomes tend to be popular, yet beyond the capacity of the government alone to effectuate. The national government cannot effectively supervise the entire bureaucracy, and it cannot credibly commit to protect the economic interests of investors. Thus, the court can exercise review, but in the service of the government and public's policy preferences.

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historians now believe Eisenhower supported desegregation (Nichols, 2008).

### 3.2.2.4 Embedded Autonomy

In this scenario, the court moves policy away from the executive's ideal point ( $|x_E - x_J| > |x_E - x_{SQ}|$ ), while its effect on the legislature is irrelevant. However, public opinion *does* support the court ( $\beta_J > 0 \cap \beta_L, \beta_E < 0$ ). The following represent PBE strategies for each player:

**Legislature:**  $S_L = [(\text{-override}; p \geq -\frac{\alpha}{\beta_L})]$

**Executive:**  $S_E = [(\text{evade}; p < \frac{|x_E - x_J| - |x_E - x_{SQ}|}{\beta_E}); (\text{-evade}; p > \frac{|x_E - x_J| - |x_E - x_{SQ}|}{\beta_E})]$

**Judiciary:**  $S_J = [(\text{review}; p > \min\{\frac{C}{\beta_J}; \frac{|x_E - x_J| - |x_E - x_{SQ}|}{\beta_E}\});$   
 $(\text{-review}; p < \min\{\frac{C}{\beta_J}; \frac{|x_E - x_J| - |x_E - x_{SQ}|}{\beta_E}\})]$

Even though the executive dislikes the court's opinion, public support affords the court far greater discretion. In line with Stephenson (2004), the public supports the court when its ideal point is closer to the court's than to that of the elected government. The legislature always follows public opinion and never attempts to override the decision, thus removing the threat of sanctions against the justices. The executive will again base its decision on the gap between the court's decision and the status quo, but must also consider the cost of public backlash for evading the court. Under these circumstances, the court can exercise review in either of two circumstances. First, if it believes that the executive will not evade its decisions ( $p > \frac{|x_E - x_J| - |x_E - x_{SQ}|}{\beta_E}$ ), it will always exercise review. Second, if the court believes that the institutional costs due to executive evasion will be low and public support sufficiently high ( $p < \frac{C}{\beta_J}$ ), then the court will exercise review. In the latter case, it is important to emphasize that the ideological benefit the court receives does not factor into its decision.

In moving policy far from the executive's ideal point, the court must realize that there is a chance the decision will never be implemented. In orienting its decision towards the public,

the court effectively bargains that public support for its decision in the short-term it will translate into support for the institution over the longer-term. This strategy can be especially appealing to courts that lack legitimacy or institutional stature, such as courts in countries that have just emerged from under authoritarian rule. The court can signal its sympathy with and value to the public by issuing bold decisions early on that match the preferences of key interest groups. Indeed, Dahl (1957) expects most new courts in democracies to issue their boldest decision within a few years of their establishment. For example, the Supreme Courts of India and the Philippines both issued several radical decisions championing environmental protection, women's rights, and other progressive causes soon after the martial law ended in their respective countries (Gatmaytan, 2003; Rosencranz and Nardi, 2011). After the transition from apartheid, the new Constitutional Court of South Africa enforced the 1996 Constitution's right to health, which many observers had assumed was merely hortatory (Sunstein, 2001). These decisions had significant financial and distributive impacts (Brinks and Gauri, 2008), prompting opposition from the government. However, the decisions also bolstered the reputation of these courts both domestically and internationally.

### **3.2.3 Nongovernmental Organizations**

Nongovernmental organizations (NGOs) are especially important actors in the embedded autonomy model. NGOs are nonprofit, formally constituted organizations with the goal of pursuing some collective good or policy change. They serve as vehicles for segments of the public to mobilize and coordinate around policy change. In forming an organization, members can pool resources and develop institutional expertise in a policy area. They can also file lawsuits on behalf of the organization.

NGOs have an interest in an independent and effective judiciary. Compared to the average citizen, NGOs are more likely to be repeat players who use the courts regularly to advance policy goals. However, most NGOs have less political power than governments or corporations, and thus have fewer opportunities to change policy through the executive or

legislative branches. For example, NGOs in developing countries find constitutional litigation a useful way to challenge neoliberal economic policies because, unlike with traditionally conservative executive or legislative branches, they can force such policy questions onto the court's agenda (Rosser, 2015*c*, 190). Courts can prove especially useful for organizations that focus on protecting the rights of political minorities who cannot advance their goals through majoritarian political institutions.

NGOs not only have a stake in judicial independence, but also have the means to defend it. NGOs can use their policy expertise and network of members to monitor the enforcement of judicial decisions more closely than the judges themselves. They can file a lawsuit to alert the court if the executive attempts noncompliance (see Epp, 1998; Vanberg, 2001). As repeat players, NGOs know the rules of litigation and can file such cases relatively quickly. Moreover, interest groups can mobilize supporters in order to lobby the government or protest violations of judicial autonomy. For example, when Pakistan's military government sacked Chief Justice Iftikhar Muhammad Chaudhry in September 2007, the Pakistan Bar Council mobilized thousands of lawyers to protest in the streets (International Crisis Group, 2008). Judges themselves rarely have the capacity to mobilize large groups of people.

### **3.2.4 Centralization of Review**

The embedded autonomy model is useful for understanding judicial behavior in legal systems with centralized mechanisms of constitutional review. Common law systems, such as the U.S., decentralize constitutional review powers, granting any court jurisdiction over constitutional issues (Rubin, 1977).<sup>11</sup> Common law judges tend to be lawyers, often senior members of the bar, and treat constitutional claims like any other legal dispute. By contrast, civil law systems frequently adopt the Kelsenian model, in which a single court has exclusive jurisdiction over constitutional questions (Shapiro, 1986; Garoupa and Ginsburg, 2011). Judges on Kelsenian courts are tend to be former politicians or prestigious scholars.

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<sup>11</sup>With the notable exception of Great Britain, where the common law system originated. Great Britain does not have a written constitution and only recently created a supreme court.

Not surprisingly, they treat constitutional disputes as inherently political and are more likely to openly assess the policy or ethical implications of constitutional claims.

The Kelsenian system potentially increases embeddedness by making it less costly for NGOs and interest groups to pursue constitutional claims than in common law systems. NGOs can focus their resources on a single court and do not have to worry about exhausting an appellate process before receiving a final decision. NGO staff attorneys only need to master a single set of procedural rules and a single body of jurisprudence. Moreover, NGOs have an opportunity to build a positive reputation before the judges through repeated appearances, more difficult to accomplish in a court of general jurisdiction with a much larger docket. In short, the Kelsenian system gives NGOs greater opportunities to engage in policy debates and be recognized by the judges as credible policy experts.<sup>12</sup>

The Kelsenian system can also increase embeddedness by giving judges a greater incentive to cultivate public opinion. In common law systems, judges can influence policy by adjudicating disputes between private parties or by ruling against local governments, while avoiding confrontation with the national government.<sup>13</sup> By contrast, because Kelsenian courts only adjudicate constitutional claims, they do not have that option. If Kelsenian courts want to influence policy, they need to declare some government actions unconstitutional. Judges will have more latitude to do so if the public agrees with the court's ruling. Thus, judges in Kelsenian court systems should be more likely to seek out signals of public opinion in controversial cases.

### 3.2.5 New Courts

New constitutional courts face a different strategic environment than older courts, and thus have greater incentives to become embedded in society. Whereas older courts in

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<sup>12</sup>On the other hand, Kelsenian constitutional courts tend to be based in the nation's capital, which disadvantages smaller regional NGOs.

<sup>13</sup>Indeed, during the nineteenth century, the U.S. Supreme Court frequently struck down state laws, but rarely invalidated federal statutes. The first instance was in the famous *Marbury v. Madison* decision. The second came 50 years later in the infamous *Dred Scott* decision.

developed democracies have typically already established their legitimacy, younger courts have not (Gibson, Caldeira and Baird, 1998). Older courts have relatively less incentive to respond strategically to public opinion because they already benefit from diffuse public support, i.e. support for the institution more broadly. The public values the court's independence even if it disagrees with the outcome of a given case. By contrast, public support for new courts tends to be more specific and contingent upon the outcome of individual cases. Building diffuse support for the judiciary requires not just that potential stakeholders agree with the court's policy preferences, but also that they have an incentive to mobilize against government attempts to retaliate, even when they disagree with the court's decision.

Constitutional courts in new democracies face unique political dilemmas. If the court had existed under an authoritarian regime, the judges will need to demonstrate their independence and distance themselves from the previous regime (see Helmke, 2002). If the court was established at the onset of democracy, it will need to establish its relevance. Newer courts often do not receive a budget sufficient to cover operating costs and staffing needs. Moreover, many citizens might not even be aware of the new institution, much less realize that the court has the power to declare laws unconstitutional. Not surprisingly, courts tend to receive relatively few petitions during their first few years. Ironically, some new judges might find themselves more worried about their relevance than about political threats.

In such circumstances, ruling strictly in favor of the government is not an effective strategy because the government has no incentive to provide the court with more resources. In line with Haynie (1994), if the judges want to become relevant and convince non-state actors to file petitions for constitutional review, they must avoid the appearance of favoring elites. They can do this by ruling against the government in high-profile cases. Doing so demonstrates that it is possible for non-state actors to win against the government. This in turn gives interest groups a greater stake in defending the court's independence so as to preserve their ability to influence policy in the future. Ultimately, the court ends up with greater leverage against the executive and legislative branches, and non-state actors have a

forum through which to influence in policy debates.

### 3.3 Concluding Remarks

In this chapter, I discussed the limitations of existing models of judicial behavior in the political science literature. Formalist and attitudinal models *might* appropriately describe the U.S. Supreme Court, but do not translate as well to countries. Historical-institutionalist and strategic-institutionalist models better account for political constraints on judicial behavior, but, in focusing primarily on the other branches of government, they tend to overlook non-state actors. I presented the embedded autonomy model as a corrective to this oversight. I looked at the incentives that constitutional courts have to engage strategically with non-state actors, particularly NGOs. I then explained why newer Kelsenian courts in developing democracies should be more responsive to public opinion and pressure from interest groups than common law courts.

The rest of this dissertation attempts to further explore the implications of the embedded autonomy model and the role of non-state actors in constitutional litigation. In Chapter IV, I find that Indonesian NGOs do play a unique agenda-setting role in constitutional litigation, thereby expanding the range of policy issues that the Constitutional Court can adjudicate. In Chapter V, I find that the justices are more likely to grant a petition that is supported by a larger number of petitioners, suggesting that public opinion matters. In Chapter VI, I find that the justices are more likely to cite text from petitions submitted by NGOs than by other types of petitioners, indicating that they view those briefs as particularly valuable. In each of these chapters, I also discuss additional literature relevant to the embedded autonomy model before testing a set of specific hypotheses.



## CHAPTER IV

### Agenda Setting

As mentioned in the last chapter (Chapter III), scholars of comparative judicial politics have tended to focus on explaining judicial voting behavior. We know much less about how and why certain disputes reach courts in the first place. Unlike the executive and legislature, courts cannot issue policy decisions *sua sponte*; judges can only rule on claims brought by external parties. In this chapter, I build upon the theoretical discussion in Epp's *The Rights Revolution*. Epp argues that NGOs help protect legal rights by mobilizing resources to ensure that constitutional claims reach the court's agenda. I conduct an empirical test of this theory using data from petitions to the Indonesian Constitutional Court.

My approach differs from the existing literature in three crucial ways. First, I treat the topics on the court's docket as an approximation of the judicial agenda. I use a latent topic model in order to obtain a quantitative measure of the distribution of topics. Thus, I measure agenda-setting as the ability to change the distribution of topics on the docket. Second, compared to traditional hand-coding, the latent topic model allows for a more refined and less biased measure of topics in legal documents. Instead of limiting my analysis to broad categories of rights cases, the topic model yielded 22 distinct topics. This matters insofar as NGOs do not have the same agenda-setting power for different types of topics. Finally, I do not treat NGOs as a homogenous group. Instead, I look at how different types of NGOs engage in agenda-setting.

In Section 4.1 of this chapter, I briefly review the literature on agenda-setting and develop a set of hypotheses about the types of claims Indonesian NGOs file with the Constitutional Court. In Section 4.2, I explain my data and my empirical strategy. I also explain the methodology underlying the Structural Topic Model. In Section 4.3, I present my results, including the 22 topics derived from the topic model. I find evidence that NGOs do act as agenda setters, but only certain types of NGOs. Moreover, I find that the effect is strongest for socioeconomic topics. In Section 4.4, I discuss several cases involving the education system that help illustrate how NGOs proved critical in challenging constitutional violations. Finally, in Sections 4.5 and 4.6, I discuss my results and implications for the broader literature.

## 4.1 Theory

Although some courts, such as the U.S. Supreme Court, have discretion over their dockets, most courts, including the Indonesian Constitutional Court, must dispose of any petition they receive that falls within their jurisdiction. In Indonesia, a petition to the Constitutional Court containing a constitutional complaint initiates the process of constitutional litigation.<sup>1</sup> This means that petitioners essentially set the court's agenda, which in turn can affect its jurisprudence. Grossmann and Swedlow (2014) finds that the agenda has a greater effect on U.S. Supreme Court policy decisions than ideological or partisan factors. In other words, courts issue a greater number of decisions about a policy issue when they receive more petitions related to that issue. By contrast, if a particular subject is not raised in a petition, the court cannot adjudicate the issue *sua sponte*.<sup>2</sup> In this section, I review the literature on NGOs and agenda-setting in constitutional litigation. I then present a set of hypotheses about how Indonesian NGOs influence the Constitutional Court's agenda.

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<sup>1</sup>Note that this differs from a petition for *certiorari* to the U.S. Supreme Court, which asks the justices to review the decision of a lower court. Granting *certiorari* only means that the Court will hear the case, not that it will rule in favor of the petitioner on the merits.

<sup>2</sup>Pakistan's Supreme Court has occasionally initiated public interest cases *sua sponte* (Nardi, 2008a), but this is the exception.

### 4.1.1 Literature Review

In *The Rights Revolution*, Epp (1998) argues that agenda-setting is one of the most powerful tools rights activists possess to influence judicial policymaking. He considers a support structure for legal mobilization (SSLM) – advocacy organizations with a staff of expert lawyers and private sources of funding – to be a necessary condition for a judicial “rights revolution.” A support structure ensures that constitutional rights remain on the court’s agenda and that the court will be informed about violations of its previous decisions. By contrast, rights revolutions fail in the absence of a support structure, even when judges would prefer to protect constitutional rights. For example, although India’s Supreme Court has issued several high-profile decisions designed to protect human and environmental rights, Epp notes that the rights situation in India did not appreciably improve because NGOs lacked the capacity to build upon their successes.<sup>3</sup> As such, simply having sympathetic judges is neither necessary nor sufficient to protect constitutional rights.

Litigation is costly and potential litigants will only file a claim if the benefits of doing so outweigh the costs. In most types of litigation, individuals bring a lawsuit because they have a selective incentive to do so. Victory will remedy a past harm or yield a future benefit. Thus, individuals will have an incentive to pursue the case if:

$$p(\textit{win})x - c > h \tag{4.1}$$

, where  $p(\textit{win})$  is the probability of a favorable decision,  $x$  is the selective benefit of winning,  $h$  is the constitutional harm suffered, and  $c$  is the cost of litigation. When this condition is satisfied, there is no collective action problem as the individual has enough incentive to pursue legal change him or herself (see Olson, 1971, regarding collective action).

By contrast, several collective action problems arise with public interest litigation.

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<sup>3</sup>Most Indian NGOs lack the resources for sustained litigation and depend heavily on a handful of social entrepreneurs. Indeed, a majority of environmental petitions during the late 20th century were filed by a single lawyer, M.C. Mehta (Divan and Rosencranz, 2002).

First, public interest litigation typically seeks to remedy harms to society rather than individuals. Although society as a whole might suffer from a constitutional violation, each individual only endures a fraction of that harm. This means that there exist fewer individuals for whom the benefits of a favorable victory outweigh the costs of litigation. For example, if a government illegally spies on its citizens, that action violates the rights of each citizen, but the average individual only suffers *de minimis* harm. Second, public interest litigation typically deals with broad policy questions, which require technical expertise and proof beyond the average citizen's knowledge or resources. Finally, when individuals challenge the constitutionality of a law, the government will generally attempt to defend that law. Given that government actors possess considerable advantages in litigation (McGuire, 1998; Farole, 1999; Flemming and Krutz, 2002; Hanretty, 2013*b*, see), this makes litigation even more costly and further decreases the probability of victory.

Epp's support structure theory provides one solution to the collective action problem. NGOs help by coordinating the actions and resources of individuals who value policy change highly (increasing  $x$ ). NGOs can and do file constitutional cases even if none of their members are directly harmed by the government's action. Moreover, NGOs essentially internalize the costs of constitutional litigation. By pooling resources and developing internal legal expertise, NGOs reduce the average costs of litigation per case (reducing  $c$ ). NGOs also have the capacity to conduct policy research and hire expert witnesses, improving the chances that they will obtain a favorable decision (increasing  $p$ ). Thus, NGOs will often find themselves in a position to pursue constitutional claims that would not otherwise have reached the court. This affords NGOs significant agenda-setting power because they can draw the court's attention to the issues most important to them.

Other scholars contend that political opportunities, such as new rights legislation, not support structures, create the conditions that lead to rights revolutions. Urribarri et al. (2011*a*) test this theory by creating an ordinal variable to rank support structures for a time series analysis of judicial voting behavior the U.S., U.K., and Canada. They find that

support structures have no impact on the likelihood that judges will vote in favor of rights claimants, and that rights victories increase in response to political opportunities. They also find that the number of rights cases in dockets in South Africa, Australia, and the Philippines is not correlated with the number of NGOs that had filed petitions before the court.

There have been few other attempts to empirically test Epp's support-structure theory, perhaps due to several methodological challenges inherent in this type of research. First, scholars have tended to select cases based on the availability of data, which in practice means English-language judicial decisions, often from common law systems. This inevitably limits the ability of these studies to isolate the effect of support structures as a causal variable and generalize findings to other countries. For example, Epp (1998) does not completely account for potential confounding variables that might explain why a rights revolution failed in India but not in the U.S., U.K., or Canada (e.g., India is obviously poorer and less politically stable).

Second, although Epp (1998) utilizes a rich combination of historical accounts, interviews, financial information, and jurisprudence in order to conduct a qualitative analysis of rights litigation, he does not provide an objective method for measuring SSLMs. What is considered a weak or small NGO in a wealthy Western country might prove sufficiently large and powerful in a developing country. This problem is exemplified by a debate in the pages of *The Journal of Politics* about about the Philippines. Urribarri et al. (2011b) note that the Philippine Supreme Court's docket contains a high proportion of rights cases despite the fact that NGOs submitted only 0.2% of the petitions. Epp (2011, 408) responds that the high number of rights cases in the court's docket could be explained by the fact that "the Philippine human rights movement remains among the most dynamic and influential in the developing world." In short, the literature has not even reached a consensus on how to assess support structures in a specific country, much less compare them across countries.

Third, the literature tends to treat NGOs as homogenous. For example, Urribarri et al. (2011a) focus on the aggregate number of NGOs rather than the actions of specific

types of NGOs. Yet, most NGOs are mission-driven, pursuing relatively narrow policy goals as opposed to all possible rights claims. In some countries, NGOs might have particular ideological preferences or resource constraints that drive them to pursue certain types of rights claims. Moreover, NGOs might prove more effective agenda setters for some types of rights claims than for others.<sup>4</sup>

In addition, the literature tends to treat rights claims as homogenous. Schorpp, Songer and Urribarri (2008) do challenge Epp on the grounds that judges do not necessarily treat all rights cases equally and might be more sympathetic to particular types of rights claims. Using data from the U.S., U.K., Canada, and Australia, they find no correlation between judicial outcomes in civil liberties and criminal rights. In other words, a revolution in civil rights jurisprudence does not necessarily lead to a revolution for criminal rights. However, even this study overlooks important distinctions between different types of civil and criminal rights (and completely ignores the unique challenges associated with socioeconomic rights). In short, the literature has not adequately accounted for the heterogeneity of NGOs or the constitutional claims they bring.

There is a small but growing literature arguing that Indonesian NGOs do indeed act as SSLMs in constitutional litigation (Rosser and Curnow, 2014; Rosser, 2015*b*; Curnow, 2015). Rosser (2015*b*) argues that Epp's support-structures theory should be even more relevant to countries like Indonesia, where litigation is relatively costly and ordinary citizens have less access to legal resources. Rosser (2015*c*, 187) goes so far as to claim that:

[I]t is difficult to imagine individuals successfully pursuing their rights in court without the financial, organisational and technical assistance provided by NGOs such as [the Legal Aid Organization of] Jakarta, PEKKA and Indonesia Corruption Watch... [S]uccessful citizen efforts to defend rights [...] in Indonesia have only occurred when citizens have had access to an effective SSLM that has enabled them to mobilise the resources required to launch and sustain expensive and time-consuming court cases.

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<sup>4</sup>Vanhala (2017) claims that opportunity structures do not influence the decisions of NGOs to pursue their policy goals in courts in the first place. However, my dissertation focuses on the effect of agenda-setting on courts, not the initial decision to file. Moreover, her data come from Europe, where NGOs are more likely to succeed in lobbying legislatures for policy change than in a developing democracy like Indonesia.

This literature is extremely useful for understanding how individual SSLMs help Indonesian citizens, but relies on a handful of qualitative case studies. It cannot tell us the overall extent to which Indonesian NGOs actively set the Constitutional Court’s agenda.

SSLMs are especially important in Indonesia because the Constitutional Court’s decisions only apply prospectively (see Chapter II). Prospectivity increases the collective action problem litigants face; it will be more difficult to find litigants willing to invest the resources necessary to challenge constitutional violations if they can only prevent future violations rather than remedy past harms. Indonesian NGOs help solve this problem pooling resources and internalizing the costs of litigation. Moreover, NGOs with specific policy goals are willing to invest resources to pursue policy change for its own sake, not just to remedy past harms. Thus, prospectivity should not deter NGOs as much as it does other potential petitioners.

#### **4.1.2 Hypotheses**

In this section, I propose a set of specific hypotheses about the Indonesian Constitutional Court (*Mahkamah Konstitusi*) and role of NGOs as agenda setters. As discussed in Chapter II, Indonesia is a particularly useful context in which to explore SSLMs. First, the Court has lowered standing requirements for petitioners pursuing public interest litigation, meaning that the institution is accessible to NGOs. Second, the Court has exercised its review powers against the government vigorously, making it an appealing policy forum for NGOs. Third, Indonesia has an active civil society and NGOs that have the resources to pursue constitutional litigation. Finally, my dataset of Indonesian petitioners allows me to obtain more refined information about different types of NGOs involved in constitutional litigation and different types of laws challenged.

A key obstacle to previous research on agenda-setting has been the difficulty of measuring the judicial agenda. Although agenda-setting could refer to a variety of ways that petitions influence which issues and legal arguments reach judges, in this chapter I focus on the distribution of topics on the docket. To obtain information on the relationship between

petitions and the agenda, I measure the percentage of text in each petition associated with each topic present in the docket (see Section 4.2.3 regarding measurement). To test Epp's support structure theory, we can leverage the fact that, despite their claims to represent the broader public interest, the distribution and intensity of NGOs' policy preferences differs from those of other potential litigants, such as local governments or corporations. Many NGOs focus on unique or niche issues that do not receive widespread attention from the public at large but are important to that group and its members. This implies that petitions filed by NGOs should cover topics different from those of petitions filed by other types of petitioners. This leads to the following:

***Hypothesis 4.1 (Topic Prevalence):** The distribution of topics in petitions filed by NGOs should on average be significantly different from the distribution of topics in petitions filed by all other types of petitioners.*

If we observe a significant relationship between NGOs and certain topics, then that would indicate an agenda-setting power because NGOs are dictating the docket with respect to those topics. In effect, NGOs are increasing the proportion of the Court's docket dealing with the legal issues of greatest concern to them.

We can also predict the topics for which NGOs will have the strongest agenda-setting powers. Given limited time and resources, NGOs will choose to focus their efforts on the issues of greatest concern to their staff and members. For example, an environmental NGO like WALHI will be more likely to file a petition challenging the constitutionality of a forestry law than a random petitioner, or even other NGOs. This leads to the following:

***Hypothesis 4.2 (NGO Identity):** NGOs whose organizational charter contains a specific policy focus will be more likely to file petitions on topics related to that policy focus.*

In other words, not all NGOs act as SSLMs for all topics. NGOs are more likely to act as agenda setters for topics related to their policy goals. One important implication of this hypothesis is that some topics traditionally affiliated with progressive politics might not be associated with SSLMs if Indonesian NGOs do not focus on that issue.



Finally, Indonesian NGOs should be more likely than other petitioners to file petitions related to socioeconomic issues, such as rights to health or education. Socioeconomic rights are relatively new constitutional innovations. Indeed, until recently, there was considerable skepticism as to whether or not courts could enforce socioeconomic rights (see Sunstein, 2001). There are also unique collective action problems associated with litigating socioeconomic rights. Violations of socioeconomic rights tend to affect groups rather than individuals because they generally confer public goods (Brinks and Gauri, 2008). Moreover, monitoring and litigating socioeconomic rights violations requires considerable technical and policy expertise, whereas civil and criminal rights violations are much easier to detect because they affect individuals directly. As policy entrepreneurs, NGOs provide the resources to litigate socioeconomic rights. They also possess policy expertise and can draw upon a network of expert witnesses during litigation. This leads to the following:

***Hypothesis 4.3 (Socioeconomic):** Petitions dealing with socioeconomic topics are more likely to be filed by NGOs than other types of petitioners.*

In other words, NGOs are more likely to act as agenda setters in cases involving socioeconomic rights, even compared to civil or criminal rights.

## 4.2 Methodology & Data

As noted above, one reason for the lack of research on agenda-setting in litigation has been the difficulty of quantifying information about legal issues on a court's docket. I solve this problem by using a Structural Topic Model to derive information about topics in petitions to the Indonesian Constitutional Court. The topic model creates clusters of topics based on the frequency and distribution of words across the documents. In this section, I describe my data and how I processed the petitions to make them machine-readable. I then explain the statistics underlying the Structural Topic Model and the process for selecting the number of topics.

### 4.2.1 Data & Measurement

The primary data for this chapter are the petitions for constitutional review that the Constitutional Court received from August 13, 2003 (the date the Court began hearing cases) to October 2, 2013 (the date Chief Justice Akil Mochtar resigned). I use petitions instead of the Court’s decisions because those are the documents that set the Court’s agenda. Overall, the Constitutional Court received 560 individual petitions during that time period (several were later withdrawn).<sup>5</sup>

In order to capture information about petitioners, I hired Indonesian law students to code the identity of all petitioners. Around half of the petitions had more than one petitioner, in which case each petitioner was coded separately. Moreover, I only counted organizations once, even if multiple individual represented that organization before the Court. For example, if the CEO and COO both signed a petition on behalf of a corporation, I counted the corporation as a single petitioner.<sup>6</sup> Overall, there were 3,002 individual petitioners, with an average of 5.36 petitioners per case. The mean is much larger than the median because of a small number of outliers; less than 14% of the petitions had more than 29 petitioners (the mean plus the standard deviation).

All petitioners were grouped into one of the following six categories: 1) national government institution;<sup>7</sup> 2) local government institution; 3) private business/corporation;<sup>8</sup> 4) nongovernmental organization (NGO); 5) political party/candidate; or 6) individual unaffiliated with any organization. These petitioner identity categories are based loosely on Haynie et al. (2007) and Carrubba et al. (2013), two of the largest cross-national databases of ju-

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<sup>5</sup>19 petitions are missing from the case files, so the corpus only includes 541 documents. I was unable to ascertain why certain documents were missing, but missingness does not seem correlated with topics. It does appear that missingness occurs more frequently in cases that were withdrawn before the Court reached a final judgment.

<sup>6</sup>Some Indonesian organizations have internal rules requiring at least two people from the governing board to support a legal petition in order to prevent abuse.

<sup>7</sup>Most of the national government institutions that filed petitions were independent commissions, such as the KPU. The president and the DPR did not file petitions and often submitted statements defending the constitutionality of the challenged legislation.

<sup>8</sup>This does not include petitioners who listed their profession as “entrepreneur,” which typically means that the individual ran the equivalent of a sole proprietorship.

dicial decisions. Categories were treated as mutually exclusive in that petitioners could not be more than one type. For the most part, identifying each petitioner type was relatively straightforward because each petition lists all petitioners involved in the case and also lists their profession (see Appendix A for more on coding rules).

Petitioner Type	Number of Cases	Number of Petitioners	Example
Individual	312	1389	<i>Refly Harun</i>
Political party	125	863	<i>Gerindra</i>
NGOs	144	497	<i>Indonesian Farmer's Union</i>
Private business	37	108	<i>PT. Gudang Garam</i>
Local gov.	45	134	<i>Papua DPRD</i>
National gov.	11	11	<i>Election Commission</i>

**Table 4.1:** Summary Statistics of Petitioners in Constitutional Review Cases (Aug. 2003 - Oct. 2013)

Table 4.1 provides summary statistics of the types of petitioners in the dataset. Almost half were individuals not affiliated with or representing an organization. NGOs constituted around 21% of the total number of petitioners and appear in 144 cases, around a quarter of the total. In other words, NGOs were the largest category of petitioner aside from individuals.<sup>9</sup> On its face, the data suggest that NGOs file constitutional petitions regularly enough to influence the Constitutional Court's agenda.

I then disaggregated the NGO category to obtain more information about the different types of NGOs involved in constitutional litigation. Coders were asked to read the NGO's mission statement or organizational charter in order to classify them. Again, all categories were treated as mutually exclusive; if the NGO covered more than one issue area, coders were asked to select the category that best described its activities. Table 4.2 provides summary statistics of the types of NGOs in the dataset. Note that in this dissertation I use "NGO" broadly to refer to all nonprofit, formally constituted organizations. This includes many diverse types of organizations, including chambers of commerce, labor unions, and indigenous groups.<sup>10</sup>

Human rights, good governance, and labor NGOs were amongst the most frequent

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<sup>9</sup>Political parties and politicians also comprise a large class of petitioners, but this is largely due to the fact that over 500 party activists joined the petition in the *Parliamentary Threshold case* (MK Decision No.

Type of NGO	# of Cases	# of NGOs	Example
Commercial	7	8	<i>Chamber of Commerce and Industry</i>
Consumer	3	3	<i>Indonesia Insurance Consumers Foundation</i>
Development	12	14	<i>Urban Poor Community</i>
Education	12	65	<i>Teacher's Union of the Republic of Indonesia</i>
Environment	11	20	<i>Indonesian Center for Environmental Law</i>
Environment	17	44	<i>Indonesian Center for Environmental Law</i>
Gender	12	19	<i>Women's Solidarity Union</i>
Governance	30	59	<i>Indonesia Corruption Watch</i>
Health	4	4	<i>Indonesian Medical Association</i>
Human rights	40	60	<i>Commission for Disappeared and Victims of Violence</i>
Indigenous	11	16	<i>Indigenous Peoples Alliance of the Archipelago</i>
Labor union	33	107	<i>Indonesian Federation of Labor Unions</i>
Lawyers	8	10	<i>Congress of Indonesian Advocates</i>
Legal aid	19	26	<i>Lembaga Bantuan Hukum</i>
Media/Journalism	7	15	<i>Indonesian Television Journalists Association</i>
Religion	10	24	<i>Nahdlatul Ulama</i>
Youth	3	6	<i>Indonesian National Student Movement</i>

**Table 4.2:** Summary Statistics of Organized Interest Group Petitioners in Constitutional Review Cases (Aug. 2003 - Oct. 2013)

NGOs to appear before the Constitutional Court (in 40, 30, and 33 cases, respectively). Indeed, the dominance of labor and rights NGOs, as well as the relatively large number education and gender NGOs, suggests that the Court is a more attractive venue to left-ist/progressive NGOs. The more conservative or traditional NGOs, such as religious foundations and chambers of commerce, do participate in constitutional litigation, but not in numbers commensurate to their influence on Indonesian politics. This suggests a substitution effect; NGOs use the Constitutional Court to advance their policy aims when they cannot do so through the legislative or executive branches.

#### 4.2.2 Processing the Petitions

In this section, I describe the steps I took to make the petitions machine-readable and to extract information about word frequency counts across documents. All of the petitions are in Indonesian (*bahasa Indonesia*), so I modified standard natural language processing (NLP)

3/PUU-VII/2009). Political parties were only involved in 125 cases.

<sup>10</sup>That said, excluding NGOs associated with private sector actors, such as chambers of commerce, from the NGO category does not significantly change any of the results in Section 4.3.

techniques to account for differences in Indonesian grammar. First, I used Tesseract<sup>11</sup> to run Indonesian-language optical character recognition (OCR) on the documents, which converted the pdf image files to text. Second, I stripped the texts of all numbers, punctuation, and extra whitespace. I then removed 359 Indonesian stop words, such as “and” (Tala, 2003, Appendix D), as well as words with fewer than three characters, on the assumption that these tend not to be associated with or relevant to topics.<sup>12</sup> I then converted all words to lowercase.

In NLP, stemming is often used to stem words to their roots by removing declensions or conjugations so that the topic model can recognize different forms of the same word, e.g., “decide” versus “deciding” (Grimmer, 2010). Indonesian relies heavily on adding prefixes and suffixes to root words in order to change the part of speech. Prefixes starting with “*me-*,” “*be-*,” or “*di-*” indicate verbs, while prefixes with “*pe-*” or “*ke-*” indicate nouns. Suffixes ending in “*-an*” indicate nouns, while other suffixes (“*-kan*” and “*-i*”) indicate different verb forms. Sometimes the prefix or suffix changes the meaning or sense of the word. For example, the root word “*pilih*” means “select,” whereas “*pemilihan*” in political documents means “election.”

According to Asian, Williams and Tahaghoghi (2005) and Widjaja and Hansun (2015), the Nazief and Adriani (1996) stemming algorithm performs best in correctly stemming Indonesian word occurrences to the correct root. Nazief-Adriani is a rule-based stemmer that use a confix-stripping approach that groups affixes into into three categories:

1. *Inflection particle suffixes* (P), which do not alter the root word and add a particle to a verb (e.g., “*pilihlah*,” the imperative form of “to vote”);
2. *Inflection possessive pronoun suffixes* (PP), which do not alter the root word and add a possessive pronoun to a noun (e.g., “*pilihannya*” or the noun “his vote”);
3. *Derivation suffixes* (DS), which are applied directly to the root word (e.g., “*pilihan*” or “a vote”);

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<sup>11</sup>Available at <https://github.com/tesseract-ocr>.

<sup>12</sup>Although I do not remove proper nouns, such as names.

4. *Derivation prefixes* (DP), which are applied directly to the root word (e.g., “*memilih*” or “to vote”);

At the start of each step, the confix stripping stemmer checks the current word against the root word dictionary. If it finds a match, the result is accepted and processing stops. If not, words are stemmed according to the rule precedence:

$$[DP + [DP + [DP+]]] \quad \textit{root \ word} \quad [[+DS][+PP][+P]] \quad (4.2)$$

The stemmer begins by removing the particle, possessive pronoun, and derivation suffixes, and then removes prefixes, with a maximum of three iterations. If the root word still has not been found after those steps, the stemmer attempts to recode the word by replacing or adding to the first letter of the word because prefixes in Indonesian sometimes change the first letter of the word (e.g., the verb form of “*pilih*” is “*memilih*,” not “*mempilih*”). If stemming still fails, the stemmer returns the original unstemmed word (see Adriani et al., 2007, for additional details).<sup>13</sup>

The Nazief & Adriani stemmer does have some drawbacks (see Asian, Williams and Tahaghoghi, 2005, Table 7). It cannot properly stem compound words, in which the true root is the compound form rather than the disaggregated components. For example, the Indonesian word for “to notify” (“*memberitahu*”) is a combination of the root words “to give” (“*memberi*”) and “to know” (“*tahu*”), but the stemmer will not find the prefix-less root “*beritahu*” in the root word dictionary, and so will reject it. The stemmer also does not unpack and stem acronyms. For example, “*pemilu*” is a common acronym for “general election,” but the stemmer would return “*pemilu*” rather than “*pemilihan*” (“election”) and “*umum*” (“general”). This limitation is important because Indonesian relies heavily on acronyms (see the List of Abbreviations at the beginning of this dissertation). However, after reviewing a sample of petitions, I decided not to remove or disaggregate these acronyms

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<sup>13</sup>I use the Sastrawi implementation of the Nazief and Adriani (1996) stemmer, which is a PHP script developed by Librian (2015) available at <https://github.com/sastrawi>. This version includes minor enhancements from Asian (2007).

because most are more informative than the stemmed roots of the full words.

Finally, because topic models utilize information about the frequency and distribution of words in a corpus, I removed both very frequent and very sparse terms. Extremely common words are less likely to indicate a unique topic and more likely to represent boilerplate legal language (e.g., “petition” or *permohonan*). By contrast, extremely sparse words are more likely to be associated with the specific facts of a case (e.g., personal names). I set a low threshold for sparse terms in the belief that even relatively rare terms can be informative about topics. Moreover, Indonesian is a relatively sparse language compared to English. As such, I removed any term that does not appear in at least 2.5% of documents, or 14 petitions, as well as words that appear in over 92.5%, or 500 petitions.<sup>14</sup>

### 4.2.3 Structural Topic Model

Traditionally, scholars have hand-coded judicial decisions in order to obtain information about topics in a court’s docket. In recent years, advances in NLP have made it possible to use probabilistic models to connect words in a corpus to latent topics (see Grimmer and Stewart, 2013). Meanwhile, hand-coding has come under increased criticism on both substantive and methodological grounds. With hand-coding, the researcher must select the topics for which to code *a priori*, a process that is necessarily influenced by the coder’s own experiences and expectations (McGuire and Vanberg, 2005). Researchers might mistakenly include more or fewer topics than would be appropriate for the corpus in question. For example, some researchers might decide to divide criminal law into “murder,” “narcotics,” etc., while others might only use an overarching “criminal law” category.

Hand-coding also imposes the assumption that judges adjudicate cases along the same dimensions that the coder used to classify the cases. Shapiro (2009) warns that scholars using the hand-coded U.S. Supreme Court Database (Spaeth et al., 2012) risk confirmation bias by conflating policy and legal issues. For example, Harvey and Woodruff (2011) find

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<sup>14</sup>By contrast, topic models for English corpora typically remove words that do not appear in at least 5% of documents (Grimmer, 2010).

that issue areas in the SCD generally align to expectations of how cases would fall along a liberal-conservative political spectrum, leading scholars to overstate the effect of policy preferences on judicial outcomes. In short, hand-coding risks forcing cases into politically salient or controversial dimensions that might not conform to actual judicial voting behavior.

Hand-coding also has trouble handling multidimensionality. Many coding schemes ask coders to fit each case into a single category, which risks misidentification. For example, in the SCD, an election crime would be forced into “election” or “crime,” neither of which alone captures the full dimensions of an “election crime” case. Shapiro (2009, 515) finds that only six out of a sample of 95 cases from the SCD involved just a single issue. By contrast, automated topic models can detect the percentage of text within each document that is associated with each topic cluster (e.g., 40% for Topic 1, 25% for Topic 2, ... 10% for Topic  $i$ ). This allows for more refined analysis of the distribution of topics on the docket. These methodological challenges are especially relevant to studying agenda-setting in constitutional courts. The coding scheme determines the scope of the judicial agenda, but defining the issue space too narrowly or too expansively might lead to incorrect inferences (see the discussion of Schorpp, Songer and Urribarri, 2008, above).

Because there is no direct means of measuring the topics in a corpus, the terms in each topic, or the distribution of topics within each document, they must be treated as latent variables. Topic models utilize a Bayesian approach in order to determine complex posteriors for the probability that a particular document falls within a particular topic cluster. The primary observed data with which topic models infer topics are word counts, particularly the frequency and distribution of words within each document and across the corpus.

The most common topic model in the social sciences, Latent Dirichlet Allocation (LDA), assumes a generative process that relies upon a Dirichlet distribution for the topic distribution  $\theta$  and the term distribution  $\beta$  for each topic (Blei, Ng and Jordan, 2003; Gerish and Blei, 2011; Wallach, Mimno and McCallum, 2009). LDA suffers from two critical limitations. First, it only uses word counts, but researchers often possess additional infor-



mation about documents that could be useful in understanding the distribution of topics. Incorporating additional covariates into the topic model could improve estimation of the topics (Roberts et al., 2014). In addition, researchers are generally more interested in the relationships between observed covariates – such as petitioner identity – and latent topics than in the topics themselves.

Second, LDA assumes independence between topics (Grimmer, 2010, footnote 6). This condition might not hold if the generative processes of some topic $_i$  and topic $_j$  are correlated. For example, if a document contains a significant block of text associated with a “presidential elections” topic, it seems more likely that it will also contain text associated with a “legislative elections” topic than a “financial” topic. Thus, the independence assumption would undermine our ability to make reliable inferences about the relationship between topics and covariates. One alternative to LDA, the Correlated Topic Model (CTM), does not assume independence (Blei and Lafferty, 2007; Grimmer and Stewart, 2013), but like LDA it does not incorporate information about covariates.<sup>15</sup>

In order to overcome both of these limitations, I use a Structural Topic Model (STM) from Roberts, Stewart and Airoldi (2016). STM leverages generalized linear models to introduce information about covariates into the model. The observed covariates are allowed to affect topic prevalence in a document (i.e., the proportion of words in a document assigned to a topic). STM replaces the Dirichlet distribution that governs topic prevalence with a Logistic Normal distribution with a mean vector parametrized as a linear function of observed covariates. Roberts, Stewart and Airoldi (2016) show that introducing covariates results in a very mild bias compared to LDA topic models, but far less variance across model simulations.

STM begins like the LDA model, with an index of documents  $d \in \{1 \dots D\}$  and an index of words in documents  $n \in \{1 \dots N_d\}$ . The primary observable data are the words  $\omega_{d,n}$ , which are instances of unique terms from a vocabulary  $V$ , indexed by  $v \in \{1 \dots V\}$ . The researcher must set the parameter  $K$ , which is the number of topics as indexed by  $k \in \{1 \dots K\}$  (see

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<sup>15</sup>In the absence of covariates, STM reduces to a version of CTM (Roberts et al., 2014).

Section 4.2.4). Moreover,  $m_v$  is the marginal log frequency of term  $v$  in the vocabulary  $V$ , which is estimated from the total word counts (Roberts, Stewart and Airoldi, 2016, 7).

The model utilizes additional observed information from a design matrix  $X$  with  $D \times P$  dimensions and with rows  $x_d$ , in which each row defines a vector of covariates for each document. In my model,  $X$  is a matrix with dummy variables for petitioner identity, such that  $\{x = 1\}$  if the the petition includes a petitioner of type  $x$ , and 0 else (see Figure 4.1). In addition, I include a spline of the log of the number of days since the Constitutional Court was established (August 13, 2003) to control for the fact that the distribution of topics on the Court’s docket might change over time.

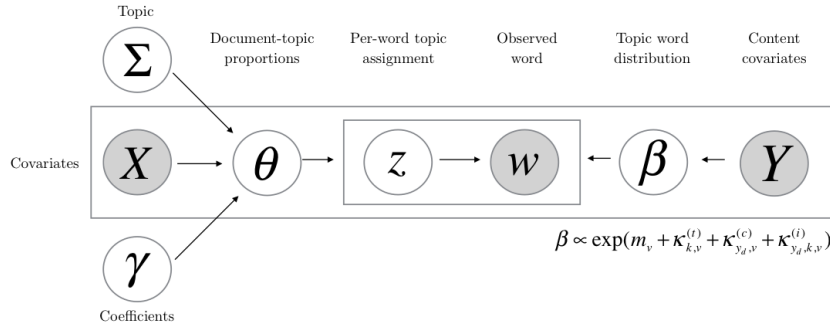


Figure 1: A graphical illustration of the structural topic model.

**Figure 4.1:** Graphical Illustration of the Structural Topic Model

Reproduced from (Roberts, Stewart and Airoldi, 2016). Note: the  $Y$  matrix is for topical content, an additional feature I do not include in my model.

The data generating process for document  $d$  given  $K$  topics, observed words  $\{\omega_{d,n}\}$ , the design matrix for topic prevalence  $X$ , scalar hyper-parameters  $s$ ,  $r$ ,  $\rho$ , and  $K$ -dimensional hyper-parameter vector  $\sigma$ , is as follows:

$$\gamma_k \sim \text{Normal}_P(0, \sigma_k^2 I_P), \quad \text{for } k = 1 \dots K - 1, \quad (4.3)$$

$$\theta_d \sim \text{LogisticNormal}_{K-1}(\Gamma' x_d' \Sigma), \quad (4.4)$$

$$z_{d,n} \sim \text{Multinomial}_K(\theta_d), \quad \text{for } n = 1 \dots N_d, \quad (4.5)$$

$$w_{d,n} \sim \text{Multinomial}_V(\beta z_{d,n}), \quad \text{for } n = 1 \dots N_d, \quad (4.6)$$

, where  $\Gamma = |\gamma_1| \dots |\gamma_K|$  is a  $P \times (K - 1)$  matrix of coefficients for the topic prevalence model specified by Equations 4.3-4.4. Equations 4.5-4.6 contain the core language model (Roberts, Stewart and Airoldi, 2016, 8), which allows for correlations in the topic proportions using the Logistic Normal distribution. For a model with  $K$  topics, the Logistic Normal can be represented by  $\eta_d \sim \text{Normal}_{K-1}(\mu_d, \Sigma)$  and mapping to a simplex by specifying  $\theta_{d,k} = \frac{\exp(\eta_{d,k})}{\sum_{i=1}^K \exp(\eta_{d,i})}$  (where  $\eta_{d,K}$  is fixed to zero to render the model identifiable). Given the topic proportion vector  $\theta_d$  for each word within document  $d$ , a topic is sampled from a multinomial distribution  $z_{d,n} \sim \text{Multinomial}(\theta_d)$ , and, conditional on such topic, a word is chosen from the appropriate distribution over terms  $B_{z_{d,n}}$ .  $B$  and  $\mu$  are a function of the document-level covariates.

The topic prevalence component of the model allows the expected document-topic proportions to vary as a function of the matrix of observed document-level covariates ( $X$ ), as opposed to arising from a single prior shared by all documents. I model the mean vector of the Logistic Normal as a simple linear model such that  $\mu_d = \Gamma' x'_d$ , with an additional regularizing prior on the elements of  $\Gamma$  to avoid overfitting. The inclusion of covariates allows the model to borrow strength from documents with similar covariate values when estimating the document-topic proportions (analogous to partial pooling in other Bayesian hierarchical models). The prior specification for the topic prevalence parameters is a zero-mean Gaussian distribution with shared variance parameter such that  $\gamma_{p,k} \sim \text{Normal}(0, \sigma_k^2)$ , and  $\sigma_k^2 \sim \text{Inverse-Gamma}(a, b)$ , where  $p$  indexes the covariates,  $k$  indexes the topics, and  $a, b$  are fixed hyper-parameters (Roberts, Stewart and Airoldi, 2016, 10).

The posterior of interest,  $p(\eta, z, K, \gamma, \Sigma | w, X, Y)$ , or the posterior probability for each topic given a document in the corpus, is proportional to:

$$\left( \prod_{d=1}^D \text{Normal}(\eta_d | X_{d\gamma}, \Sigma) \left( \prod_{n=1}^N \text{Multinomial}(z_{n,d} | \theta_d) \text{Multinomial}(w_n | \beta_{d,k=z_{d,n}}) \right) \right) \times \prod p(K) \prod p(\Gamma) \quad (4.7)$$

, with  $\theta_{d,k} = \frac{\exp(\eta_{d,k})}{\sum_{i=1}^K \exp(\eta_{d,i})}$  and  $\beta_{d,k,v} \propto \exp(m_v + K_{k,v}^{(t)} + K_{y_d,v}^{(c)} + K_{y_d,k,v}^{(i)})$ , as well as the priors on the prevalence coefficients  $\Gamma$  and  $K$  topics (see 4.2.4).

As with LDA, the exact posterior for the model is intractable (Blei, Ng and Jordan, 2003; Grimmer, 2010). Moreover, using a Logistic Normal with the multinomial likelihood introduces a non-conjugacy. As such, STM relies upon a variational Expectation-Maximization (EM) algorithm that uses a Laplace approximation for the non-conjugate portion (Roberts, Stewart and Airoldi, 2016, 4).<sup>16</sup> This makes the model computationally tractable and efficient. Following Roberts, Stewart and Airoldi (2016), the STM model I use also integrates out the word-level topic indicator  $z$  while estimating the variational parameters for the logistic normal latent variable, and then reintroduces  $z$  when maximizing the topic-word distributions  $\beta$ . Thus, inference consists in optimizing the variational posterior for each document’s topic proportions in the E-step, and then estimating the topical prevalence coefficients in the M-step.

The goal of variational EM in STM is to find the approximate posterior  $\prod_d q(\eta_d)q(z_d)$  in order to maximize the Laplace approximation of the Evidence Lower Bound such that:

$$\begin{aligned} \mathcal{L}_{ELBO} = \sum_{d=1}^D \left( \left( \sum_{i=1}^B w_{d,v} \log(\theta_d \beta_{d,v}) \right) - .5 \log |\Sigma| \right. \\ \left. - .5 (\lambda_d - \mu_d)^T \Sigma^{-1} (\lambda_d - \mu_d) + .5 \log (|v_d|) \right) \end{aligned} \quad (4.8)$$

, where  $q(\eta_d)$  is fixed to be Gaussian with mean  $\lambda_d$  and covariance  $\nu_d$  and  $q(z_d)$  is a variational multinomial with parameter  $\phi_d$ .  $H(q)$  indicates the entropies of the approximating distributions (Roberts, Stewart and Airoldi, 2016, 12-13).<sup>17</sup>

In the expectation step (E-step) of EM, the model iterates through each document while updating the variational posteriors  $q(\eta_D)$ ,  $q(\phi_d)$ . Because the Logistic Normal is not conjugate with the multinomial,  $q(\eta_D)$  does not have a closed form update. To account for

<sup>16</sup>As opposed to Gibbs sampling or mean-field variational Bayes as in LDA.

<sup>17</sup>The model is not the true bound on the marginal likelihood because of the Laplace approximation, and is not directly maximized by the updates.

this, I adopt the Laplace approximation based on Roberts, Stewart and Airoldi (2016), which involves estimating  $\hat{\eta}_d$  and approximating the posterior with a quadratic Taylor expansion. This results in a Gaussian form for the variational posterior  $q(\eta_d) \approx N(\hat{\eta}_d, -\nabla^2 f(\hat{\eta}_d)^{-1})$ , where  $\nabla^2 f(\hat{\eta}_d)$  is the Hessian of  $f(\eta_d)$  evaluated at the mode.<sup>18</sup> Solving for  $\hat{\eta}_d$  for a given document amounts to optimizing:

$$f(\hat{\eta}_d) \propto -\frac{1}{2}(\eta_d - \mu_d)^T \Sigma^{-1}(\eta_d - \mu_d) + \left( \sum_v c_{d,v} \log \sum_k \beta_{k,v} e^{\eta_{d,k}} - W_d \log \sum_k e^{\eta_{d,k}} \right) \quad (4.9)$$

, where  $c_{d,v}$  is the count of the  $v^{\text{th}}$  term in the vocabulary within the  $d^{\text{th}}$  document and  $W_d$  is the total count of words in the document. The model is then optimized using the gradient:

$$\nabla f(\eta_d)_k = \left( \sum_v c_{d,v} \langle \phi_{d,v,k} \rangle \right) - W_d \theta_{d,k} - (\Sigma^{-1}(\eta_d - \mu_d))_k \quad (4.10)$$

, where  $\theta_d$  is the simplex mapped version of  $\eta_d$  and we define the expected probability of observing a given topic-word as  $\langle \phi_{d,v,k} \rangle = \left( \frac{\exp(\eta_{d,k}) \beta_{d,v,k}}{\sum_k \exp(\eta_{d,k}) \beta_{d,v,k}} \right)$ . This leads to variational prior  $q(\eta_d) = N(\lambda_d = \hat{\eta}_d, v_d = \nabla^2 f(\hat{\eta}_d)^{-1})$ . Solving for  $q(z_d)$  in closed form yields:

$$\phi_{d,n,k} \propto \exp(\lambda_{d,k}) \beta_{d,k,w_n} \quad (4.11)$$

In the maximization step (M-step) of EM, the prior on document-topic proportions maximizes the approximate ELBO with respect to the model parameters  $\Gamma$ , topic covariance matrix  $\Sigma$ , topics  $K$ , and document specific mean  $\mu_{d,k} = X_d \gamma_k$ . Updates for  $\gamma_k$  correspond to linear regressions for each topic under the specified prior with  $\lambda_k$  as the outcome variable. By default,  $\gamma_k$  is given a Normal( $\mu, \sigma_k^2$ ) in STM, where  $\sigma_k^2$  is given a broad inverse-gamma prior.

The topic covariance matrix  $\Sigma$  is then estimated as the convex combination of the

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<sup>18</sup>In standard variational approximation algorithms for CTM, inference iterates between the word-level latent variables  $q(z_d)$  and the document-level variables  $q(\eta_d)$  until local convergence.

maximum-likelihood estimation and a diagonalized form of the MLE:

$$\hat{\Sigma} = w_{\Sigma}(\text{diag}(\hat{\Sigma}_{MLE})) + (1 - w_{\Sigma})(\hat{\Sigma}_{MLE}) \quad (4.12)$$

, where the weight  $w_{\Sigma} \in [0, 1]$  is 0. Updates for the topic-word distributions correspond to estimation of the coefficients ( $K$ ) in a multinomial logistic regression model where the observed words are the output, and the design matrix  $X$  includes the expectations of the word-level topic assignments  $E[q(z_d)] = \phi_d$  (Roberts, Stewart and Airoldi, 2016).

#### 4.2.4 Selecting the Number of Topics

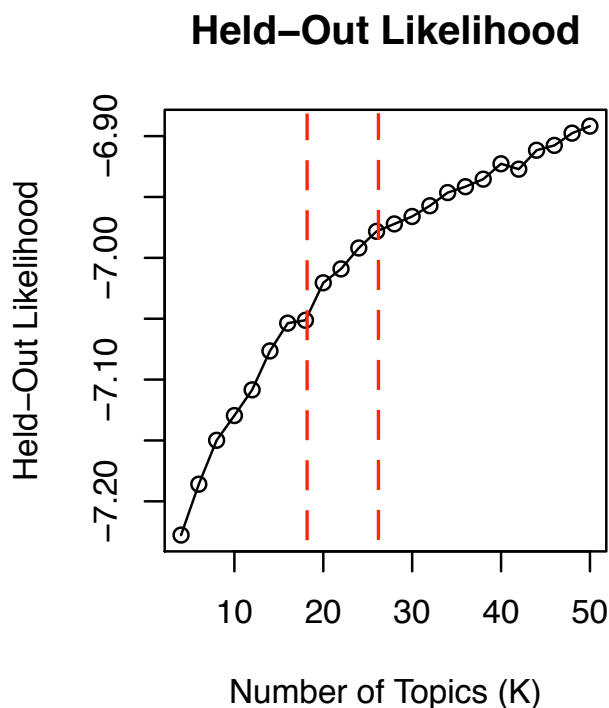
As noted above, the number of topics  $k$  must be set *a priori* in topic models. Unfortunately, there is no method that completely eliminates human discretion (Grimmer, 2010; Grimmer and Stewart, 2013). Following Blei, Ng and Jordan (2003), Wallach, Mimno and McCallum (2009), and Rosen-Zvi et al. (2004), I use perplexity scores to guide my choice. The topic model assumes a generative process that treats documents as a collection of terms  $\omega = (\omega_1, \dots, \omega_N)$  from corpus  $D$  containing  $N$  words from a vocabulary of  $V$  different terms ( $\omega_i \in \{1, \dots, V\}$  for all  $i = 1, \dots, N$ ) (Grün and Hornik, 2011). Perplexity equals the geometric mean per-word likelihood, as follows:

$$\text{Perplexity}(\omega) = E^{-\frac{\log(p(\omega))}{\sum_{d=1}^D \sum_{j=1}^V n^{(jd)}}} \quad (4.13)$$

, where  $n^{(jd)}$  indicates how often the  $j^{\text{th}}$  term occurs in  $d^{\text{th}}$  document (Grün and Hornik, 2011). Intuitively, perplexity is a measure of how well the model can predict the distribution of topics in a test document after having analyzed the terms in a training portion. The better the prediction, the less “perplexed” the model. However, perplexity is monotonically decreasing in the number of topics, so researchers cannot simply select a global or local minimum. Rather, Blei, Ng and Jordan (2003) recommend selecting  $k$  based on the rate of change. If the marginal decrease in perplexity at  $k < k^*$  is relatively large but remains

consistently small for every  $k > k^*$ , then  $k^*$  provides the best improvement in perplexity.

I used R to calculate perplexity scores at 2-50 topics. First, 80% of texts were randomly assigned to a training set, while the remaining 20% were used for testing. I then used the first half of each document to estimate the topic distribution within that document based on the parameters derived from the training data. Finally, I estimated the number of equally probable word choices for the second half of the document. Figure 4.2 plots the results. I focus on locations with a relatively steep marginal rate of increase followed by a gradual decrease in change (see Goutte et al., 1999, Figure 6 for more on the the “elbow test”). The marginal increase in perplexity for each additional increase in topics is steep until around  $k = 18-24$  topics, at which point it becomes more gradual. This suggests that the true value of  $k$  falls in between this range.



**Figure 4.2:** Perplexity Analysis of Structural Topic Model Results

Perplexity provides a “best fit” for the model, but does not always produce substantively interpretable results. Chang et al. (2009) claim that topic models selected only using to perplexity scores tend to suffer word intrusion (i.e., words that do not appear related to

the topic) and topic intrusion (i.e., topics that do not appear related to the corpus). They recommend conducting a visual inspection of the top topic terms in order to check that each topic has a substantively interpretable meaning.

I devised several rules for visual inspection. First, the top 10 terms for any topic should not contain non-informative personal, institutional, or geographic names, which would indicate that the model was forced to create too many unique topics without enough informative terms. Second, the top 5 terms should suffer no more than a single instance word intrusion. Finally, I rejected a model if it combined two or more conceptually distinct areas of law into a single topic. If there are too few topics such that  $k < k^*$ , then the topic model will clump otherwise distinct topics. I inspected the top ten terms for each topic at  $k = 18-24$ . I consistently observed less word intrusion and topic intrusion at 22 topics. The additional topic clusters in models with more than 22 topics did not appear conceptually distinct from clusters in previous models. Models with less than 22 topics omitted conceptually distinct topic clusters. Thus, I set  $k = 22$ .

## 4.3 Results

In this section, I present the results of my topic model. I begin by discussing the 22 topic clusters identified by the topic model. Next, I test the effect of petitioner identity on the prevalence of topics in petitions. Then, I run the same test for different types of NGOs. Ultimately, the findings confirm that at least some NGOs play a significant agenda-setting role when they file petitions before the Indonesian Constitutional Court, but there is considerable heterogeneity in the results.

### 4.3.1 Topics

Table 4.3 shows the 22 topics derived from the Structural Topic Model. I use two sets of terms to summarize the topics. The first row contains the most frequent terms within each topic based on Grimmer (2010). The second row utilizes the Frequency-Exclusivity (FREX)



score, which combines information about the frequency of a term in a topic with information about the exclusivity of that term to that topic (Bischof and Airoldi, 2012). With a  $K \times V$  matrix of topic-conditional term probabilities ( $B$ ), the FREX statistic is:

$$\text{FREX}_{k,v} = \left( \frac{w}{\text{ECDF}(\beta_{k,v} / \sum_{j=1}^K \beta_{j,v})} + \frac{1-w}{\text{ECDF}(\beta_{k,v})} \right)^{-1} \quad (4.14)$$

, where  $w$  is a weight which balances the influence of frequency and exclusivity, and  $w$  is set to 0.5 based on Roberts, Stewart and Airoldi (2016, 15-16). This calculates the harmonic mean of the empirical cumulative distribution function of a term’s frequency under a topic with the empirical CDF of exclusivity to that topic.

The Indonesian words for both the highest probability and FREX terms are stemmed root words. Below each Indonesian term is an English translation. If multiple translations were available, I chose the sense most appropriate to constitutional litigation. For example, the most common dictionary translation of the word *pilih* in Topic 12 is “select,” but it can also be translated as “elect,” which is more appropriate in this context. The topic model does not automatically create labels for each topic cluster, so I assigned names to each topic based on the first five terms.

The 22 topics that the model derived from the corpus generally correspond to the types of topics one would expect to find in petitions to the Constitutional Court. However, the results differ from what hand-coding might have yielded in a few important ways. First, the topic model managed to capture information about niche topics that are often not considered of interest to political scientists. For example, Topic 11 covers “advertising,” even though relatively few petitions focus on advertising law. Second, there is a unique topic for “judicial” issues (Topic 3), which covers not just judicial institutions, but also text related to the process of litigation. Third, in Topic 15, the model captured information about the address of each petitioner, which is listed at the top of each petition (in documents with many petitioners, this can constitute a significant proportion of the text).

To demonstrate how the topic model classifies documents, I selected five random petitions from the corpus and plotted the distribution of topics in each (see Figure 4.3). As noted above, the topic model assigns a posterior probability for each topic to each document, meaning that each petition will contain some nonzero amount of each topic. The largest topic assigned to each petition adequately describes the law challenged. For example, Petition No. 39/PUU-XI/2013 challenged the 2008 Law on Political Parties and the largest topic is about “political parties” (Topic 12). The results for Petition No. 4/PUU-XI/2013 show how the topic model handles multidimensionality. The petition challenged the 2008 Law on Presidential and Vice Presidential Elections, and, not surprisingly, the model assigned the highest probability to the “executive elections” topic (04). However, it also assigned high probabilities to the “legislative” (18) and “political parties” (12) topics, both of which were discussed in the petition.<sup>19</sup> Overall, the topic model results accurately reflect the legal issues discussed in the petitions.

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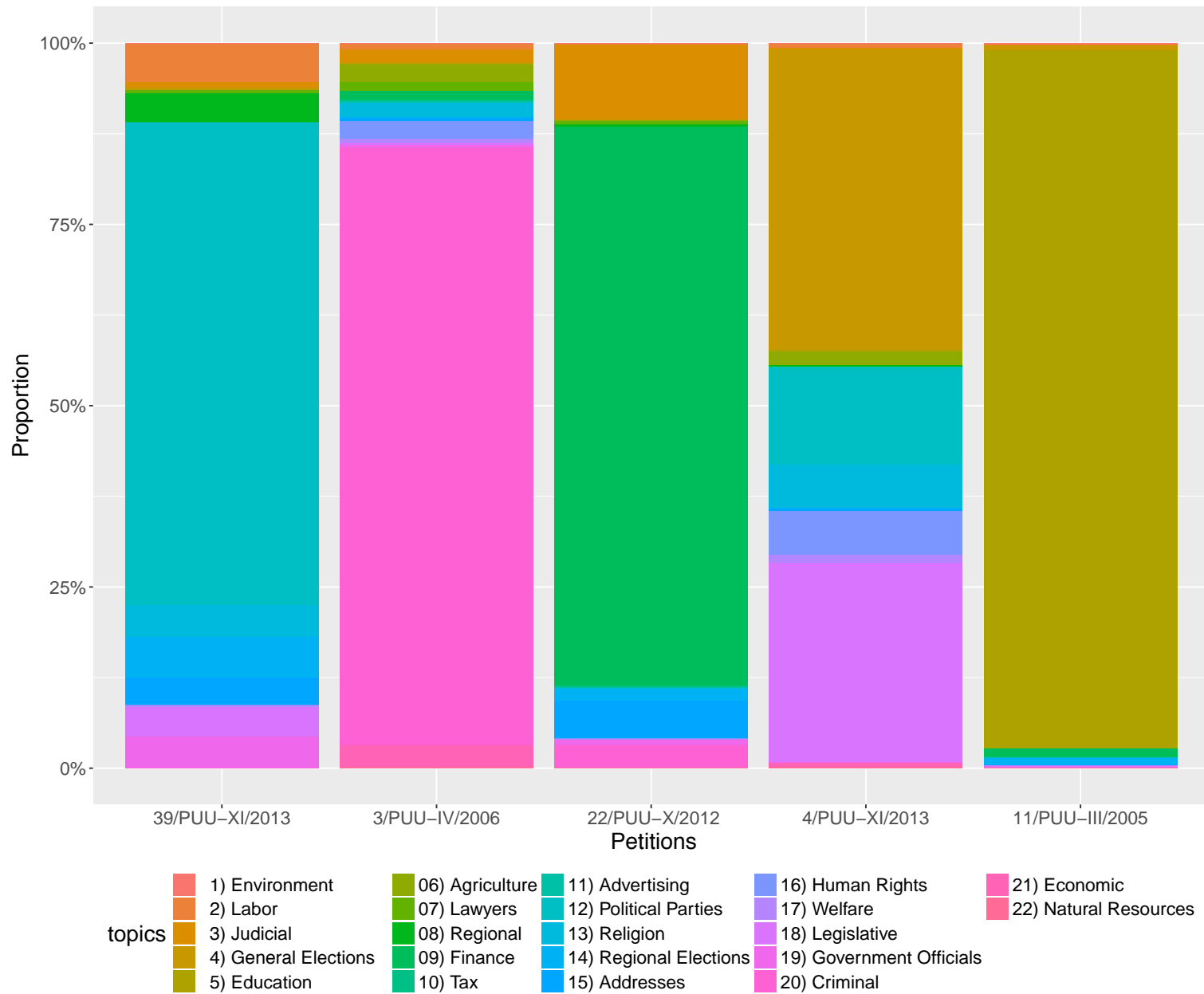
<sup>19</sup>Indonesian parties must win a certain percentage of seats in the DPR, in order to nominate a presidential candidate.

Topic 1 <i>Environment</i>	Frequency:	hutan ( <i>forest</i> )	tambang ( <i>mining</i> )	kawasan ( <i>area</i> )	daerah ( <i>region</i> )	tetap ( <i>remain</i> )
	F̄RĒX̄:	hutan ( <i>forest</i> )	tambang ( <i>mining</i> )	kawasan ( <i>area</i> )	mineral ( <i>mineral</i> )	batubara ( <i>coal</i> )
Topic 2 <i>Labor</i>	Frequency:	kerja ( <i>work</i> )	buruh ( <i>labor</i> )	serikat ( <i>union</i> )	usaha ( <i>business</i> )	alamat ( <i>address</i> )
	F̄RĒX̄:	buruh ( <i>labor</i> )	serikat ( <i>union</i> )	kerja ( <i>work</i> )	ketenagakerjaan ( <i>employment</i> )	umur ( <i>age</i> )
Topic 3 <i>Judicial</i>	Frequency:	hakim ( <i>judge</i> )	agung ( <i>supreme</i> )	perkara ( <i>court case</i> )	gugat ( <i>lawsuit</i> )	kuasa ( <i>power</i> )
	F̄RĒX̄:	agung ( <i>supreme</i> )	gugat ( <i>lawsuit</i> )	tinjau ( <i>review</i> )	hakim ( <i>judge</i> )	sengketa ( <i>dispute</i> )
Topic 4 <i>General Elections</i>	Frequency:	presiden ( <i>president</i> )	pilih ( <i>elect</i> )	wakil ( <i>representative</i> )	calon ( <i>candidate</i> )	politik ( <i>political</i> )
	F̄RĒX̄:	presiden ( <i>president</i> )	calon ( <i>candidate</i> )	pilpres ( <i>pres. election</i> )	pasang ( <i>pair</i> )	gabung ( <i>join</i> )
Topic 5 <i>Education</i>	Frequency:	didik ( <i>students</i> )	selenggara ( <i>implement</i> )	guru ( <i>teacher</i> )	yayasan ( <i>foundation</i> )	anggar ( <i>budget</i> )
	F̄RĒX̄:	didik ( <i>student</i> )	guru ( <i>teacher</i> )	yayasan ( <i>foundation</i> )	sekolah ( <i>school</i> )	dosen ( <i>lecturer</i> )
Topic 6 <i>Agriculture</i>	Frequency:	tanah ( <i>land</i> )	tani ( <i>farm</i> )	usaha ( <i>business</i> )	rakyat ( <i>people</i> )	ikan ( <i>fish</i> )
	F̄RĒX̄:	ikan ( <i>fish</i> )	advokasi ( <i>advocacy</i> )	prapatan ( <i>Prapatan</i> )	tani ( <i>farm</i> )	laut ( <i>marine</i> )
Topic 7 <i>Lawyers</i>	Frequency:	advokat ( <i>lawyer</i> )	profesi ( <i>profession</i> )	organisasi ( <i>organization</i> )	publik ( <i>public</i> )	bentuk ( <i>form</i> )
	F̄RĒX̄:	advokat ( <i>advocate</i> )	profesi ( <i>profession</i> )	akuntan ( <i>accountant</i> )	etik ( <i>ethics</i> )	kode ( <i>code</i> )
Topic 8 <i>Regional</i>	Frequency:	kabupaten ( <i>district</i> )	daerah ( <i>region</i> )	provinsi ( <i>province</i> )	Papua ( <i>Papua</i> )	bentuk ( <i>shape</i> )
	F̄RĒX̄:	Papua ( <i>Papua</i> )	distrik ( <i>district</i> )	Riau ( <i>Riau</i> )	Mekar ( <i>Mekar</i> )	Irian ( <i>Irian</i> )
Topic 9 <i>Finance</i>	Frequency:	pailit ( <i>bankruptcy</i> )	bayar ( <i>pay</i> )	wajib ( <i>compulsory</i> )	utang ( <i>debt</i> )	tunda ( <i>postpone</i> )
	F̄RĒX̄:	pailit ( <i>bankruptcy</i> )	tunda ( <i>postpone</i> )	utang ( <i>debt</i> )	bank ( <i>bank</i> )	bayar ( <i>pay</i> )
Topic 10 <i>Tax</i>	Frequency:	pajak ( <i>tax</i> )	alat ( <i>tool</i> )	kena ( <i>taxable</i> )	bea ( <i>duty</i> )	berat ( <i>weight</i> )
	F̄RĒX̄:	motor ( <i>motor</i> )	kendaraan ( <i>vehicle</i> )	pajak ( <i>taxes</i> )	bea ( <i>duties</i> )	pungut ( <i>collect</i> )
Topic 11 <i>Advertising</i>	Frequency:	anak ( <i>child</i> )	siar ( <i>broadcast</i> )	rokok ( <i>television</i> )	bukti ( <i>proof</i> )	hidup ( <i>living</i> )
	F̄RĒX̄:	siar ( <i>broadcast</i> )	rokok ( <i>television</i> )	iklan ( <i>advertise</i> )	anak ( <i>child</i> )	pers ( <i>press</i> )
Topic 12 <i>Political Parties</i>	Frequency:	partai ( <i>party</i> )	pilih ( <i>elect</i> )	politik ( <i>politics</i> )	anggota ( <i>member</i> )	pemilu ( <i>election</i> )
	F̄RĒX̄:	kursi ( <i>seat</i> )	partai ( <i>party</i> )	DPRD ( <i>DPRD</i> )	pemilu ( <i>election</i> )	suara ( <i>popular will</i> )
Topic 13 <i>Religion</i>	Frequency:	agama ( <i>religion</i> )	islam ( <i>islam</i> )	umat ( <i>congregation</i> )	kawin ( <i>married</i> )	bangsa ( <i>nation</i> )
	F̄RĒX̄:	islam ( <i>islam</i> )	kawin ( <i>wedding</i> )	umat ( <i>congregation</i> )	agama ( <i>religion</i> )	syariah ( <i>Sharia</i> )

Topic 14 <i>Regional Elections</i>	Frequency:	daerah ( <i>region</i> )	kepala ( <i>chief</i> )	pilih ( <i>elect</i> )	calon ( <i>candidate</i> )	KPU ( <i>KPU</i> )
	FREX:	sumpah ( <i>oath</i> )	kepala ( <i>chief</i> )	KPU ( <i>KPU</i> )	saksi ( <i>witness</i> )	bupati ( <i>regent</i> )
Topic 15 <i>Addresses</i>	Frequency:	alamat ( <i>address</i> )	camat ( <i>district</i> )	kabupaten ( <i>county</i> )	desa ( <i>village</i> )	Jawa ( <i>Java</i> )
	FREX:	identitas ( <i>identity</i> )	dusun ( <i>hamlet</i> )	Jawa ( <i>Java</i> )	desa ( <i>village</i> )	Batang ( <i>Batang</i> )
Topic 16 <i>Human Rights</i>	Frequency:	manusia ( <i>human</i> )	asasi ( <i>right</i> )	lindung ( <i>protect</i> )	bebas ( <i>free</i> )	bentuk ( <i>form</i> )
	FREX:	perempuan ( <i>female</i> )	HAM ( <i>human rights</i> )	bahasa ( <i>language</i> )	asasi ( <i>right</i> )	informasi ( <i>information</i> )
Topic 17 <i>Welfare</i>	Frequency:	sehat ( <i>health</i> )	jamin ( <i>guarantee</i> )	sosial ( <i>social</i> )	anggar ( <i>budget</i> )	tembakau ( <i>tobacco</i> )
	FREX:	sehat ( <i>health</i> )	tembakau ( <i>tobacco</i> )	belanja ( <i>shop</i> )	BBM ( <i>fuel</i> )	iur ( <i>dues</i> )
Topic 18 <i>Legislative</i>	Frequency:	DPR ( <i>DPR</i> )	rakyat ( <i>people</i> )	dewan ( <i>chamber</i> )	anggota ( <i>member</i> )	wakil ( <i>vice</i> )
	FREX:	MPR ( <i>MPR</i> )	koperasi ( <i>cooperative</i> )	DPD ( <i>DPD</i> )	ruu ( <i>bill</i> )	dpr ( <i>DPD</i> )
Topic 19 <i>Government</i>	Frequency:	jabat ( <i>officeholder</i> )	uang ( <i>money</i> )	masa ( <i>term</i> )	badan ( <i>agency</i> )	pegawai ( <i>employee</i> )
	FREX:	jabat ( <i>officeholder</i> )	pegawai ( <i>employee</i> )	BPK ( <i>Audit Board</i> )	masa ( <i>term</i> )	sipil ( <i>civil</i> )
Topic 20 <i>Criminal</i>	Frequency:	pidana ( <i>criminal</i> )	tindak ( <i>act</i> )	korupsi ( <i>corrupt</i> )	jaksa ( <i>prosecute</i> )	berantas ( <i>eradicate</i> )
	FREX:	jaksa ( <i>prosecute</i> )	sidi ( <i>confirmation</i> )	berantas ( <i>eradicate</i> )	pidana ( <i>crime</i> )	korupsi ( <i>corrupt</i> )
Topic 21 <i>Economic</i>	Frequency:	rumah ( <i>home</i> )	usaha ( <i>business</i> )	modal ( <i>capital</i> )	ekonomi ( <i>economy</i> )	listrik ( <i>electricity</i> )
	FREX:	listrik ( <i>electricity</i> )	modal ( <i>capital</i> )	rumah ( <i>house</i> )	Matraman ( <i>Matraman</i> )	PLN ( <i>PLN</i> )
Topic 22 <i>Natural Resources</i>	Frequency:	air ( <i>water</i> )	usaha ( <i>business</i> )	sumber ( <i>resource</i> )	daya ( <i>power</i> )	guna ( <i>use</i> )
	FREX:	air ( <i>water</i> )	migas ( <i>oil</i> )	bumi ( <i>earth</i> )	minyak ( <i>oil</i> )	gas ( <i>gas</i> )

**Table 4.3:** Topics 1-22 from Structural Topic Model of Petitions

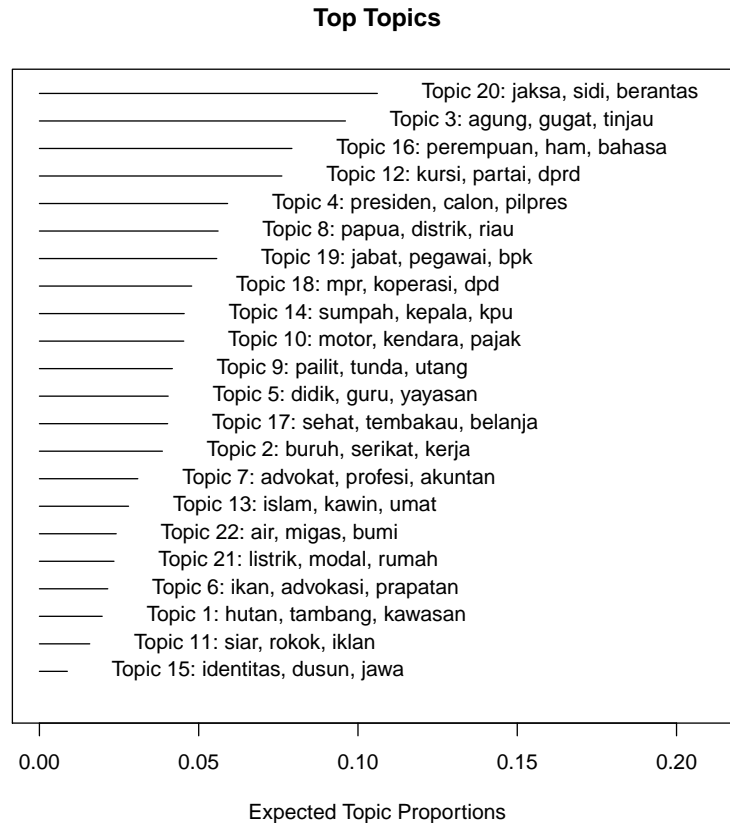
The top five stemmed Indonesian words are listed in the first row of each topic, with translations below. The first row contains the highest probability word associated with each topic, whereas the second row contains the words derived using FREX scores, which accounts for the exclusivity of the word to the topic.



**Figure 4.3:** Histogram of Topic Results for Constitutional Court Petitions

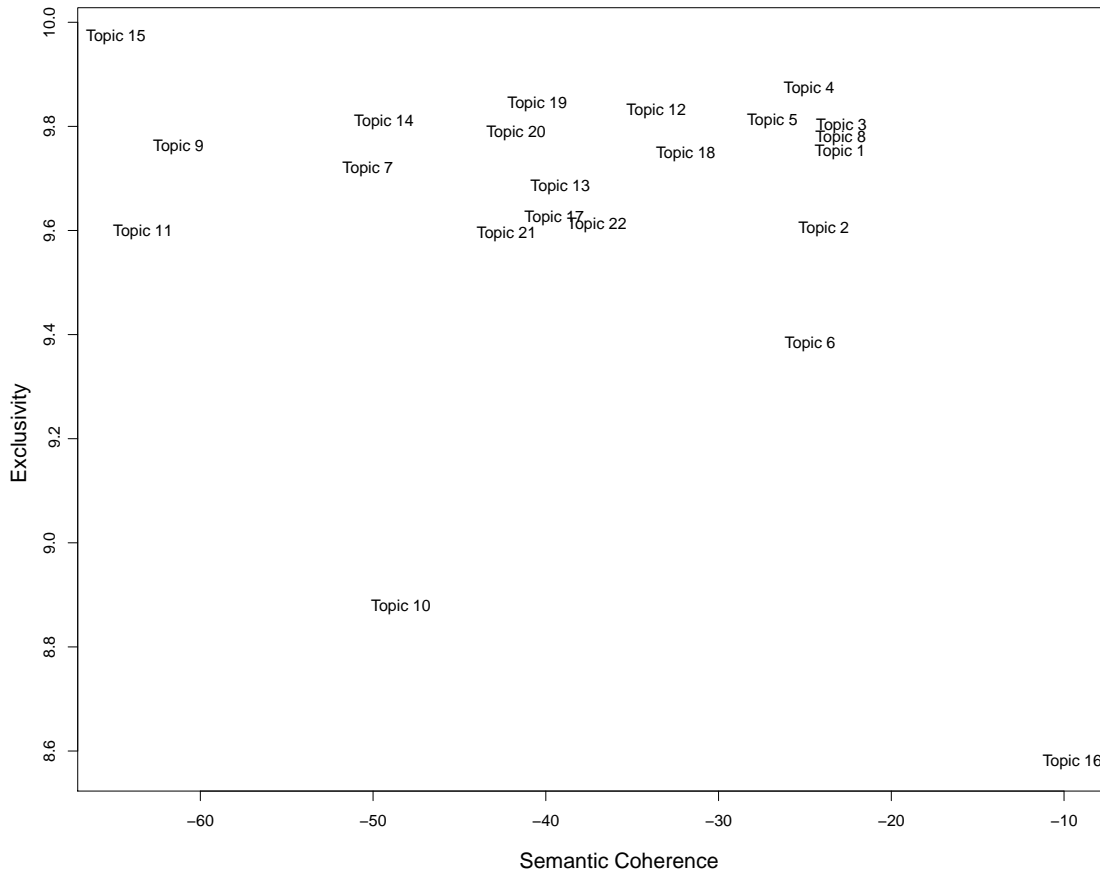
The laws challenged in each petition and largest topics are: Law No. 2 of 2008 on Political Parties (12); Law No. 31 of 1999 on the Eradication of the Crime of Corruption (20); Law No. 37 of 2004 on Bankruptcy and Debt Payment Suspension (09); Law No. 42 of 2008 on the Presidential and Vice Presidential Elections (04); and Law No. 20 of 2003 on the National Education System (05).

Figure 4.4 shows the expected posterior probability for the average document in the corpus of petitions for each of the 22 topics. The most frequent topic is Topic 20 (“criminal”), which accounts for around 12% of the text in the petitions, whereas the least frequent topic is Topic 15 (“addresses”), which accounts for just 1% of the text. Given that Topic 3 also covers language frequently used to describe the process of litigation, it is not surprising that it is the second largest topic in the corpus (around 10%). The results also confirm that much of the Court’s work involves challenges to election laws. The three topics most closely related to elections – Topics 12, 4, 18, and 14 – combined have an expected posterior probability of approximately 22.5%, or almost a quarter of the text in the corpus.



**Figure 4.4:** Expected Posterior Probability for Topics

Roberts et al. (2014) propose a quantitative test for topic quality relying on the fact that semantically interpretable topics are: 1) cohesive, i.e., high-probability words for a given



**Figure 4.5:** Exclusivity & Semantic Coherence for Structural Topic Model Topic

topic tend to co-occur within documents, and 2) exclusive, i.e., the top words for a given topic are unlikely to appear within top words of other topics. The former is a measure of internal consistency within documents associated with the topic, whereas the latter measures how distinct the topic is from other topics. A topic that possess both cohesion and exclusivity is more likely to be semantically useful. I plot the semantic coherence and exclusivity scores for the topics in my model in Figure 4.5. Topics in the upper right corner score higher on both measures. At  $k = 22$ , most of the topics score relatively high on both measures, while only five – Topics 9, 10, 11, 15, and 16 – score poorly on one or both. It should not be surprising that Topic 16 lacks exclusivity because it covers “human rights,” which includes general legal terms such as “right” or “free” that are also used frequently in other types of constitutional

cases. Topics 9 (“finance”) and 11 (“advertising”) occur relatively infrequently within the corpus, possibly explaining their low semantic coherence scores. The low scores for Topic 15 are easily explained in that topic covers petitioners’ contact information; there is little reason to expect terms associated with one petitioner to appear in a different petition for a different petitioner.<sup>20</sup>

I also conducted a qualitative tests to ensure that the model yielded topics that conform to the contents of the documents in the corpus. First, I found the document with the highest posterior probability associated with each topic. I then read through the 22 documents to see the extent to which the words in the topic cluster accurately reflected the issues discussed in the petitions. In Figure 4.6, I list a representative paragraph from each petition. In each, the legal issues discussed in the petition are clearly related to the topic clusters. Moreover, the law challenged in each case was often associated with that topic.

As noted above, STM allows topics to be correlated. I show these correlations in Figure 4.7, with dashed lines indicating significant correlations and distance between each topic cluster indicating the strength of that correlation. The cluster of five topics at the top of the plot includes all of the topics related to elections and government functions, which is not surprising given that these issues do overlap. The cluster of topics in the bottom of the plot all focus on socioeconomic issues, such as welfare and taxes. Although these topics are conceptually distinct from each other, they do use many of the same terms, especially economic jargon.<sup>21</sup> Finally, the “human rights” and “advertising” topics (11 & 16) are closely correlated. At first, this might seem counterintuitive, but many of these “advertising” petitions challenged restrictions on corporate advertising as a violation of the right to free speech.<sup>22</sup>

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<sup>20</sup>I also measured semantic coherence and exclusivity for  $k = 18, 20, 24, 26$  topics (not shown), but did not find any appreciable improvement in how those models performed.

<sup>21</sup>The topics for “regional” and “addresses” (8 & 15) are obviously related because both often use the names of geographic locations, but it is not immediately clear why the topic about judicial issues is correlated with addresses.

<sup>22</sup>E.g., *Cigarette Advertising case*, MK Decision No. 6/PUU-VII/2009.



**Topic 1: Environment**

Whereas the provisions of the articles of the Minerba a quo Law, which norms are centralistic and authorizes the central government to establish Mining Areas (WP), Mining Business Areas (WUP), and determines the extent and boundaries of Mineral Mining Business License (WIUP) of Metals and Coal in the territory of the regional government, has reduced, obstructed, ignored and/or derogated the Petitioner's constitutional authority granted by UUD 1945, because previously the central government decided on a WP, the WUP, and specified the extent and limits of the WIUP a quo, the Petitioner has not yet been able to exercise constitutional authority in the form of regulating and managing government affairs in the field of energy and mineral resources in the Petitioner's own territory;

(Petition No. 10/PUU-X/2012)

**Topic 2: Labor**

The petitioner considers that legislation should not restrict the mechanisms and procedures for membership verification based on membership cards, only that the membership verification process should be conducted in an open/transparent manner through public announcements to all workers within the company, the occurrence of checks and controls over all workers concerned, and eliminate the potential inflation of membership data by certain unions through the manipulation of the number of photocopies of membership card.

(Petition No. 115/PUU-VII/2009)

**Topic 3: Judicial**

As the result, the Administrative Court in Palembang claims that they have the right to investigate and bring claims of Freehold Title cancellation of the land to justice by saying that the dispute about rights of the land, where the ownership is proven by Freehold Title, is included in the jurisdiction of the Administrative Court, *inter alia*, Chief Justice Decision of Administrative Court in Palembang No. 27/G/2010/PTUN-PLG.

(Petition No. 17/PUU-IX/2011)

**Topic 4: General Elections**

The Petitioners acknowledge that the 1945 Constitution grants constitutional rights to political parties or coalitions of political parties to propose candidate pairs of President and Vice President before the General Election is held. There is no intention of the Petitioners to question this right. What matters is that the law that regulates the general election of the President and Vice President, or the Presidential Election Act [PILPRES Act], in fact deviates from and exceeds the intent and guarantees of the Constitution. The PILPRES Act has also been discriminatory because it grants exclusive rights to political parties on the one hand and on the other hand prevents citizens' rights to choose not to use political parties as the vehicle of their hopes for democracy.

(Petition No. 56/PUU-VI/2008)

**Topic 5: Education**

That it turns out in Budget Year 2005, the education budget, regulated based on Law No. 36 of 2004 concerning State Budget Year of Fiscal Year 2005, is less than 20%, so through Decision of Constitutional Court No. 012/PUU-11/2005 dated October 13, 2005, stating that Law No. 36 of 2004 on the State Budget of the 2005 Budget Year insofar as it concerns the education sector is contradictory to Article 31 Paragraph (4) of the 1945 Constitution and therefore declared to have no binding legal force.

(Petition No. 9/PUU-VI/2008)

**Topic 6: Agriculture**

That the existence of Law No. 12 of 1992 about the Plant Cultivation System inhibits the development of ecological agriculture cultivation, weaken the cultivation skills of farmers, and hamper the establishment of farmers' organizations, so that the goal of the Petitioner VIII's organization will be blocked, and the seed breeders will continue to be criminalized and discriminated against, especially the community that is the basis of PETITIONER VIII's organization [Perkumpulan Sawit Watch].

(Petition No. 99/PUU-X/2012)

**Topic 7: Lawyers**

Therefore, the best solution in overcoming the conflict about single bar association is by admitting that the single association as mentioned in Law on Lawyers is not appropriate to Indonesia. It also contrasts with the concept of pluralism (Unity in Diversity), which is guaranteed in and has become the soul of the 1945 Constitution, so forming a single bar association system should not be required. The choice of the right form of bar association should be given to the lawyers through the mechanism of lawyers' democratic national consensus, where the election for member of organization is held fairly and attended by lawyers from all over Indonesia to choose their own members by using the one-person, one-vote rule.

(Petition No. 66/PUU-VIII/2010)

**Topic 8: Regional**

Besides, another fact has proved that the "lighthouse" guard in Berhala island came from Tanjung Pinang Navigation in Riau Province, and not from Navigation Department of another province. That is the good intentions from the Riau government (including Lingga Regency government) that has for a long time dominated the area physically, and the recognition from the government of Berhala Region by Riau Province - it was previously in the territory of Riau Province.

(Petition No. 47/PUU-X/2012)

**Topic 9: Finance**

Whereas with the enactment of Article 2, Paragraph (2a), Point 1 and Article 6, Paragraph (2a) of Law No. 21 of 1997 as amended by Law No. 20 of 2000 concerning Acquisition of Land and Building Rights (BPHTB) in the process of bankruptcy management and determination No. 12/Pailit/2007/PN.Niaga Sby., especially regarding the application of the taxable property sale value to the estate of the insolvent property mentioned above, is clearly eliminating or negating the specific/specificity of Law No. 37 Year 2004 Concerning Bankruptcy and Postponement of Debt Payment Obligations, whereas one aspect of Law No. 37 of 2004 referred to that is very important and constitutes the highest State interest is the fulfillment of the obligations of bankrupt debtors to the State without exception.

(Petition No. 68/PUU-VIII/2010)

**Topic 10: Tax**

Whereas despite the fact that the Petitioner has obeyed the law by complying with the provisions of the applicable law at the time of the establishment of PT SINAR ABADI, the petitioner did not receive any recognition, guarantee, protection and legal certainty that met the standards for equal treatment before the law by applying Elucidation of Article 6, paragraph (3), subparagraph (a) of Law No. 15 on Brands stating that "That which is included in the name of the legal entity that uses the brand and is included on the General Register of Brands," as well as the formulation of the words "are equal in essence..." in Article 6, paragraph (1), subparagraph (a), Article 91 of Law Number 15 of 2001 concerning Brands, ALTHOUGH pursuant to Act Number 1 of 1995 on Limited Liability Companies and Government Regulation No. 26/1998 on Limited Public Expenditure and Act No. 3 of 1982 about Mandatory Company Lists were enacted to guarantee business certainty.

(Petitioner No. 118/PUU-VII/2009)

**Topic 11: Advertising**

That there are incorrect or misleading advertisements about cigarettes (as a form of information or art products), where the scientific truth and the reality is that cigarettes contain 4000 poisonous chemical substances, and 69 substances are carcinogenic and addictive. Both the reality and under the official juristic definition of broadcasting, cigarette advertisement is aimed to persuade consumers to use addictive and carcinogenic cigarettes, the content and messages contained in cigarette advertising has metamorphosed in various forms and unconsciously go deep into consumer life (especially children and teenagers), where the advertisement portrays smoking as a normal thing. Therefore, it will not be viewed as a dangerous substance for health and life. Moreover, smoking is described fraudulently and unjustly as an image of "masculinity", "friendship", "exclusivity", "cool", etc.

(Petition No. 6/PUU-VII/2009)

**Topic 12: Political Parties**

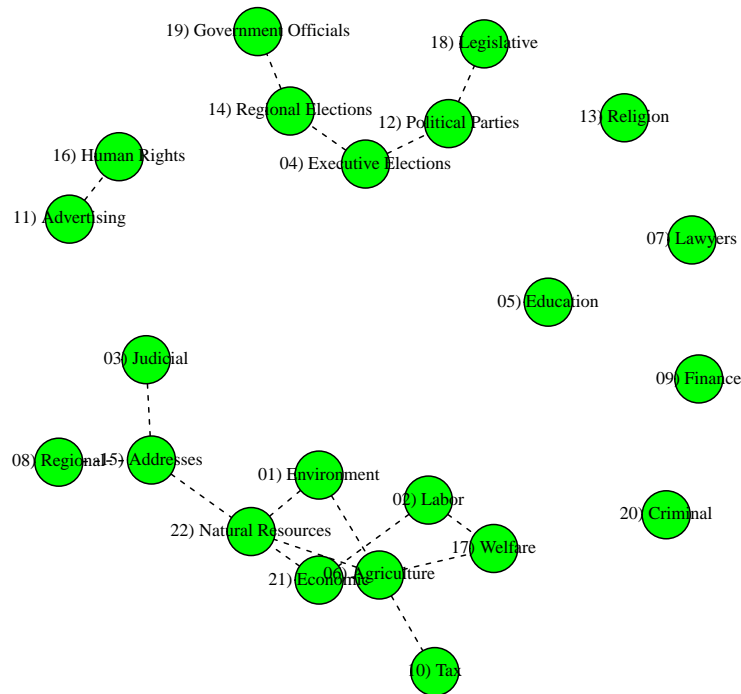
Whereas the provision of Article 8, Paragraph (1) through the phrase "which meets the threshold of the number of valid votes nationally" and paragraph (2) through the phrase "political parties that do not meet the vote threshold in the previous election" in Article 208 of General Election Law, or not least Article 208 of the General Election Law through the phrase: "The Provincial DPRD and Regency DPRD", the General Election Law will certainly harm or at least potentially harm the Petitioners. This is because it regulates a very unjust and discriminatory provision that applies to the Petitioners as political parties that contested in the last election (Election 2009) which did not meet the national threshold of valid votes (commonly called: parliamentary threshold/PT) in the election to be eligible for the next election (2014), because of the very rigorous factual verification required by the General Election Commission (KPU).

(Petition No. 52/PUU-X/2012)

Topic 13: Religion	Topic 14: Regional Elections	Topic 15: Addresses	Topic 16: Human Rights	Topic 17: Welfare	Topic 18: Legislative
<p>That Islamic Religious Law (<i>Shari'at</i>) should in fact be upheld in the Indonesian Religious Courts completely (<i>kaffah</i>), because the Petitioners did not find any indication that the enforcement of Shari'a of Islamic Law (<i>kaffah</i>) was absolutely prohibited by the 1945 Constitution and Pancasila. Even those that are based on some articles of the 1945 Constitution, may actually be possible to enforce through Islamic Religious Law (<i>Shari'at</i>) as a whole (<i>kaffah</i>). Of course it is intended only for the adherents of the Muslim community.</p> <p>(Petition No. 19/PUU-VI/2008)</p>	<p>That the pair of Regent and Vice Regent Candidates No. 2 (Dr. H. Ujang Iskandar, ST, Msi and Bambang Purwanto, S. ST), did not accept the Decision of the General Elections Commission of Kotawaringin Barat Regency Number: 62/Kpts-KPU-020.436792/2010, dated June 12, 2010 and Minutes Number: 367/BA/VI/2010 dated June 12, 2010 concerning the Stipulation of Selected Candidate Pair in the Regent and Vice Regent Election of Kotawaringin Barat 2016; they subsequently submitted an Application for Dispute regarding the Election Result for Head of District of Kotawaringin Barat to the Constitutional Court of the Republic of Indonesia as registered in case Number 45/PHPU.D-VIII/2010. (Exhibit P.5).</p> <p>(Petition No. 75/PUU-VIII/2010)</p>	<p>121. Name: Marsini. ID Number: 11.0213.690771.0001 Address: Pencar sub-village, Kaliputi village, District of Singorojo, Kendal Regency, Central Java Province.</p> <p>122. Name: Sakimin ID Number: 11.0213.170868.0002 Address: Pencar sub-village, Kaliputi village, District of Singorojo, Kendal Regency, Central Java Province.</p> <p>123. Name: Amin ID Number: 11.0213.311245.0009 Address: Kalidapu sub-village, Kaliputi village, District of Singorojo, Kendal Regency, Central Java Province.</p> <p>(Petition No. 8/PUU-III/2005)</p>	<p>A Commission of Truth and Reconciliation requires the process of searching for the truth supported by relevant facts which are later used as the "official history" of the nation. For that reason, all confessions from this commission should be fully given or "full truth" and there should be an opportunity to verify and investigate to get the real facts. The Commission of Truth and Reconciliation also requires a guarantee of victims' rights fairly and without discrimination. The victims also should not be put at a disadvantageous position and under pressure. The Commission also requires the fulfillment of human rights principles, so the purpose of this commission is to solve the violation of human rights in the past, and should be done in the framework of universal principles of law.</p> <p>(Petition No. 6/PUU-IV/2006)</p>	<p>That the social security system can get more victims from the majority of people who work in informal sector, farmers, fishermen, laborers in informal sector, Indonesian migrant workers, women workers, cultural observer, etc. who cannot pay a contribution, and do not have someone else to pay for her/him. Automatically, they will not get the benefits from that social security system, although they do contribute much to provide for the main needs of Indonesian people and support Indonesian economic system. For example, a farmer plants the rice, and at the harvest time he sells it at a price of Rp ± 2.500,- per kilogram. However, the world price is Rp ± 5.000 – if there is rice crop failure, they are responsible for themselves. Indonesian migrant workers, women workers are the source of foreign exchange, and farmers as the protein producers, etc.</p> <p>(Petition No. 9/PUU-X/2012)</p>	<p>This determination contrasts with Article 20, Section 2 of the 1945 Constitution of the Republic of Indonesia since every Bill should be discussed by the House of Representative and the President, not by a Faction of the House of Representatives and the President. A Faction according to Article 80, Section 1 of the Law for the People's Consultative Assembly (MPR), House of People's Representative (DPR), Leadership of Political Party at Provincial (DPD), and Assembly at Provincial (DPRD) is not tool of the DPR. Therefore, this mini-opinion is not from the Faction, but from the DPR.</p> <p>(Petition No. 92/PUU-X/2012)</p>
Topic 19: Government Officials	Topic 20: Criminal	Topic 21: Economic	Topic 22: Natural Resources		
<p>The definition of "Functional Position" is also mentioned in Article 1, Number 1 of the Government Regulation of the Republic of Indonesia Number 16 of 1994 concerning the Functional Position of Civil Servants [hereinafter referred to as PP 16/1994, Exhibit P-6], namely:</p> <p>"Functional Position of Civil Servants which further in this Government Regulation is called "functional position" is a position that indicates duty, responsibility, authority and rights of a civil servant in an organizational unit in the execution of its duties based on justice and/or certain skills and is independent."</p> <p>(Petition No. 34/PUU-X/2012)</p>	<p>As a good citizen, the appellant obeys the law as long as the implementation and the norm or law used does not contradict with the law itself and is based on legal principles and law and justice. In fact, because of the interpretation of Assistant Attorney General for Special Crimes and Violations and the Attorney General for Enforcement of Article 65, Section 116, Subsection (3) and (4) of Indonesian Law Number 8 of 1981, about Criminal Procedure Code (KUHP), which does not provide for protection and legal certainty, has caused constitutional harm to the appellant.</p> <p>(Petition No. 65/PUU-VIII/2010)</p>	<p>Housing policies should be consistent with state policies and economically feasible for the purchasing power of the MBR group. However, the provisions of Article 22m paragraph (3) of Law Number 11 of 2011 as legal norms are irrational and have no financial justification because they are not applicable and not feasible with the size of the housing economy if objectively reviewed and analyzed in accordance with the provisions of Regulation of the Minister of Finance (PMK) No. 31/PMK.03/2011 (revising PMK No. 36/PMK.03/2007).</p> <p>(Petition No. 14/PUU-X/2012)</p>	<p>Law No. 7 of 2004 on Water Resources also provides a vast space for the private sector to control water resources, including groundwater, all surface water forms, and some river bodies. Legal Instruments for Usufruct Rights take two forms: Right to Use for Consumption and Right to Use for Business, as stipulated in Articles 7, 8, 9 and 10 of Act Number 7 of 2004 regarding Water Resources, which shall be the basis of allocation and control of the sources water for individuals, business entities and communities.</p> <p>(Petition No. 59/PUU-II/2004)</p>		

Figure 4.6: Thoughts for Topics 1-22

Each box contains a representative paragraph from the petition with the largest proportion of text associated with the topic listed above.



**Figure 4.7:** Structural Topic Model Topic Correlations

Dashed lines indicate significant correlations, while the distance between each topic cluster indicates the strength of that correlation.

### 4.3.2 Type of Petitioner

In order to test the agenda-setting power of NGOs, I measured how the expected distribution of topics in a petition changed with different types of petitioners. I used a dummy variable to indicate whether or not a particular type of petitioner supported the petition. I then found the difference between the mean topic proportions associated with a given type of petitioner and the mean topic proportions associated with all other petitioners

(i.e.,  $\text{petitioner\_type}_{i=1} - \text{petitioner\_type}_{i=0}$ ).<sup>23</sup>

The results for petitioner identity are shown in Figure 4.8 (I omit “national government” and “individual” petitioners because there were no significant relationships). Figure 4.8 provides evidence for Hypothesis 4.1, which posits that the distribution of topics in petitions filed by NGOs differs from those filed by other types of petitioners. NGOs do help set the Constitutional Court’s agenda role for “labor,” “education,” “agriculture,” “human rights,” “welfare,” and “economic” topics (2, 5, 6, 16, 17, & 21). There is no overlap between these topics and the topics strongly associated with other types of petitioners. Moreover, NGOs are associated with a greater number of different topics (six) than other types of petitioners, suggesting that NGOs act as agenda setters across a wide range of issues.

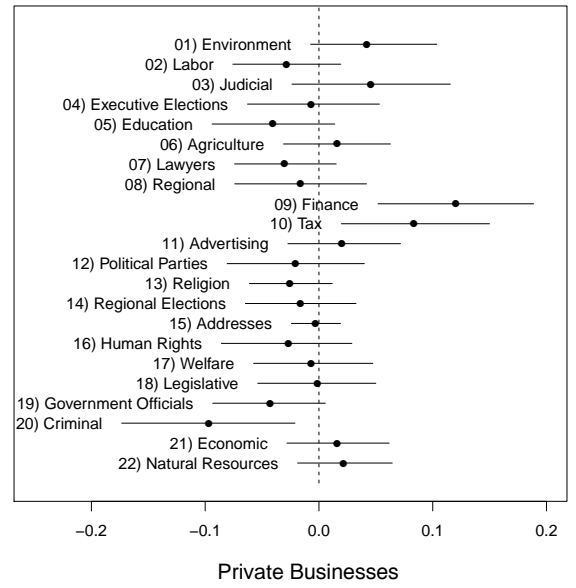
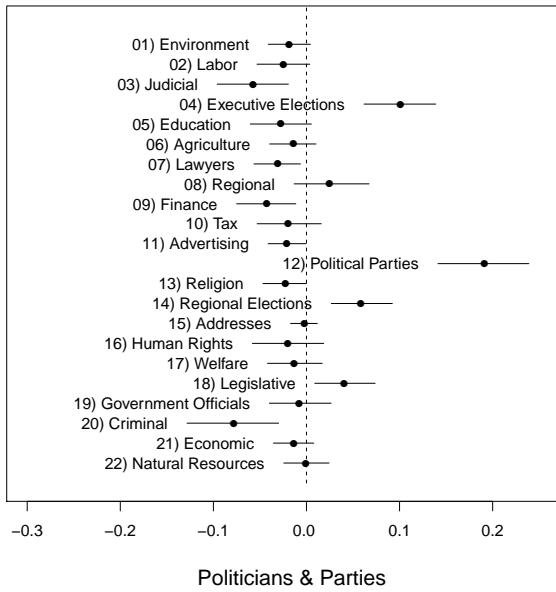
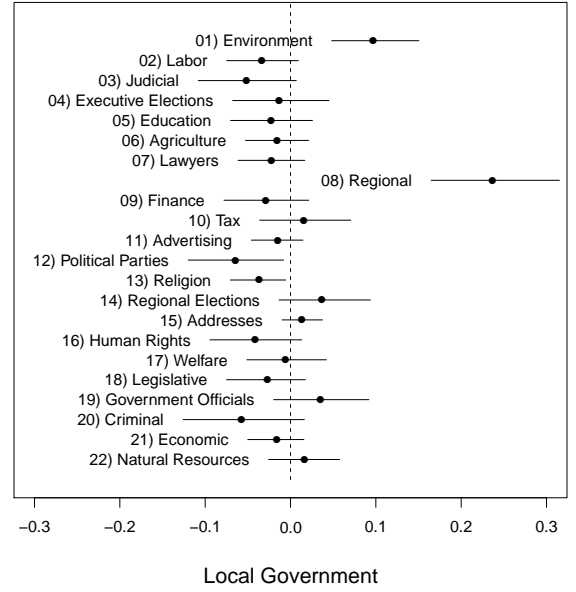
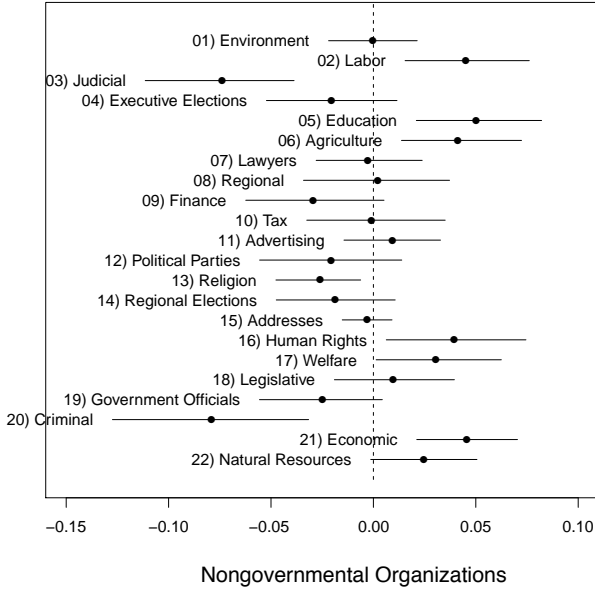
Other types of petitioners also appear to have agenda-setting powers. Not surprisingly, local government petitioners – including governors, district chiefs, and local legislatures – were far more likely to file petitions associated with the “regional” topic (8). On average, a petition filed by a regional government was around 25% more likely to contain text associated with the “region” topic, indicating that regional governments played a significant agenda-setting role for this topic. *Reformasi* entailed a massive devolution of power from Jakarta to the provinces, which led to much confusion about the jurisdiction and powers of regional governments. Moreover, the central government reorganized the borders of several provinces, which led to legal challenges from local chieftains.<sup>24</sup>

Politicians and political parties were more likely to file petitions related to the “executive elections,” “political parties,” “regional elections,” and “legislative” topics (4, 12, 14, & 18). The agenda-setting effect is strongest for the first two topics; petitions filed by political parties were around 10% and 20% more likely to contain text associated with these topics, respectively. While the model did find a significant relationship between electoral topics

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<sup>23</sup>One concern about STM is that by including covariates in the modeling stage the relationship between the topics and petitioner identity is “baked in” to the results. To check this, I ran a permutation test, which replaces the covariate with a placebo. The results are in Appendix B. Ultimately, I only accepted results for a covariate if the placebo did not significantly differ from zero.

<sup>24</sup>E.g., *Jambi Province Borders case*, MK Decision No. 47/PUU-X/2012.



**Figure 4.8:** Estimated Effects of Petitioners on Topic Proportions

The plot shows the expected difference in topic posterior probability for when the petitioner is of the type listed below versus all other petitioners. The bars represent 95% confidence intervals.

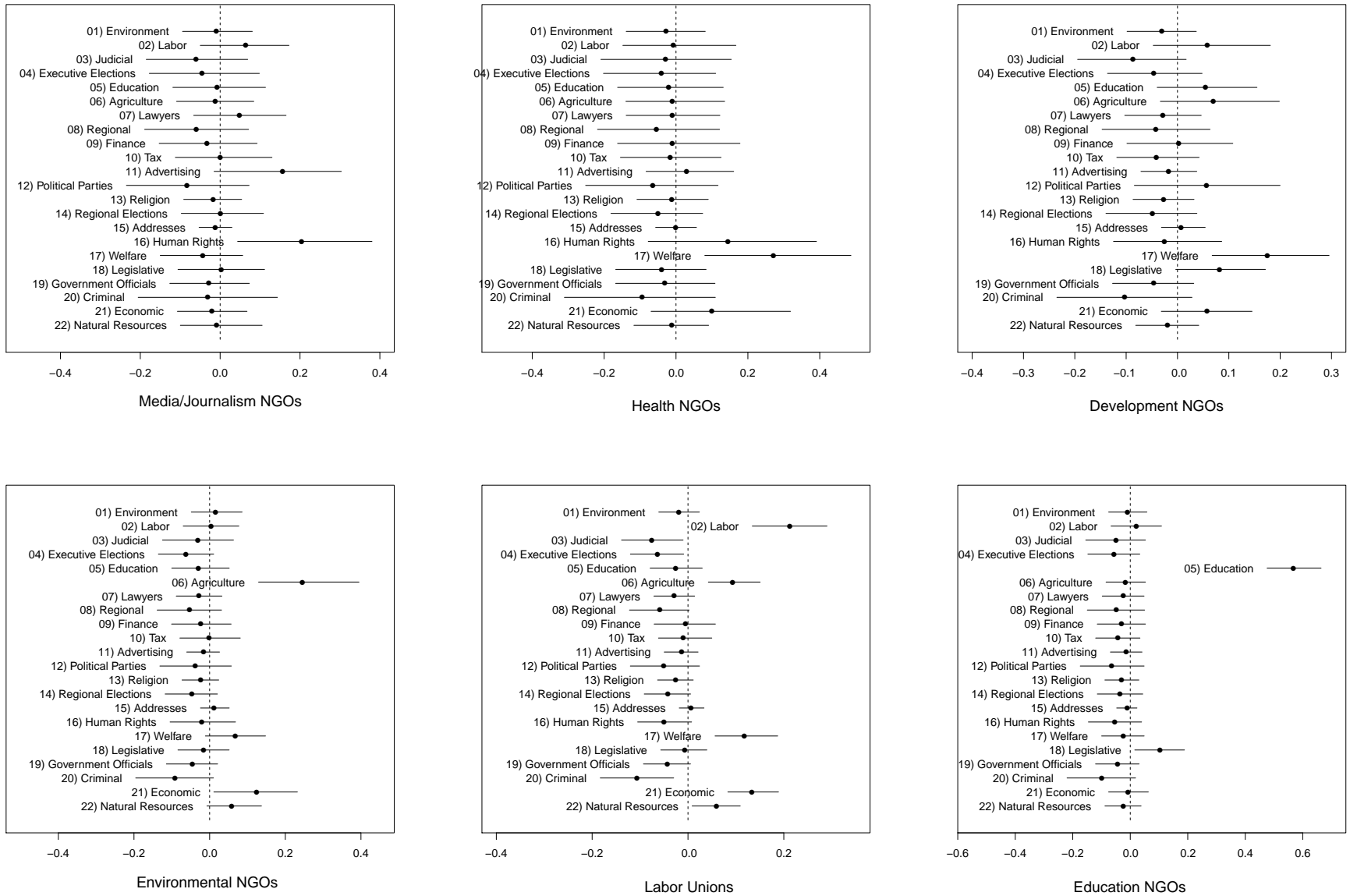
and political party petitioners, the magnitude of the effect is perhaps smaller than might be expected because parties are not the only types of petitioners to litigate these issues. For example, NGOs that work on election reform, such as CETRO, frequently challenge election laws (see Section 5.4). Nevertheless, parties and politicians do set the Constitutional Court's agenda for these topics, at least to some degree.

Finally, private businesses and corporations were more likely to file petitions related to the "finance" and "tax" topics (9 & 10). Businesses tend to engage in constitutional litigation relatively infrequently, but it is not surprising that they tend to challenge laws that regulate taxation and corporate governance. However, the magnitude of this effect is relatively small (around 0.1 for both).

### **4.3.3 Type of NGO**

As noted in the previous section, NGOs do seem to act as agenda setters in constitutional litigation. However, the magnitude of the effect is generally small (around 0.05 for each topic). One possibility is that combining all types of NGOs into a single category obscures individual differences. After all, the NGO category includes many different types of organizations, including labor unions, student groups, legal aid organizations, professional associations, and rights advocates. Each of these focuses on a unique set of policy issues. Figure 4.8 simply presents the average effect for all NGOs, obscuring any possible heterogeneous effects.

To account for this problem, I use the disaggregated NGO categories in Figure 4.2 to show the effect each type has on topic probabilities. I created a dummy variable for each NGO type and found the difference between means to show how the presence of each type of NGO affected the distribution of topic probabilities. The results are shown in Figure 4.9. I only show plots for NGOs with at least one difference between means significantly different from zero.



**Figure 4.9:** Estimated Effects of NGOs on Topic Proportions (1)

The plot shows the expected difference in topic posterior probability for when the specific type of NGO petitioner is of the type listed below versus all other NGO petitioners. The bars represent 95% confidence intervals.

The upper-left panel of Figure 4.9 shows the effect of petitions supported by supported by media/journalism NGOs. There is no topic specifically for “freedom of speech,” but the “human rights” topic (16) seems to cover speech.<sup>25</sup> The magnitude of the relationship is relatively large in that the presence of a media NGO increases the amount of text in a petition associated with the human rights topic by around 20%.

The next two panels in Figure 4.9 show the effect of petitions supported by health and development NGOs, both of which are significantly associated with the “welfare” (17) topic. Based on the top terms in Table 4.3, this topic seems to capture information about several different issues, including health (e.g., *sehat & tembakau*) and social security (e.g., *jamin & sosial*). The magnitude of the effect for both types of NGOs is relatively large; a development NGO increases the amount of text in a petition associated with the welfare topic by just under 20%, while that rises to over 25% for health NGOs.

In the bottom-left panel of Figure 4.9, environmental NGOs have a significant relationship with the “agriculture” topic (6), such that the presence of an environmental NGO increases the proportion of text in the petition associated with the “agriculture” topic by around 25%. Surprisingly, environmental NGOs are not agenda setters with respect to the “environment” or “natural resources” topics (1 & 22). I discuss possible explanations for this in Section 5.5.

Labor unions have a significant relationship with the “labor” topic (2); the presence of a labor union in a petition increases the text associated with that topic by around 20%. Labor union petitions also have a significant relationship with the “economic,” “agriculture,” and “welfare” topics (21, 6, & 17). The effect for the “economic” topic is modest (around 0.15), but still significant. These results likely stem from the fact that Indonesian labor unions occasionally participate in policy debates about economic and welfare legislation.<sup>26</sup>

Finally, education NGOs have the strongest agenda-setting effect amongst all NGOs

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<sup>25</sup>One of the constitutional amendments enacted during *Reformasi* protects the right to “communicate and acquire information” (Article 28F). The inclusion of the word “*informasi*” in the top terms for Topic 16 could be a reference to this provision.

<sup>26</sup>E.g., *Social Security Law Labor case*, MK Decision No. 70/PUU-IX/2011.



in Figure 4.9. Having an education NGO, teacher’s association, or university on the petition increases the amount of text associated with the “education” topic (05) by around 60%. This suggests that education NGOs proved dominant in policy debates about the constitutionality of education policy. I discuss the agenda-setting powers of education NGOs in greater depth in the next section.

Overall, the results in Figure 4.9 provide support for Hypothesis 4.2 in that NGOs with a specific policy focus will be more likely to file petitions related to that issue. Education NGOs are more likely to submit petitions related to education issues, labor unions file petitions related to labor, etc. However, Hypothesis 4.2 is not uniformly true because not all NGO petitions cover topics associated with the mission statements of those NGOs. The most obvious example is that petitions from human rights NGOs are not strongly correlated with the “human rights” topic (16). I discuss possible explanations for this discrepancy in Section 4.5.

As predicted in Hypothesis 4.3, the results suggest that petitions from NGOs are more likely to focus on socioeconomic issues compared to petitions from other types of petitioners. The topics most strongly associated with NGO petitioners in Figures 4.9-4.9 – “education,” “labor,” “agriculture,” “welfare,” and “economic” – all involve socioeconomic issues (and the welfare topic covered health issues). This suggests that NGOs set much of the Constitutional Court’s agenda with regard to socioeconomic rights and have considerable power in how they frame these issues for the justices.

## 4.4 Case Narratives

As noted in the previous section, education NGOs were responsible for a large proportion of the text in constitutional petitions associated with the education topic. In this section, I provide a set of qualitative examples demonstrating how education NGOs provided a support structure that allowed education-related policy disputes to reach the Constitutional Court. These cases support my theoretical argument in three critical ways. First, they illus-

trate the various tools NGOs use to set the Court's agenda. Second, they reveal that many of these cases would not have reached the Court but for the assistance of NGOs. Finally, they show NGOs using agenda-setting to keep an issue on the docket until the government complies with the Court's judgments.

By the early 2000s, the Indonesian education system was notorious for its low quality and corruption, with frequent accounts of parents or students paying bribes to obtain higher grades. Although the New Order increased the geographic reach of the state education system, government spending on education – per capita and as a percentage of GDP – remained low. The 1997-98 Asian Financial Crisis and *Reformasi* created a new opening for education reform by increasing the leverage of government technocrats and foreign donors, especially the World Bank. These groups pushed for autonomy for educational institutions, teacher certification, and market-based reforms (Rosser, 2015*b*, 199-200).

At the same time, leftist and progressive NGOs worried that the market-oriented reforms would lead to the privatization of the education system, increase costs, and reduce access for poorer and marginalized groups. Spurred by groups like ICW, they also worried that the reforms would exacerbate the corruption problem. For their part, teachers unions wanted the government to increase funding for the public school system. These groups initially tried to push for policy change by raising public awareness through the media and lobbying the DPR, but to no avail (Rosser, 2015*b*, 201). They then turned to the Constitutional Court, where they found more success.

NGOs could bring education debates to the Court because *Reformasi* constitutionalized education issues. As part of the fourth package of constitutional amendments passed in 2002, the MPR inserted an explicit “right to obtain an education” in Article 31. It also added a provision stating that the “government has a responsibility to fund” compulsory basic education for grades 1-9 (Article 31(2)). In Article 31(4), it even imposed a requirement that the government must allocate at least 20% of the state budget to education. Ironically, this last provision was thought by many to be an aspirational statement rather than a

justiciable right (Ellis, 2002, 146).

In 2004, a coalition of NGOs filed a petition alleging that the government had violated Article 31(4) because the 2005 budget only allocated 7% of the budget to educational expenditures as opposed to 20% (Susanti, 2008, 258). The petitioners also challenged the elucidation to the National Education System Law, which permitted the government to reach the 20% threshold “gradually” instead of immediately.<sup>27</sup> The Court agreed with the petitioners, but declined to declare the budget null and void, citing practical concerns that doing so would throw government into chaos (Butt, 2009).

A different group of NGOs, including the Indonesian Teacher’s Union, or *Persatuan Guru Republik Indonesia* (PGRI), challenged the 2006 and 2008 budgets on the same grounds, and again the Court declared the budgets unconstitutional but not null and void, deferring to the legislature to remedy the issue.<sup>28</sup> However, because the president and DPR had been made aware of the Court’s earlier ruling, they could no longer argue that they had made a good faith effort to comply with the Constitution. In the 2008 case, the Court found the president and DPR guilty of deliberately defying the Constitution and demanded that the 2009 budget fully meet their constitutional obligations. It also informed the government that if the next budget failed to pass constitutional muster, the Court would use its previous rulings as precedent to declare the budget null and void (Hendrianto, 2016*b*, 7).

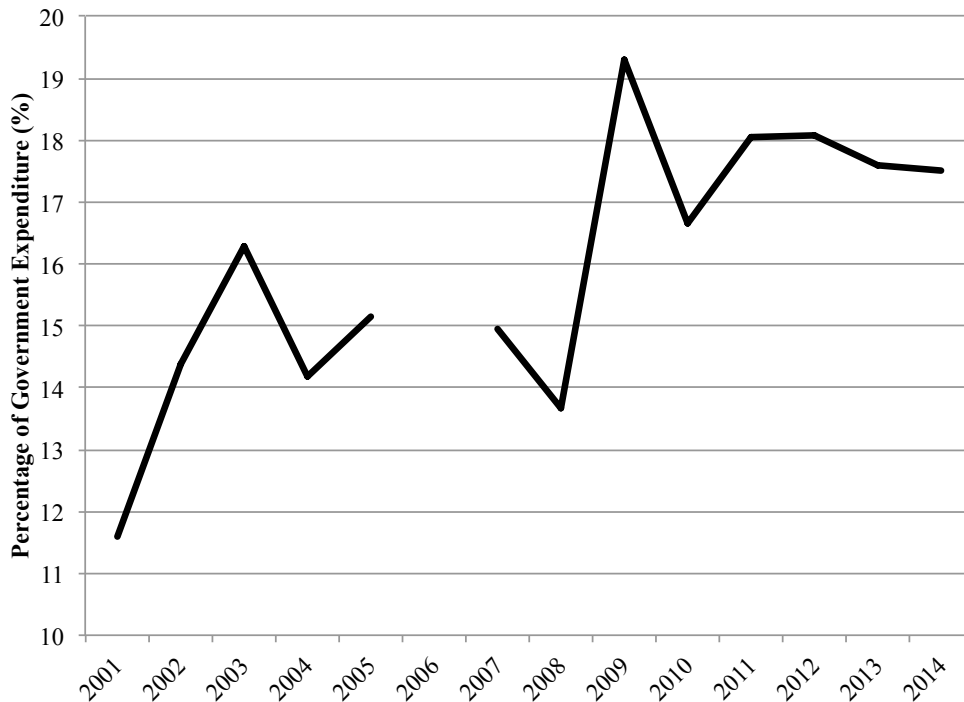
Although the Court hesitated to declare the state budgets null and void, its decisions had several important impacts. First, the justices received an opportunity to participate in the debate over education policy. Importantly, the majority stated unequivocally that Article 31 was justiciable. Second, the cases allowed the Court to interpret Article 31(4). Government lawyers argued that the 20% requirement included teacher’s salaries, whereas PGRI argued teacher salaries should be treated no differently than those of other civil servants – a particularly important point for PGRI because it represented teachers. The Court agreed

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<sup>27</sup> 2005 Budget case, MK Decision No. 012/PUU-III/2005.

<sup>28</sup> 2006 Budget case, MK Decision No. 026/PUU-III/ 2005 & 2008 Budget case, MK Decision No. 13/PUU-VI/2008.

with PGRI, shifting the benchmark for what citizens could and should expect for education funding. Finally, the cases put pressure on the DPR to increase funding for education (Gauri and Brinks, 2015, 93-94). After the rulings, the media and DPR committees increasingly focused on the state of the education system (Venning, 2008, 125). Moreover, this pressure led to concrete results; education as a share of total government expenditure increased from an average of 14.3% during 2001-2008 to 18.2% during 2009-2014 (see Figure 4.10).<sup>29</sup>



**Figure 4.10:** Education as Percentage of Total Government Expenditure (%)

Data are from the World Bank World Development Indicators available at <http://data.worldbank.org/>. Note data are missing for the year 2006.

In another case, a coalition of NGOs and activists challenged the 2009 Law on Education Legal Entities (*Badan Hukum Pendidikan* or BHP), which was designed to grant public and private schools greater autonomy. NGOs worried that these reforms were simply a way for the state to avoid its obligation to fund the education system and raise tuition. The coalition included the Education Forum, students associated with the Indonesian Is-

<sup>29</sup>It is interesting to compare this outcome with Chilton and Versteeg (2016), which finds that the adoption of a constitutional right to education generally does not lead to a significant increase in government spending on education.

Islamic Students' Movement (PMII), and the Association of Indonesian Private University Implementing Bodies (ABPPTSI), an association of charitable foundations managing private universities. One group of parents involved in the case was represented by lawyers from prominent NGOs, including ICW, the Institute for Policy Research and Advocacy (ELSAM), and the Legal Aid Organization. The petitioners were divided in their reasons for opposing the law. ABPPTSI feared losing control over the higher education institutions it managed and its ability to ensure delivery of education services. By contrast, the Education Forum parents worried about the cost of tuition and the stress of competitive exams (Rosser, 2015*b*, 204-05). ICW's lawyers emphasized the risk of corruption due to privatization.

In 2010, the Constitutional Court declared the 2009 BHP law unconstitutional, not as a violation of the constitutional right to education, but rather because it violated the right to legal certainty.<sup>30</sup> In other words, the Court accepted ABPPTSI's arguments about how the law would disrupt the status quo. The other NGOs were apparently satisfied with this outcome, viewing the Court's reasoning as a strategic decision to avoid the risk of a political backlash from relying too heavily on Article 31 (Rosser, 2015*b*, 205).<sup>31</sup> Some observers believe that the NGOs' public awareness campaign also helped because at the time Chief Justice Mahfud was preparing to run for president and saw education as a popular cause (Rosser, 2015*b*, 205).

Another education case involved the international standard schools, or *Sekolah Bertaraf Internasional* (SBI). The government created the SBI program as a way to encourage high-performing schools that used curricula from OECD countries, had modern information technology facilities, and taught in English. However, NGOs worried that the subsidies provided to these schools diverted resources from other state schools. Moreover, SBIs were allowed to charge fees, which NGOs claimed violated the constitutional obligation to provide free basic education. Finally, some NGOs worried that corruption in the state schools would increase

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<sup>30</sup> *Education Entities case*, MK Decision No. 11-14-21-126-136/PUU-VII/2009.

<sup>31</sup> The government later passed a new law (Law of 12 of 2012) granting a more limited form of autonomy to higher education institutions. This law was challenged by a group of student activists, but the justices rejected their argument. *University Entities case*, MK Decision No. 98/PUU-XIV/2016.

as they struggled to compete with SBIs (Rosser and Curnow, 2014, 305).

In 2012, three parents who had tried to pay for their children to attend SBIs submitted a petition to the Constitutional Court challenging Article 50(3) of the Law on the National Education System, which formed the legal basis for SBIs.<sup>32</sup> The parents did not launch the case on their own, but rather were supported by a coalition of NGOs, including ICW, ELSAM, the Education Coalition, and Schools Without Borders. The parents were of modest means, so it is unlikely they could have pursued litigation without this support (Rosser and Curnow, 2014, 313). These NGOs not only helped finance the litigation, but also found scholars, parents, and teachers through their networks who testified before the justices as witnesses (Rosser and Curnow, 2014, 312). In January 2013, the Court ruled in their favor, finding that funding public education is the responsibility of the state rather than private individuals.<sup>33</sup> The verdict rendered Article 50(3) null and void.<sup>34</sup>

The SBI case demonstrates how NGOs can set and frame the agenda even while advocating on behalf of indigent clients. The parents tended to focus on what they believed were the injustices they faced in the form of school fees and discrimination against poorer students. However, in the petition and in oral arguments, ICW focused on how corruption in the SBIs undermined the quality of education (Rosser and Curnow, 2014, 313). Thus, even within the specific field of education law, ICW's participation in the case allowed it to frame the case in a way that emphasized its policy preferences.

These cases help demonstrate how Indonesian NGOs used their agenda-setting power to influence the Constitutional Court, and ultimately education policy. First, they helped bring education issues to the Court's attention, affording the Court an opportunity to engage in policy debates. This is especially important given the initial uncertainty over the justiciability of Article 31. Second, NGOs possessed the infrastructure to monitor the government's

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<sup>32</sup>Law No. 20 of 2003.

<sup>33</sup>*Standard International Schools case*, MK Decision No. 5/PUU-X/2012.

<sup>34</sup>The government has since encouraged parents to make "voluntary contributions" to the former SBIs, and some local governments have chosen to provide these schools with additional funds to maintain their facilities, but it has not formally attempted to revive the SBI policy.

compliance with judicial decisions and file petitions if they detected any violations. This ability to engage in repeated litigation proved crucial with the budget cases because it allowed the Court to express its frustration with the government's noncompliance. Finally, in pursuing litigation alongside political mobilization, NGOs created an atmosphere in which the Court was allowed – or even expected – to rule against the government (Rosser, 2015*b*, 196).

## 4.5 Discussion

Both the topic model and the education cases provide evidence that Indonesian NGOs do act as support structures for legal mobilization in constitutional litigation. NGOs are more likely to file petitions dealing with socioeconomic issues compared to civil or criminal rights. Moreover, NGOs act as agenda setters for topics related to their mission statements. However, I also found significant heterogeneity in that these general results did not hold true for all NGOs for all topics. In this section, I explore some of the reasons for that heterogeneity, as well as other factors that might have affected my results.

One important question is why more types of NGOs in Table 4.2 did not end up acting as agenda setters for more topics. The results might simply confirm Hypothesis 4.3, in that NGOs are more likely to act as agenda setters for socioeconomic issues than for other types of topics. As noted above, litigating socioeconomic rights requires overcoming collective action problems and acquiring technical expertise. This is beyond the means of the average Indonesian citizen without help from SSLMs. As such, NGOs that focus on socioeconomic issues, such as PGRI, will have more opportunities to act as agenda setters than NGOs that work on claims also pursued by individuals, private business, and political parties.

Another possible explanation is that the distribution of topics uncovered by the topic model does not necessarily reflect how all NGOs view policy. While some NGOs, like PGRI, focus narrowly on a single policy issue, other NGOs focus on social problems that cut across

a range of topics. For example, ICW<sup>35</sup> participated in challenges to legislation about criminal procedure, elections, education, and legislature institutions. For ICW, these cases all represented opportunities to combat corruption, an issue that did not form a unique topic cluster in the topic model. Other NGOs, such as ELSAM,<sup>36</sup> are oriented less around a specific issue and more around an ideological skepticism of neoliberal economic policies. Their petitions might influence the docket, but not along the same dimensions as the clusters in the topic model.

NGOs also vary in the extent to which they view the Court as an appropriate forum for their grievances. As Bedner (2014, 565) notes, progressive NGOs tend to be more comfortable framing their arguments in terms of legal rights than as political tradeoffs. They lack influence in the legislature and bureaucracy, so they file petitions with the Court as an alternative. By contrast, religious organizations and industry groups can influence policy through the legislative and executive branches. Thus, these latter groups might not act as agenda setters in constitutional litigation simply because they do not need to rely on the Court to pursue their policy goals. More research on differences between types of Indonesian NGOs would help clarify when and why NGOs pursue policy change through constitutional litigation.

Finally, NGOs were not the only parties that filed petitions related to rights and other topics typically associated with progressive causes. For example, although one might expect environmental NGOs to be associated with the “environment” and “natural resources” topics (1 & 22), they are not (see Figure 4.9). This is because corporations and regional governments also actively challenged the constitutionality of environmental laws.<sup>37</sup> Their petitions influenced the Court’s agenda and diluted the agenda-setting power of environmental NGOs. Thus, NGOs are not the sole – or even the dominant – voice the Constitutional Court hears with regard to these issues.

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<sup>35</sup>Categorized as a “governance” NGO.

<sup>36</sup>Categorized as a “human rights” NGO.

<sup>37</sup>E.g., *Mining Law case*, MK Decision No. 10/PUU-X/2012.



Scholars who study Indonesia claim that the Constitutional Court tends to favor socioeconomic rights (Butt, 2012; Faiz, 2016*b*; Hendrianto, 2016*c*). By contrast, the justices tend to balance civil and criminal rights, especially freedom of religion, against morality and local customs (Faiz, 2016*b*, 167). While the results in this chapter do not directly confirm these observations, they do suggest another possible explanation. NGOs dominate agenda-setting for labor, education, and welfare issues on the Court's docket. In engaging with the Court so consistently on these issues, these NGOs might have helped persuade the Court to accept their ideological preferences. By contrast, where NGOs do not play an agenda-setting role, they have less influence over the Court, especially as it receives briefs from other types of petitioners who might advance competing policy positions.

One important limitation to this study is that I cannot account for the counterfactual. In other words, I can only observe the distribution of topics on the Court's docket given that petitioners had already filed those petitions. I cannot observe the distribution of topics with NGOs and compare it to the distribution of topics in the absence of NGOs. In theory, this presents a causal inference problem. It is possible that some of the cases filed by NGOs would have been filed anyways in their absence by other types of petitioners. Indeed, NGOs often formed a coalition with other types of litigants, including law professors, smaller political parties, and individual activists.

I argue several factors mitigate this problem. First, the fact that the Court's decisions only apply prospectively means it is less likely non-NGO petitioners would have substituted for NGOs in their absence. Individual citizens are less likely to pursue litigation without the prospect of selective incentives, such as a remedy for past harms. More importantly, the average Indonesian lacks the legal knowledge and financial resources to litigate constitutional claims on their own. For example, although parents had wanted to challenge the education policies discussed in the previous section, they required assistance from NGOs. In fact, Rosser and Curnow (2014, 312) suggest that the initiative for the SBI case came from the NGOs, not the parents. Finally, the anti-neoliberal, anti-politics preferences most of these

NGOs represent are not widely shared by other elite Indonesian organizations with the power and resources to pursue constitutional litigation.

It is worth noting that my test only covers one form of agenda-setting, namely bringing topics to the court's docket. This is critical in that the distribution of topics on the docket is associated with the range of policy issues the court can adjudicate. However, agenda-setting can also operate in more nuanced ways, such as how the petitioner frames a legal argument, the type of evidence provided, etc. For example, in the SBI case, ICW attempted to frame its objections to a law about education privatization in terms of corruption. Unfortunately, it is more difficult to detect this type of agenda-setting with natural language processing tools, so my results do not capture the full scope of NGOs' agenda-setting powers.

## 4.6 Concluding Remarks

Much of the judicial politics literature focuses on the outcomes of disputes, but as Epp (1998) argues it is at least as important to understand how and why disputes reach courts in the first place. Using data from the Indonesian Constitutional Court, I developed a Structural Topic Model in order to capture information about the distribution of topics in petitions submitted to the Court from August 2003 to October 2013. I then tested the agenda-setting power by measuring the association between each topic and each type of petitioner. My results provide qualified support for Epp's theory about the role of support structures in setting the judicial agenda. However, they also demonstrate the importance of treating NGOs and topics as heterogeneous groups. Past studies have treated all NGOs alike, but my results suggest heterogeneous NGO behavior in constitutional litigation. I also found that NGOs had a stronger influence over socioeconomic cases than other types of cases. At the very least, this suggests that scholars should be wary of overgeneralizing the relationship between NGOs and rights litigation.

In assessing the generalizability of my results, I believe there are two features of the Indonesia Constitutional Court that might not be present in other countries. First, the

Court has adopted a relatively lax standing threshold. Higher standing thresholds in other countries would raise the barriers NGOs face and prevent them from filing petitions not tied to a specific harm. This could prove especially problematic for socioeconomic right violations, which tend to affect groups rather than individuals. Second, the Court's prospectivity doctrine prevents petitioners from obtaining redress for past harms, which discourages individuals from pursuing constitutional claims. In countries without such a rule, individual citizens would probably play a larger role in constitutional litigation because there would be greater benefit to obtaining a favorable decision. At the very least, these two rules influence the strategic decisions of Indonesian NGOs in ways that might not hold true elsewhere.

Other factors influence the distribution of topics that Indonesian NGOs pursue. Indonesia is a middle-income, developing democracy (approx. \$3,475 GDP per capita). To the extent NGOs are responsive to public demand, this means they will focus relatively more on socioeconomic issues or corruption than civil rights or environmental issues. The dockets of constitutional courts in other countries will inevitably contain a different distribution of legal topics based on local demand. Moreover, Indonesian civil society includes an influential subset of NGOs that is anti-neoliberal and anti-political. My specific findings about agenda setting and socioeconomic rights might hold true for courts in other developing democracies with an active, anti-neoliberal NGO sector, but not necessarily for developed democracies like the U.S. or Japan.

The results in this chapter suggest several areas for future research. First, we need to better understand the strategic factors that influence an NGO's decision to pursue constitutional litigation. To what extent do NGOs view litigation as simply an alternative to lobbying the elected branches of government? What other factors encourage or discourage NGOs from pursuing litigation? It is possible that political factors or resource constraints affect the distribution of NGOs that even consider constitutional litigation, which in turn affects the legal issues that reach the docket. Moreover, researchers should try to better understand why some NGOs focus narrowly on a single issue, while others address a wider

range of policies. This would help us better understand when we should expect NGOs act as agenda setters for specific legal topics.

Of course, filing a petition is merely the first step in constitutional litigation and tells us little about whether or not the Constitutional Court will grant the petition. Epp (1998) argues that SSLMs do ultimately effectuate policy change through repeatedly setting the judicial agenda. Although I did not specifically test this part of Epp's theory, the education cases discussed in Section 4.4 suggest that Indonesian NGOs did ultimately manage to achieve policy change through repeated constitutional litigation. In the next chapter of this dissertation (Chapter V), I focus on case outcomes in Constitutional Court cases and the extent to which public opinion influences judicial voting behavior.

## CHAPTER V

### Judicial Voting

In Chapter IV, I looked at how NGOs influence the agenda of the Indonesian Constitutional Court by filing petitions. In this chapter, I examine how the justices dispose of those petitions once they reach the docket. Although many scholars have used statistical models to understand judicial voting behavior, most of the literature focuses on the effects of political constraints or ideology, not on the litigants themselves (see Chapter III). The identity of litigants could matter in several ways. On the one hand, Galanter (1974) argues that litigation inherently favors wealthier litigants with greater access to legal resources. On the other hand, Vanberg (2005) believes judges look to litigants, especially *amicus curiae*, for signals of public opinion; the judges will feel more confident ruling against the government if they believe the public will mobilize to support the court's decision. I test these theories using data from Indonesian Constitutional Court cases.

Although I build upon previous models of judicial voting behavior to test how litigants influence case outcomes, my approach differs from the existing literature in three crucial ways. First, I test several different measures of litigant identity, including an ordinal measure of petitioner resources, a dummy variable for different types of petitioners, and a continuous variable with the total number of petitioners. Second, I treat the number and diversity of individuals and/or organizations that sign on to a petition as an indirect signal of public support for the petition. Third, I count briefs submitted by *amicus curiae* as an alternative

signal of public support, ones that might counteract signals sent by the petitioners.

In Section 5.1 of this chapter, I build upon the review of the judicial behavior literature in Chapter III and discuss models that incorporate information about public opinion and party identity. I also present a set of testable hypotheses. Next, in Section 5.2, I explain my empirical strategy and data. I then summarize my results in Section 5.3, finding that the Constitutional Court is more likely to grant petitions supported by a larger number of petitioners, but less likely to do so when it receives third-party briefs opposing the petition. In Section 5.4, I discuss constitutional challenges to electoral and blasphemy laws in order to illustrate how and why public opinion influences the justices. Finally, in Sections 5.5 and 5.6, I discuss my results and the broader implications for the literature.

## **5.1 Theory**

As discussed in Chapter III, the majority of the literature on judicial voting behavior focuses on how political institutions and judges' policy preferences affect voting outcomes. There has been far less research on the effect of litigants, the actors with the most at stake in the outcome of the case. In this section, I review the political science literature on litigant-centric models of judicial voting behavior, particularly those addressing the roles of party resources, litigant identity, and public opinion. I conclude with a game theoretic model that leads to a set of testable hypotheses.

### **5.1.1 Literature Review**

#### **5.1.1.1 Party Resources**

In theory, courts reduce power asymmetries between litigants by acting as neutral arbiters in legal disputes. However, Galanter (1974) argues that parties with greater access to legal resources are more likely to succeed in litigation. He notes that resource-rich litigants (“haves”), such as corporations, also tend to be “repeat players” in the legal system. The

system advantages repeat players because they can: 1) amortize the costs of developing legal expertise; 2) build a credible reputation through repeated interactions with the judges; 3) afford short-term losses in order to maximize long-term gains; and 4) influence the development of the rules of litigation over time (Galanter, 1974, 96-103). By contrast, “one-shot” players focus on maximizing immediate gains and might prove unwilling or unable to invest the resources needed to win a case.

Other scholars have sought to test Galanter’s party capability/resource inequality theory, primarily in the U.S. appellate federal courts. Following Wheeler et al. (1987), scholars measure party strength by ranking types of litigants, with the federal government as the strongest, then state/local governments, businesses, unions/NGOs, and finally individuals. The results have been mixed. Wheeler et al. (1987), Songer and Sheehan (1992), Songer, Sheehan and Haire (1999), and Albiston (1999) find that stronger parties do possess an advantage, with a much higher ratio of success as appellants than losses as respondents.<sup>1</sup> Likewise, several articles have found a positive relationship between the quality of attorneys and success in litigation (McGuire and Caldeira, 1993; McGuire, 1995).

While these findings seem to hold true for U.S. courts, evidence for the party capability theory in other countries is at best inconclusive. Scholars have found that “have-nots,” such as farmers, fare worse in Shanghai courts (He and Su, 2013), while more experienced attorneys do seem to improve the chances of success in the South African Supreme Court of Appeal (Haynie and Sill, 2007) and Canadian Supreme Court (John Szmer and Sarver, 2007). Beyond that, researchers have found no systematic advantage for repeat players or “haves” in countries as different as Australia (Smyth, 2000), Israel (Dotan, 1999), Russia (Hendley, Murrell and Ryterman, 1999), South Africa (Haynie and Sill, 2007), and Taiwan (Chen, Huang and Lin, 2013). The results for Canada (e.g., McCormick, 1993; Flemming and Krutz, 2002) and the U.K. (e.g., Atkins, 1991; Hanretty, 2013*b*) are also mixed, with

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<sup>1</sup>Wheeler et al. (1987) recommend using this net advantage measure rather than the party’s absolute rate of success because it is independent of the number of times the party acted as an appellant or appellee. This is not a problem for my dissertation because the Indonesian Constitutional Court has exclusive competence to adjudicate constitutional claims.

different studies reaching different conclusions.

One reason for the contradictory results is that scholars treat litigant status as an ordinal variable, which imposes questionable assumptions about the relative strength of litigants (see Olson, 1990). As Grossman, Kritzer and Macaulay (1999) point out, governments are not simply another form of repeat player, but rather have a unique ability to reshape the rules of litigation. This is perhaps most evident in how governments can define the court's jurisdiction and standard of review (Shipan, 2000). Later work on party strength in the U.S. (Farole, 1999; Ulmer, 1985; Sheehan, 1992), Canada (McCormick, 1993; Flemming and Krutz, 2002), the U.K. (Hanretty, 2013*b*), and Taiwan (Chen, Huang and Lin, 2013) found that the positive relationship between party strength and judicial outcomes in previous research was driven largely – and sometimes exclusively – by government litigants. It is not clear if party strength still matters in the absence of government litigants.

Another problem is that litigant status could be correlated with judicial ideology (Black and Boyd, 2012). For example, in the U.S., liberal judges tend to be more sympathetic to legal arguments associated with “have-nots” (e.g., racial minorities challenging discrimination), whereas conservative judges tend to be more sympathetic to legal arguments associated with “haves” (e.g., such as corporations challenging economic regulations). Indeed, several studies have found that the effect of party resources changes as the median justice's ideal point changes over time (Ulmer, 1985; Sheehan, 1992; Sheehan, Mishler and Songer, 1992).

Haynie (1995) presents an interesting rebuttal to the party capability theory. Using two measures of party strength – litigant status (Haynie, 1994) and geographic location (Haynie, 1995) – she finds that, during the years 1961-1986, the Philippine Supreme Court was not only more likely to rule in favor of “have-nots,” but also in favor of litigants from poorer regions of the country. She argues that the Court favored weaker litigants during the Marcos dictatorship in order to enhance its legitimacy. Had the court consistently favored elite parties, it would have risked appearing corrupt or politically subservient. Haynie's theory could help explain the presence of activist courts sympathetic to “have-nots” in weak



authoritarian regimes or developing democracies.

Although this chapter is the first study to directly test the party capability theory in Indonesia, the Community and Ecological Based Society for Law Reform (HuMa), an Indonesian NGO focused on justice for marginalized communities, issued a report in 2012 alleging that the Constitutional Court primarily benefits elites. HuMa reached this conclusion by analyzing 478 decisions and finding that most of the litigants were either political parties or corporations; by contrast, only 6.4% of the decisions involved NGOs, religious institutions, or traditional groups (HukumOnline, 2010). However, the report relies upon a sample that includes not just constitutional review cases, but also disputes over election results and the authority of state institutions, both of which inevitably involve political parties or state actors. Moreover, while access to the Court is important, case outcomes are even more so. Thus, while elite institutions pursue their policy goals in the Court, it is far from clear that they possess a distinct comparative advantage. Most scholars who study the Court believe that it does not systematically favor petitions from elites and often rules against them (e.g., Mietzner, 2012; Butt, 2015).

#### **5.1.1.2 Public Opinion**

Litigants can also influence judicial behavior by sending signals about public opinion. Judges do not poll the public about cases that come before their court, so litigants are the primary intermediaries between the court and the public. The briefs sometimes include information about public attitudes toward the policy challenged in the petition. For example, briefs to the U.S. Supreme Court in death penalty cases regularly refer to opinion polling on capital punishment (Vidmar and Sarat, 1976). In addition, judges might view the number of parties that file briefs supporting/opposing a petition for constitutional review as indicative of public opinion. The literature on U.S. courts finds that a party's chances of success increase as it receives more support from amicus curiae briefs (see Caldeira and Wright, 1988; Songer and Kuersten, 1995; Songer, Kuersten and Kaheny, 2000; Vanberg, 2005; Collins, 2008;

Collins and Martinek, 2010).<sup>2</sup> Collins (2007, 63) even claims that the the unprecedented number of amicus briefs in *Grutter v. Bollinger* (more than 70) convinced Chief Justice Rehnquist, a conservative, to uphold affirmative action.

Courts are often depicted as countermajoritarian institutions, acting as a check on the popular will (see Bickel, 1962). With a few exceptions,<sup>3</sup> judges are selected by other government institutions, not by the voters. However, even independent courts are not completely insulated from the elected branches of government, which in turn respond to public opinion (Bergara, Richman and Spiller, 2003; Friedman, 2009). In many countries, the legislature and executive have some role delineating a court's jurisdiction, setting standards of review, appropriating funds, and even removing judges. If the court becomes too unpopular, elected politicians might respond to their constituents by attacking or constraining the court.<sup>4</sup> Thus, judges do have incentives to pay attention to and not veer too far from public opinion (Mishler and Sheehan, 1993).

On the other hand, a sympathetic public can protect the judiciary from a hostile executive or legislature. Members of the public are more likely to mobilize on behalf of the court if they view it as a legitimate and impartial forum for dispute resolution, regardless of the outcome of any particular case. Courts accrue legitimacy over time, so older courts tend to receive higher levels of public support (Gibson, Caldeira and Baird, 1998). This presents a challenge for newer courts, which cannot rely upon their reputation or historical legacy. People tend to evaluate newer courts based on the outcomes of individual cases. They are more likely to view the court's impartiality and independence as credible if they observe it ruling against elite actors or the government. Thus, under certain conditions,

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<sup>2</sup>Although in the Supreme Court the effect is larger for appellees than appellants (Collins, 2004; Kearney and Merrill, 2000).

<sup>3</sup>Notably the United States, where around half of states hold elections for judges at either the trial or appellate level, and Bolivia (see Baum, 2003; Driscoll and Nelson, 2013).

<sup>4</sup>As happened in the U.S. during the early 20<sup>th</sup> century, when courts regularly struck down popular progressive economic legislation (Milkis, 2009). President Franklin D. Roosevelt infamously tried to pack the Supreme Court with sympathetic justices, but was ultimately thwarted by Congress (Shesol, 2010). Increasingly, countries use independent judicial commissions to appoint and discipline judges, creating an additional buffer between popular opinion and the court (see Garoupa and Ginsburg, 2009).

newer courts have an incentive to burnish their legitimacy by granting popular petitions against elites (Haynie, 1994). In the Philippines, for example, strong public support has enabled the Supreme Court to rule against other branches of government, despite strong elite opposition (Deinla, 2014, 150-52). By contrast, the public is less likely to mobilize on behalf of the court if it is viewed as politically or ethically compromised (Haynie, 1994).

Public opinion can also help courts enforce their judgments against recalcitrant politicians. Even if legislature does not attempt to directly undermine the court's independence, it can still try to override the judgment by passing a constitutional amendment. For its part, the executive can undermine the judgment by refusing to enforce it. Vanberg (2005) argues that courts are more likely to rule against the government when the public can monitor and punish such noncompliance. He tests this theory using amicus briefs submitted to the German Constitutional Court as an indicator of public support. Indeed, he finds that the court is more likely to declare a law unconstitutional if it receives a larger number of amicus briefs asking it to do so. Thus, judges can strategically mobilize popular opinion to advance their policy preferences.

However, Vanberg also notes that the public has less capacity to detect noncompliance in cases dealing with complex legal issues. For complex policy issues, such as economic regulation, assessing compliance with the law often requires advanced subject-matter expertise. By contrast, the average person should possess enough information to determine if the government has violated civil and political rights because such violations tend to be highly visible and easily understood. Indeed, Vanberg (2001) finds that amicus briefs to the German Constitutional Court are less effective in complex cases (see also Carrubba and Zorn, 2010, finding similar results for the U.S. Supreme Court). Thus, judges not only need to consider public opinion, but also the extent to which the public can detect noncompliance.

Broad measures of public opinion do risk overlooking the views of impassioned minorities. Even a decision popular with the general public could provoke a backlash if it angers a mobilized and politically influential minority, such as a significant ethnic minority group

or a geographic region of the country. As per the logic of Weingast (1997), when the court's ruling satisfies a broader coalition, it becomes less likely there exists a group that would have an incentive to retaliate against the court for an adverse ruling. As such, we should expect judges to give greater weight to a litigant coalition's claims if it represents a more diverse set of interests. A coalition that cuts across social cleavages and interest groups has greater capacity to mobilize the public against the executive should it refuse to comply with the judgment.

There is some evidence that the decisions of independent courts do reflect public opinion, at least to some extent. For example, although the U.S. Supreme Court's jurisprudence does not strictly track the public's ideal point or policy preferences (Norpoth and Segal, 1994; Calvin, Collins and Eshbaugh-Soha, 2011), the Court tends not to stray too far from public opinion (Mishler and Sheehan, 1993; McGuire and Stimson, 2004), especially when it comes to decisions on major policies or legislation (Barnum, 1985, 664). Friedman (2009) claims that Congress and the president have successfully pressured the Court when it veered too far from public opinion. In the Philippines, Deinla (2014, 144) finds that the Supreme Court is very responsive to trends in public opinion, carefully evaluating which cases on its docket received the largest public outcry or scrutiny. We know much less about how information regarding public opinion reaches judges in the first place.

As discussed in Chapter II, Indonesian public opinion seems to influence the Constitutional Court. The justices themselves openly admit the importance of public opinion. Justice Muruarar Siaahan called public opinion "absolutely vital" to preserving the Court's independence. Former Chief Justice Asshiddiqie even claims that public opinion and NGO activism were far more influential than any intimidation the justices faced from the executive, DPR, or military (Mietzner, 2010, 414).<sup>5</sup> Knowing this, the chief justices took steps to cultivate and shape public opinion. Asshiddiqie launched a campaign to raise public awareness about the MK, including a weekly radio and television program in which he discussed the

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<sup>5</sup>On the other hand, he also worried that "some judges want to be popular" (Mietzner, 2010, 414).

Court's decisions. Former Chief Justice Mohammad Mahfud regularly gave interviews to the media, sometimes to criticize government agencies that had not complied with judgments (Hendrianto, 2016c, 520, 541).<sup>6</sup> In this chapter, I investigate the effect of public opinion on the outcome of individual cases.

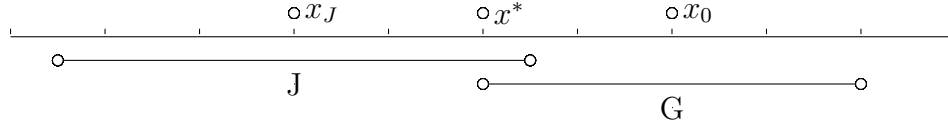
### 5.1.2 Hypotheses

In this section, I present a game theoretic model in order to demonstrate how public opinion and litigant identity might affect judicial voting outcomes in the Indonesian Constitutional Court. I use an ideal point analysis along a unidimensional policy space with three actors: the court/median judge ( $J$ ), the government ( $G$ ), and a petitioner ( $P$ ). Each actor's ideal point is located in the center of its tolerance zone, or Pareto set. I begin by allowing the government to pass a law ( $x_0$ ) located at its ideal point  $G$ . I then assume that a petitioner files a petition for constitutional review asking the Court to shift policy  $x$  closer to its ideal point.

In Figure 5.1, I present the general game without any petitioners so as to demonstrate the implications of the judicial behavior models discussed in Chapter III. According to a formalist model, the judges would issue a decision based upon their understanding of the law, which could result in  $x$  being shifted anywhere along the policy space. By contrast, according to the attitudinal model, the judges would issue a decision based on their policy preferences, moving policy from  $x_0$  to their ideal point  $x_J$ . However, the strategic-institutionalist model argues that even independent courts do need to consider the preferences of other government institutions. If the court moves policy too far left, then there is a risk that the legislature will try to override its decision or that the executive will try to evade it. Knowing this, the court only moves policy to  $x^*$ , as close to its ideal point as possible while remaining within the government's tolerance zone.

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<sup>6</sup>For example, the General Election Commission initially refused to comply with the Court's judgment in the *Open List case* (MK Decision No. 22-24/PUU-VI/2008). Mahfud issued a press statement warning that the commissioners would face political and criminal consequences if they did not comply, which they eventually did (Budiarti, 2010, 92).



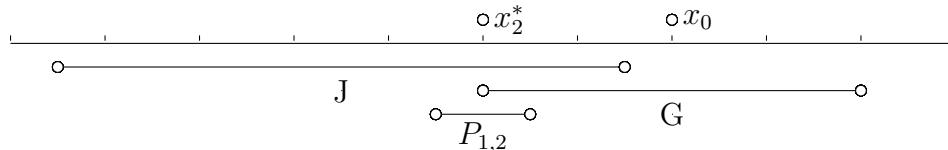
**Figure 5.1:** Game Theoretic Model: Judicial Voting Behavior

$J$  = Judiciary;  $G$  = Government;  $x_0$  = government legislation;  $x$  = court's judgment, such that  $x^*$  is within the overlap between court and government's tolerance zones.

In Figure 5.2, I introduce petitioners,  $P_1$  and  $P_2$ , to represent the party capability/resource inequality model.  $P_1$  and  $P_2$  each file separate challenges to the constitutionality of  $x_0$ . Assuming for illustrative purposes that the petitioners share the same ideal point, the party capability theory predicts that the stronger party is more likely to win its case. If  $P_1 < P_2$  (e.g.,  $P_1$  is a street vendor and  $P_2$  is a multinational corporation), then  $P_1$  will fail to convince the judges to grant its petition (i.e.,  $x_0$  remains constitutional), but  $P_2$  will succeed (i.e.,  $x^* = x_2$ ). This leads to the first hypothesis:

**Hypothesis 5.1 (Petitioner Strength):** The probability that the Constitutional Court grants a petition *increases* if the petition is filed by a litigant with greater access to resources.

Note that the court only shifts  $x$  to the petitioner's ideal point, not the leftmost edge of its tolerance zone, because otherwise the petitioner would acquiesce to government attempts to shift  $x^*$  to the right.



**Figure 5.2:** Game Theoretic Model: Party Strength Model

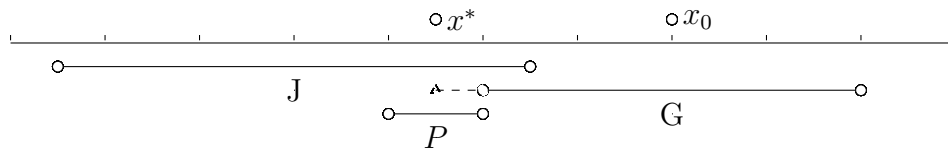
$P_1$  = Petitioner 1;  $P_2$  = Petitioner 2;  $J$  = Judiciary;  $x$  = court's judgment, such that  $x^*$  is within the overlap between court and first petitioner's tolerance zones if  $P_1 > P_2$ .

In Figure 5.3, I present a version of the model motivated by my discussion of embedded judicial autonomy in Chapter III (see Section 3.2). The embedded autonomy model posited

that courts have an incentive to strategically grant petitions from non-state actors because doing so increases the government’s audience costs should it try to defy court judgments. This effectively extends the government’s tolerance zone to the petitioner’s ideal point (as indicated by the dashed line in Figure 5.3). In this scenario, I consider two different types of non-state actors: NGOs and public opinion. If the judges believe that NGOs are critical external stakeholders, then it will be more likely to rule in favor of petitions supported by NGOs (i.e.,  $P$  is an NGO). This leads to the second hypothesis:

**Hypothesis 5.2 (NGOs):** The probability that the Constitutional Court grants a petition *increases* if NGOs support the petition.

In this case, the court rules in favor of  $P_{NGO}$ , shifting policy away from the government’s ideal point toward its own. It does so in the knowledge that the NGO will mobilize to defend the decision because  $x^*$  is closer to its ideal point than  $x_0$ .



**Figure 5.3:** Game Theoretic Model: Embedded Autonomy Model  
 $P_{NGO}$  = NGO;  $J$  = Judiciary;  $G$  = Government;  $x_0$  = government legislation;  $x$  = court’s judgment, such that  $x^*$  is within the overlap between court and NGO’s tolerance zones.

By contrast, the court might believe that NGOs are not a sufficient proxy for audience costs, especially because NGOs do not always share the same policy preferences as the average person. Courts might instead look for signals about public opinion more generally. One observable signal – at least for judges in a low-information environment – is the size and diversity of the petitioner’s coalition. Judges might believe that a petition more likely reflects the public will if it is supported by a larger and more diverse group of individuals and/or organizations. In this scenario,  $P$  in Figure 5.3 represents a large and diverse coalition of petitioners. The court will rule in favor of this petition and move policy to  $x^*$ , knowing that the public will mobilize to defend its decision. This leads to the following hypotheses:

**Hypothesis 5.3a (Petitioner Number):** The probability that the Constitutional Court grants a petition *increases* as the number individuals and/or organizations who support the petition increases.

**Hypothesis 5.3b (Petitioner Diversity):** The probability that the Constitutional Court grants a petition *increases* as the diversity of individuals and/or organizations who support the petition increases.

The mechanism of audience costs is similar to that of Hypothesis 5.2, but the court looks to the general public instead of NGOs.

As Vanberg (2001) notes, courts also receive signals about public opinion through amicus curiae briefs. If the court receives a larger number of related party briefs supporting a petition, that would reinforce the perception that the petitioner’s policy preferences have widespread public support. By contrast, if it receives a larger number of briefs against the petition, it would signal that there exists a significant segment of the population that has the ability and motivation to mobilize against the court if it grants the petition. In Indonesia, amicus curiae, known as related parties (*pihak terkait*), can file briefs in support of or against a petition. This leads to the following two corollary hypotheses:

**Hypothesis 5.4a (Related Party Briefs For):** The probability that the Constitutional Court grants a petition *increases* as the number of related parties that file briefs in support of the petition increases.

**Hypothesis 5.4b (Related Party Briefs Against):** The probability that the Constitutional Court grants a petition *decreases* as the number of related parties that file briefs against the petition increases.

## 5.2 Methodology & Data

In this section, I build upon the literature to develop a statistical model to test how Indonesian litigants influence Constitutional Court case outcomes. Because there are no preexisting databases of Indonesian Constitutional Court cases, I created a unique dataset of cases adjudicated during the terms of the first three chief justices, Jimly Asshiddiqie,



Mohammad Mahfud, and Akil Mochtar (August 13, 2003 – October 2, 2013). During this period, the Court received 560 petitions and issued 460 final judgments,<sup>7</sup> while 64 were withdrawn before the Court could issue a final judgment (omitted from analysis). The primary independent variables for the model utilize information about petitioner identity.

The primary dependent variable (*outcome*) is whether or not the Constitutional Court granted the petition, either in whole or part. I use a logit model because the dependent variable is binary ( $y = 1$  if yes, 0 else). Although the Court can reject a petition for many reasons, including lack of standing, I treat all rejections the same ( $y = 0$ ). As noted in Chapter II, the Court adopted relatively liberal standing rules; in most cases where petitioners lacked standing, they did so because they had not proved a constitutional harm, meaning that they would also not have won on the merits. Overall, the Court granted around 28.5% of the petitions for constitutional review it received during its first ten years. This rate remained fairly consistent under each of the three chief justices. To account for unobserved effects of the Court's leadership on the court's proclivity to grant briefs, I use a fixed-effects model grouped by the chief justice who presided over each case (Jimly Asshidique, Mohammad Mahfud, or Akil Mochtar).

### 5.2.1 Petitioners

To test the party capability/resource inequality theory (Hypothesis 5.1), I follow the literature in creating an ordinal variable for the relative strength of petitioners (*party-strength*). Different scholars have taken different approaches to coding party strength (see Black and Boyd, 2012, Table 1), but all tend to place individuals at the lowest level, then NGOs, private businesses, and finally local and national governments. Because of the difficulty of finding information about many Indonesian petitioners, I could not utilize the more granular approach of Sheehan, Mishler and Songer (1992) or Collins (2007), who differentiate between poor, minority, and other individuals. Moreover, almost a quarter of constitutional review

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<sup>7</sup>Some petitions were consolidated with others challenging the same law.

cases on the Indonesian Constitutional Court’s docket involved political parties and party members (see Table 4.1), so I needed to create a new category for these litigants.

First, I used the same coding scheme to categorize petitioners as in in Section 4.2 of Chapter IV (see also Appendix A). I then ranked the parties from weakest to strongest as follows: 1) individual unaffiliated with any organization; 2) political party/candidate; 3) nongovernmental organization (NGO); 4) private business/corporation; 5) local government institution; and 6) national government institution. I placed the “political party/candidate” group in between NGOs and individuals because the overwhelming majority of petitions from parties/candidates were from small or niche parties that had no seats in the DPR. I ranked each petition based on the identity of its strongest petitioner. For example, if a petition included an individual, political party, and local government, then  $x_{party\_strength} = 5$ . In Table 5.1, I provide summary statistics for each category of party strength. Although government petitioners (5 & 6) are more likely to win, the overall rate of success is not clearly correlated with party strength, providing preliminary evidence against Hypothesis 5.1.

Party Strength $\geq$	1	2	3	4	5	6	Total
<i>Number of Cases</i>	186	93	107	31	28	15	460
<i>Petitions Granted</i>	26.9%	18.3%	34.6%	29.0%	39.3%	46.7%	28.5%

**Table 5.1:** Summary Statistics of Party Resources Variable

To test the effect of NGOs on case outcomes (Hypothesis 5.2), I created two variables. First, I created dummy variables for each petitioner type indicating the presence of at least one of that type in the case. For example, if an NGO submitted the petition, then  $x_{dummy\_ngo} = 1$ , while  $x_{dummy\_individual} = 0$ , etc. These variables are not mutually exclusive; a single case can contain more than one type of petitioner. Second, I created an alternative measure using the number of each type of petitioner involved in each case (e.g., *number\_ngo*). I then took the natural log of this measure because I expect the marginal effect of petitioner identity to decrease with each additional petitioner.<sup>8</sup> In Table 5.2, I provide summary statistics on the types of petitioners involved in each case. Unlike Table 5.1, which focused on

<sup>8</sup>I transformed all logged variables in this chapter by adding 1 to avoid taking the log of 0.

the overall strength of the petitioner coalition, Table 5.2 only looks at the identity of each petitioner. Aside from the national government, NGOs have the highest rate of success in constitutional litigation, followed closely by local governments. This provides preliminary support for Hypothesis 5.2 in that the Court seems more likely to rule in favor of NGOs.<sup>9</sup>

	Individual	Political	NGO	Business	Local gov.	National gov.	Total
<i>Number of Cases</i>	260	110	122	31	36	15	460
<i>Petitions Granted</i>	31.2%	19.8%	36.9%	29.0%	36.1%	46.7%	28.5%

**Table 5.2:** Summary Statistics of Petitioner Type Dummy Variables

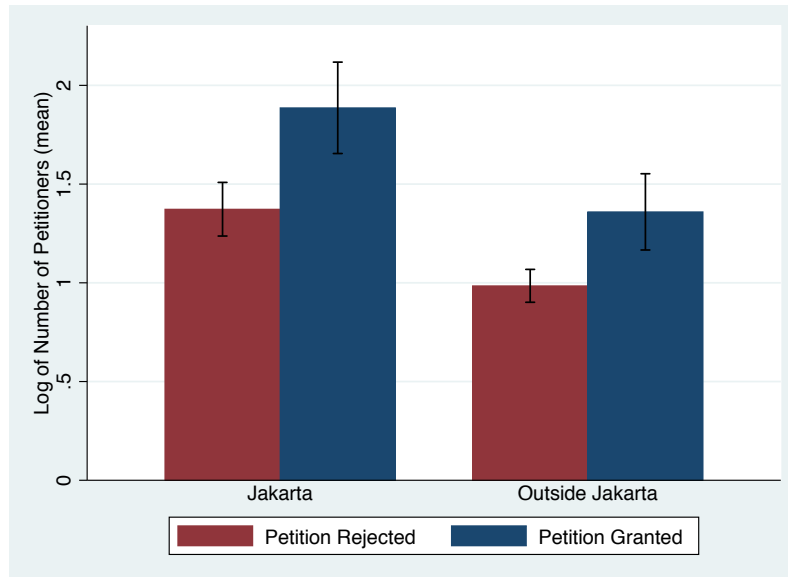
To test the effect of public opinion on case outcomes (Hypotheses 5.3a & 5.3b), I simply counted the overall number of petitioners – regardless of type – in a case (*number\_petitioner*) in the expectation that judges would perceive a larger petitioner coalition as a signal of public support for the petition. Overall, 3,002 individual petitioners filed petitions with the Court. The average petition had six petitioners, while the median petition only had one. The mean is much larger than the median because of a small number of outliers; less than 14% of the petitions had more than 29 petitioners (the mean plus the standard deviation), while the largest case had 503 petitioners.<sup>10</sup> Again, I take the log in the expectation that the marginal effect of each additional petitioner decreases.

I then interacted that variable with a dummy variable indicating if any of the petitioners were based outside of Jakarta (*number\_petitioner \* diversity\_petitioner*). This interaction term is intended to capture information about both the size and the diversity of the petitioner coalition. Geography is one of the most important social cleavages in Indonesia. During the New Order, Jakarta dominated the country’s political, economic, and cultural power. Even after *Reformasi*, Jakarta is still home to much of the country’s elite. As such, if the Constitutional Court looks to the petitioners as a signal of public opinion, they will be more

<sup>9</sup>I also tried a matching technique in order to improve causal inference for treatment variable *petitionerngo*. I utilized Coarsened Exact Matching (CEM) (see Blackwell et al., 2009) to find a matched set of data on the following covariates: the other petitioner identity variables and the posterior probabilities of topics 2, 3, 5, 6, 16, 17, 20, and 21 from the topic model in Chapter IV. I used these topics because they are the ones significantly associated with NGOs in Figure 4.8. Ultimately, the matching did not change my analysis, so I do not present those results here.

<sup>10</sup>See *Parliamentary Threshold case*, MK Decision No. 3/PUU-VII/2009.

likely to grant a petition that is supported by at least some petitioners who are not based in Jakarta. In over 60% of the cases, all of the petitioners lived or were based in Jakarta ( $x_{diversity\_petitioner} = 0$ ), which constitutes less than 4% of Indonesia’s population. Thus, other parts of the country are severely underrepresented before the Court.<sup>11</sup>



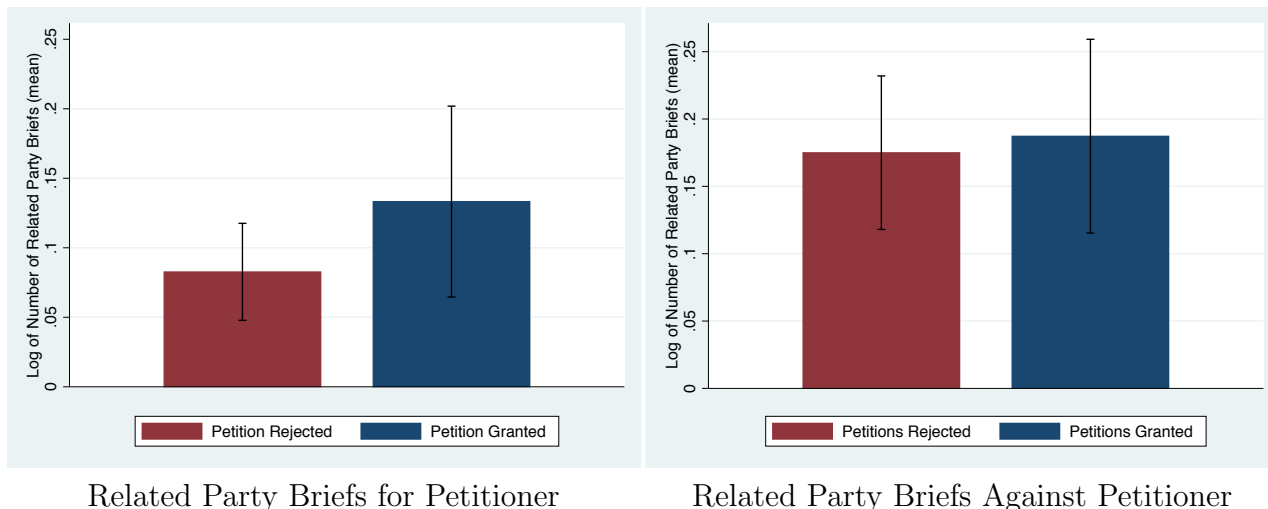
**Figure 5.4:** Histogram of Number and Diversity of Petitioners

The histograms represent the log of the average number of petitioners for petitions granted and rejected by the Constitutional Court. The histogram on the left is for petitioners exclusively from Jakarta, whereas the histogram on the right is for petitions with some petitioners from outside Jakarta. The log was transformed to avoid taking the log of 1. Bars represent 95% confidence intervals.

As seen in Figure 5.4, petitions that the Court granted had on average more petitioners than those rejected by the Court. Moreover, this difference is statistically significant, providing preliminary evidence for Hypothesis 5.3a. By contrast, there does not appear to be any significant difference in success rates based on the presence of petitioners from regions of the country other than Jakarta, suggesting that geographic diversity does not significantly improve a petition’s chances of success (Hypothesis 5.3b).

The data have a positive skew as there is a small number of cases with a large number of petitioners. As such, before estimating the models, I conducted a diagnosis using Cook’s

<sup>11</sup>I reran the model using a geographic variable that included an intermediate tier for petitions with members from Java but outside Jakarta. The island of Java contains around half of the country’s entire population. However, the results for Java and for all other parts of Indonesia were nearly indistinguishable, so I dropped that intermediate tier.



**Figure 5.5:** Summary Statistics for Related Party (*Pihak Terkait*) Briefs

The histograms represent the log of the average number of related party briefs in cases granted and rejected by the Constitutional Court. The log was transformed to avoid taking the log of 1. Bars represent 95% confidence intervals.

method to identify highly influential cases (Cook, 1977). The Cook’s distance is the scaled change in fitted values after deleting a given observation. Not surprisingly, the Cook’s distance revealed that the case with 503 petitioners was an influential observation (by contrast, the next largest case had just 136 petitioners). However, removing the observation did not fundamentally affect my results or analysis, so I ultimately left it in the final model.

As noted above, it is possible that the Court views related party briefs as another signal of public opinion (Hypothesis 5.4a & 5.4b). To test this, I count the number of related party briefs in each case both for and against the petition. Overall, 328 related parties were involved in 85 cases, 97 in favor of the petition and 231 against. I took the log of the number of related parties in the expectation that the marginal effect of each additional related party would decrease. As seen in Figure 5.5, the Court is more likely to grant petitions supported by a larger number of related party briefs, although the difference is not significant because of the large amount of variance. By contrast, there is no noticeable difference in success rates for related party briefs against the petition.

### 5.2.2 Other Variables

I also attempted to account for other theories of judicial behavior. It is difficult to quantify the underlying legal merits of a petition and how legal doctrine might constrain judges. Because constitutional review was relatively new to Indonesia and many Indonesians did not understand what constituted a valid constitutional claim, I expect that some petitioners mistakenly filed claims that had little basis in law, while others filed frivolous petitions. The Court could dismiss these petitions relatively quickly. By contrast, claims that have more merit should require more consideration, including longer oral arguments and hearings for evidence. Thus, I use the length of the transcripts of court proceedings (*risalah sidang*) as a proxy for the legal quality of the petition.<sup>12</sup> All else equal, I expect transcripts with more words to be associated with higher-quality petitions. I use the log of the number of words in the expectation that the marginal effect of each additional word decreases.<sup>13</sup>

In order to account for political constraints on the Constitutional Court, I include a dummy variable (*president*) indicating if the president submitted a statement in the case. Because the Court's jurisdiction only covers national legislation, all presidential statements asked the Court to dismiss the petition. Given that it costs time and resources to submit a brief, these statements act as a signal of the executive branch's preferences.<sup>14</sup> Overall, the president submitted statements in 291 cases. The legislature (DPR) also submitted statements to the Court in 250 cases, but I do not include these for two reasons. First, cases with presidential and DPR statements are highly correlated (0.79), leading to concerns about multicollinearity. Second, in a presidential system, statements from the executive are a more informative signal to the Court regarding the risks of noncompliance or override.

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<sup>12</sup>Note: I excluded transcripts that merely announced the Court's judgment, usually the last transcript in the case file.

<sup>13</sup>The *risalah sidang* variable is correlated with the dummy for presidential statements (0.71), potentially leading to multicollinearity. However, the variance inflation factor (VIF) is less than 5 and tolerance is more than 0.1, indicating an acceptable level of bias.

<sup>14</sup>In theory, the president's statement could merely provide objective information relevant to the case without taking a stance. In fact, Chief Justice Asshiddiqie initially instructed the president's lawyers to provide objective information, not argue the merits. However, he claims they did not take his advice. Subject #32, interview with former justice, Jakarta, Indonesia, July 20, 2012.

As Carrubba and Zorn (2010) argue, the president can veto legislation and oversees the bureaucracy, giving him/her more influence over implementation of court judgments. By contrast, it is more difficult for the legislature to override a constitutional decision because to do so it would have to pass a constitutional amendment.<sup>15</sup>

I also include several controls in the model. First, I include a variable for the age of the law being challenged (*law\_age*) to account for the effect of time. I suspect that the Constitutional Court will be less likely to grant petitions challenging newer laws passed by incumbent legislators. In general, older laws are less likely to reflect the policy preferences of the governing majority, which, between the president and DPR, appointed six of the judges. This should prove especially true in Indonesia because many of the country's older laws were passed under the authoritarian New Order or Dutch colonial governments, and thus might be incompatible with post-*Reformasi* democracy. By contrast, declaring a law passed by the current legislative majority unconstitutional would be more likely to provoke a backlash from political elites.

Following Vanberg (2005), I also included a dummy variable indicating if the case involved a complex legal issue, defined as economic, socioeconomic rights, or natural resource issues (*complex\_issue* = 1). As discussed in Section 5.1.1.2, the public has less technical capacity to monitor and detect violations of judgments in complex fields of law, so the Court should be less likely to grant petitions challenging complex laws. Other issues, such as elections, government processes, the legal system, and rights issues, are considered "not complex" because these issues are easier for the public to understand and monitor (*complex\_issue* = 0).

In an alternative attempt to control for the effect of legal issues on case outcomes, I also used the results of Structural Topic Model from Chapter IV. I took the posterior probability of the amount of text in each petition associated with each topic as an independent variable.

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<sup>15</sup>To ensure that my results did not depend upon the choice of presidential or legislative statements, I reran the models using a dummy variable for statements submitted by the DPR and omitting the *president* variable. The magnitude of the (positive) coefficient for DPR statements was slightly smaller than for presidential statements, but still significant. The inclusion of DPR statements did not otherwise change my results.

For cases with two or more petitions, I used the average of the posterior probabilities.<sup>16</sup> I omit the complexity variable (*complex\_issue*) when including the topic posteriors.

Note that my models focus on case-level effects rather than vote-level effects. Although Indonesian Constitutional Court justices can write individual opinions, dissents are still relatively rare (and concurrences even rarer).<sup>17</sup> The most frequent dissenter on the Constitutional Court, Justice Maruarar Siahaan (2003-2008), only dissented in 5.72% of cases in which he participated (most justices dissented in less than 2.5% of cases). Moreover, the majority opinion is unsigned, so it is impossible to tell which justice took the lead in drafting a particular decision. Thus, there is insufficient variation in vote-level outcomes to model individual justices' voting behavior.

## 5.3 Results

In Tables 5.3-5.6, I present the results of my judicial voting models. The expected direction/sign (if any) for each independent variable is indicated in brackets. The first model in each table includes only the petitioner variable(s), the second model adds controls, and the third incorporates the latent topic variables. I also show the marginal effect for each independent variable, holding all other variables at their means.

### 5.3.1 Petitioners

To measure the effect of party strength on case outcomes, I estimated the following model:

$$Prob(const. review) = \beta_1 + \beta_2 \textit{party strength} + \beta_i \textit{controls} + \epsilon \quad (5.1)$$

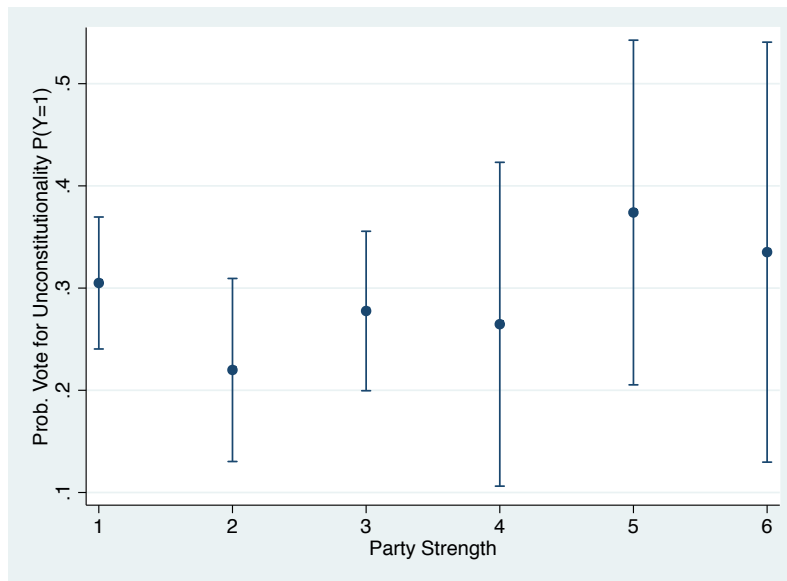
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<sup>16</sup>I exclude Topics 3, 15, and 16 (“judicial,” “addresses,” and “rights”) because tended to be highly correlated with each other, leading to multicollinearity. I also ran the models using hand-coded categories for topics. Using hand-coding did not change the results or analysis for my primary independent variables, so I do not present those models here.

<sup>17</sup>Before *Reformasi*, Indonesian judges were prohibited from filing a dissents. The first formal dissent in a Supreme Court case only occurred in 2004 (Pompe, 2005, 378).



, where  $\beta_2$  should be positive if access to legal resources increases the probability that the Court rules for the petitioner. Table 5.3 shows the results of this model. Although party strength has a positive and significant effect in model 1, that effect is not robust; adding any controls makes the effect statistically indistinguishable from zero (see models 2 & 3). In Figure 5.6, I plot the marginal effect of each tier of *party\_strength*, holding all other variables at their means. Although stronger petitioners are generally more likely to receive a favorable decision from the Constitutional Court, the probability does not increase uniformly with party strength. As with the other studies mentioned in Section 5.1.1.1, any advantage for stronger parties seems primarily driven by government litigants. Moreover, the confidence intervals overlap and the intervals for the strongest types of petitioners are especially large (likely because there are so few government petitioners). Thus, the model does not provide sufficient evidence for Hypothesis 5.1, meaning that a petitioner’s access to legal resources does not significantly affect its probability of success in constitutional litigation.



**Figure 5.6:** Probability of Unconstitutionality & Party Strength

The plots represent the probability that the Constitutional Court will grant a petition/vote for unconstitutionality given each level of the party strength variable. Results are taken from model 2 in Table 5.3. All other variables are held at their means. Bars represent 95% confidence intervals.

To measure the effect of party identity on case outcomes, I estimated the following

<i>Case outcome</i>	(1)		(2)		(3)	
	<i>Coefficient</i>	<i>% Change</i>	<i>Coefficient</i>	<i>% Change</i>	<i>Coefficient</i>	<i>% Change</i>
<b>Petitioners:</b>						
<i>Party Strength</i> [+]	0.162* (0.07)	+3.29%	0.048 (0.09)	+0.88%	0.011 (0.10)	-0.20%
<b>Related Parties:</b>						
<i>Support</i> [+]			0.051 (0.33)	+0.92%	-0.046 (0.38)	-0.84%
<i>Against</i> [-]			-0.489° (0.26)	-8.90%	-0.539° (0.31)	-9.77%
<b>Case Attributes:</b>						
<i>President brief</i> [-]			1.478*** (0.37)	+24.1%	1.364*** (0.37)	+22.3%
<i>Hearing length</i> [+]			1.078* (0.53)	+19.6%	1.385* (0.60)	+25.1%
<i>Law age</i> [+]			-0.150 (0.12)	-2.73%	-0.183 (0.16)	-3.32%
<i>Complex issue</i> [-]			-0.010 (0.25)	-0.18%		
<b>Constant</b>	-1.300*** (0.21)		-6.353** (2.03)		-7.244** (2.45)	
<i>Term</i>	NO	NO	YES	YES	YES	YES
<i>Topics</i>	NO	NO	NO	NO	YES	YES
<i>N</i>	460		459		447	
<i>Pseudo R<sup>2</sup></i>	0.009		0.135		0.168	
<i>Model χ<sup>2</sup></i>	4.78		55.37		75.22	

**Table 5.3:** Model of Constitutional Case Outcomes with Party Strength Variables

°  $p < 0.1$ , \*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$ . The unit of analysis is each constitutional review case from August 13, 2003 to October 2, 2013. The dependent variable is binary indicating if the Constitutional Court voted for unconstitutionality. The entries are logit coefficients with robust standard errors in parentheses. Coefficients for topic variables not shown. The expected direction of the coefficients appears in brackets. Percent change indicates the marginal effect on the dependent variable of a 0-1 increase in dummy variables or one standard deviation increase in continuous variables, holding all other variables at their mean or modal values.

model:

$$\begin{aligned}
 Prob(const. review) = & \beta_1 + \beta_2 NGO + \beta_3 nat. gov. + \beta_4 local gov. \\
 & + \beta_5 political party + \beta_6 business + \beta_i controls + \epsilon
 \end{aligned}
 \tag{5.2}$$

, where  $\beta_2$  should be positive if the Court is more likely to grant petitions submitted by NGOs. Table 5.4 shows the results for this model using the petitioner identity dummy variables. NGO, national government, and local government petitioners all have positive and significant effects on the probability of obtaining a favorable decision. However, these

effects are not robust when controls are added (see models 2 & 3). By contrast, the dummy for political parties is consistently negative and significant across all three models. Simply having at least one political party as one of the petitioners decreases the probability that the Court will declare a law unconstitutional by approximately 10%. Note that in model 3 the topic variables include topics for election law (Topics 4 & 14), so that model should control for the fact that political parties are more likely to challenge election laws.

Table 5.5 shows the results for the number of each petitioner type involved in each case. Without any controls (model 1), the variable for NGO petitioners is positive and significant, but the effect disappears with the introduction of controls in models 2 and 3. Although the sign for the NGO variable is consistently positive, it is statistically indistinguishable from zero. Combined with the results from Table 5.4, these results suggest that, contrary to Hypothesis 5.2, the Constitutional Court is not significantly more likely to grant constitutional petitions submitted by NGOs.

Another interesting result in Table 5.5 is that the coefficients for both national and local government petitioners are positive and significant across all three models. This indicates that the Court is more likely to grant petitions supported by government institutions, such as the Indonesian Broadcasting Commission, or *Komisi Penyiaran Indonesia* (KPI), or a provincial governor. Moreover, the marginal effect is substantively large. Using the results from model 2, going from 0 to 1 national or local government petitioners increases the probability that the Court declares a law unconstitutional by 12% and 10%, respectively.<sup>18</sup> These results suggest that the Court views government institutions as key stakeholders in the enforcement of any judicial decision, and thus is more likely to grant the petition when it has their support.

Finally, to measure the effect of public opinion on case outcomes, I estimated the

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<sup>18</sup>I use a change from 0 to 1 petitioners, not the standard deviation of the variable, because the variable is logged.

<i>Case outcome</i>	(1)		(2)		(3)	
	<i>Coefficient</i>	<i>% Change</i>	<i>Coefficient</i>	<i>% Change</i>	<i>Coefficient</i>	<i>% Change</i>
<b>Petitioners:</b>						
<i>NGO</i> [+]	0.475* (0.23)	+9.97%	0.021 (0.28)	+0.39%	-0.105 (0.32)	-1.87%
<i>National gov.</i> [+]	1.075° (0.62)	+25.1%	0.420 (0.65)	+8.37%	0.283 (0.75)	+5.45%
<i>Local gov.</i> [+]	0.465 (0.35)	+10.0%	0.370 (0.38)	+7.20%	0.238 (0.46)	+4.50%
<i>Political party</i> [?]	-0.573* (0.28)	-10.7%	-0.578° (0.31)	-9.60%	-0.705° (0.41)	-11.5%
<i>Business</i> [?]	0.001 (0.41)	+0.01%	-0.206 (0.50)	-3.55%	0.176 (0.56)	+3.30%
<b>Related Parties:</b>						
<i>Support</i> [+]			0.054 (0.33)	+0.97%	-0.035 (0.37)	-0.64%
<i>Against</i> [-]			-0.507° (0.27)	-9.16%	-0.500° (0.31)	-8.99%
<b>Case Attributes:</b>						
<i>President brief</i> [-]			1.455*** (0.37)	+23.6%	1.352*** (0.38)	+22.0%
<i>Hearing length</i> [+]			1.042° (0.54)	+18.8%	1.375* (0.59)	+24.7%
<i>Law age</i> [+]			-0.203 (0.13)	-3.67%	-0.169 (0.16)	-3.04%
<i>Complex issue</i> [-]			-0.108 (0.27)	-1.93%		
<i>Constant</i>	-1.009*** (0.16)		-5.894** (2.09)		-7.272** (2.43)	
<i>Term</i>	NO	NO	YES	YES	YES	YES
<i>Topics</i>	NO	NO	NO	NO	YES	YES
<i>N</i>	460		459		447	
<i>Pseudo R<sup>2</sup></i>	0.027		0.143		0.175	
<i>Model <math>\chi^2</math></i>	13.89		63.96		84.40	

**Table 5.4:** Model of Constitutional Case Outcomes with Party Type Dummy Variables

°  $p < 0.1$ , \*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$ . The unit of analysis is each constitutional review case from August 13, 2003 to October 2, 2013. The dependent variable is binary indicating if the Constitutional Court voted for unconstitutionality. The entries are logit coefficients with robust standard errors in parentheses. Coefficients for topic variables not shown. The expected direction of the coefficients appears in brackets. Percent change indicates the marginal effect on the dependent variable of a 0-1 increase in dummy variables or one standard deviation increase in continuous variables, holding all other variables at their mean or modal values.

following model:

$$\begin{aligned}
 \text{Prob}(\text{const. review}) = & \beta_1 + \beta_2 \# \text{petitioners} + \beta_3 \text{geographic diversity} \\
 & + \beta_4(\# \text{petitioners} * \text{geographic diversity}) + \beta_i \text{controls} + \epsilon
 \end{aligned}
 \tag{5.3}$$

<i>Case outcome</i>	(1)		(2)		(3)	
	<i>Coefficient</i>	<i>% Change</i>	<i>Coefficient</i>	<i>% Change</i>	<i>Coefficient</i>	<i>% Change</i>
<b>Petitioners:</b>						
# <i>NGO</i> [+]	1.159*** (0.34)	+23.3%	0.375 (0.42)	+6.81%	0.055 (0.49)	+0.99%
# <i>National gov.</i> [+]	3.977* (1.99)	+79.8%	1.972 (2.12)	+35.8%	1.402 (2.44)	+25.3%
# <i>Local gov.</i> [+]	1.948** (0.64)	+39.1%	1.842* (0.79)	+33.4%	2.248** (0.84)	+40.5%
# <i>Political party</i> [?]	0.293 (0.41)	+5.87%	0.051 (0.42)	+0.93%	0.368 (0.59)	+6.63%
# <i>Business</i> [?]	0.950 (0.70)	19.1%	0.388 (0.88)	+7.05%	1.095 (1.02)	+19.7%
<b>Related Parties:</b>						
<i>Support</i> [+]			0.080 (0.35)	+1.45%	-0.109 (0.40)	-1.97%
<i>Against</i> [-]			-0.550* (0.28)	-9.99%	-0.477 (0.31)	-8.60%
<b>Case Attributes:</b>						
<i>President brief</i> [-]			1.541*** (0.38)	+25.0%	1.386*** (0.39)	+22.5%
<i>Hearing length</i> [+]			0.864 (0.57)	+15.7%	1.207* (0.62)	+21.8%
<i>Law age</i> [+]			-0.145 (0.13)	-2.63%	-0.209 (0.17)	-3.76%
<i>Complex issue</i> [-]			-0.036 (0.27)	-0.64%		
<b>Constant</b>	-1.280*** (0.14)		-5.553* (2.19)		-6.403* (2.50)	
<i>Term</i>	NO	NO	YES	YES	YES	YES
<i>Topics</i>	NO	NO	NO	NO	YES	YES
<i>N</i>	460		459		447	
Pseudo <i>R</i> <sup>2</sup>	0.042		0.146		0.181	
Model $\chi^2$	23.88		64.29		83.94	

**Table 5.5:** Model of Constitutional Case Outcomes with Number of Party Type Variables

<sup>o</sup>  $p < 0.1$ , \*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$ . The unit of analysis is each constitutional review case from August 13, 2003 to October 2, 2013. The dependent variable is binary indicating if the Constitutional Court voted for unconstitutionality. The entries are logit coefficients with robust standard errors in parentheses. Coefficients for topic variables not shown. The expected direction of the coefficients appears in brackets. Percent change indicates the marginal effect on the dependent variable of a 0-1 increase in dummy variables or one standard deviation increase in continuous variables, holding all other variables at their mean or modal values.

, where  $\beta_2 + (\beta_4 * \textit{geographic diversity})$  should be positive if having a larger coalition of petitioners increases the probability that the Court grants the petition. Table 5.6 presents the results from this model. Because this is an interaction, I calculated the marginal effect

of each variable to obtain the overall effect. The overall effect of the number of petitioners across all three models was positive and significant (at  $p < 0.01$ ). As the number of petitioners increases, the probability that the Court grants a petition for constitutional review also increases. The size of the effect is substantively large. Simply raising the number of petitioners from 1 to 2 increases the probability that the Court will grant a petition by around 2.87%. Moreover, this effect increases as the number of petitioners increases. Going from 1 to 10 petitioners increases the probability of a favorable outcome by 13.8%.

On its own, the diversity of petitioners has a small effect. Including a petitioner from outside Jakarta ( $x_{diversity\_petitioner} = 1$ ) only increases the probability that the Court will declare a law unconstitutional by 4.96%. Moreover, this effect is not statistically significant at conventional levels. The interaction with the number of petitioners does yield interesting results. As seen in Figure 5.7, for petitions with a smaller number of petitioners, geography has no effect on case outcomes. As the number of petitioners increases, petitions with at least one member from outside Jakarta do on average fare better than those with only Jakarta residents. However, the confidence intervals overlap, reflecting the small number of cases at higher values. Overall, the results in Table 5.6 suggest that the number of petitioners does send a signal to the justices about public opinion, but geographic diversity has no effect (accepting Hypothesis 5.3a, but rejecting Hypothesis 5.3b)

### 5.3.2 Other Variables

For all of the models in Tables 5.3-5.6, related party (*pihak terkait*) briefs that oppose the petition have a negative and significant effect on the probability that the Court will grant a petition for constitutional review. For example, for model 2 in Table 5.6, adding one related party statement against the petition decreases the probability of unconstitutionality by 6.6% (see Figure 5.8). Increasing the number of related party briefs has an even larger effect on case outcomes; going from 0 to 3 briefs decreases the probability of unconstitutionality by 15.2%. This provides strong evidence for Hypothesis 5.4b in that related parties signal public

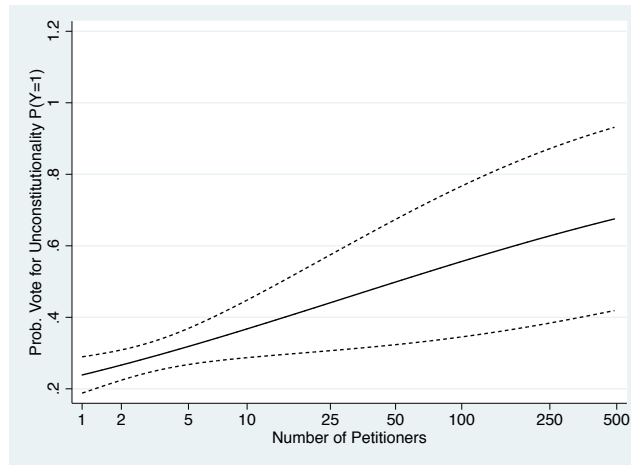
<i>Case outcome</i>	(1)		(2)		(3)	
	<i>Coefficient</i>	<i>% Change</i>	<i>Coefficient</i>	<i>% Change</i>	<i>Coefficient</i>	<i>% Change</i>
<b>Petitioners:</b>						
<i># Petitioners</i> [+]	0.548*** (0.17)	+14.4%	0.261 (0.17)	+7.79%	0.257 (0.19)	+9.04%
<i>Diversity</i> [+]	-0.425 (0.44)	+0.41%	-0.176 (0.46)	+4.96%	-0.351 (0.49)	+5.35%
<i>Number * Diversity</i> [+]	0.338 (0.30)		0.337 (0.30)		0.483 (0.33)	
<b>Related Parties:</b>						
<i>Support</i> [+]			0.432 (0.33)	+0.95%	-0.047 (0.40)	-0.876%
<i>Against</i> [-]			-0.564* (0.27)	-10.4%	-0.596° (0.32)	-11.1%
<b>Case Attributes:</b>						
<i>President brief</i> [-]			1.443*** (0.38)	+23.9%	1.331*** (0.38)	+22.4%
<i>Hearing length</i> [+]			0.953° (0.57)	+17.6%	1.172° (0.62)	+21.8%
<i>Law age</i> [+]			-0.093 (0.12)	-1.72%	-0.172 (0.16)	-3.20%
<i>Complex issue</i> [-]			-0.870 (0.25)	+0.04%		
<b>Constant</b>	-1.666*** (0.30)		-6.356** (2.23)		-6.873** (2.57)	
<i>Term</i>	NO	NO	YES	YES	YES	YES
<i>Topics</i>	NO	NO	NO	NO	YES	YES
<i>N</i>	460		459		447	
Pseudo $R^2$	0.055		0.149		0.182	
Model $\chi^2$	25.29		60.43		83.64	

**Table 5.6:** Model of Constitutional Case Outcomes with Petitioner Coalition Variables

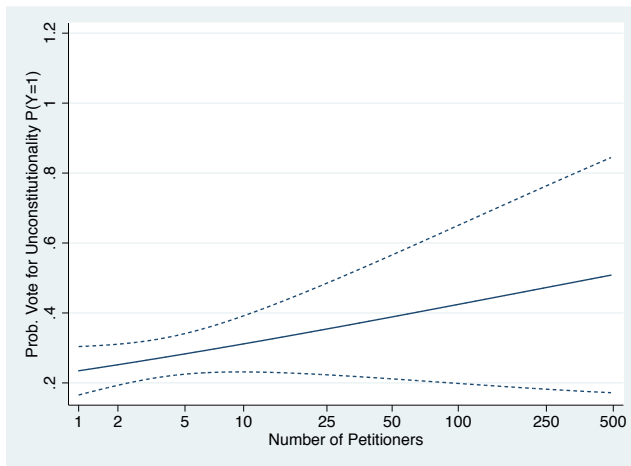
°  $p < 0.1$ , \*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$ . The unit of analysis is each constitutional review case from August 13, 2003 to October 2, 2013. The dependent variable is binary indicating if the Constitutional Court voted for unconstitutionality. The entries are logit coefficients with robust standard errors in parentheses. Coefficients for topic variables not shown. The expected direction of the coefficients appears in brackets. Percent change indicates the marginal effect on the dependent variable of a 0-1 increase in dummy variables or one standard deviation increase in continuous variables, holding all other variables at their mean or modal values. Marginal effects for *number petitioners* and *diversity* represent combined effects for term both alone and in interaction.

opposition against the petition. By contrast, related party briefs supporting the petition do not appear to help the petitioners obtain a favorable decision (contrary to Hypothesis 5.4a).

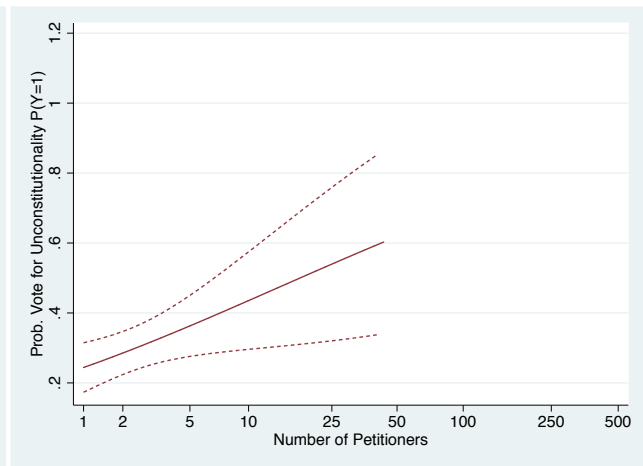
Surprisingly, a statement from the president consistently *increases* the probability that the Court declares a law unconstitutional. For example, in model 2 of Table 5.6, filing a presidential statement increases the probability that the Court will grant a petition by around



All Petitioners



Jakarta Only



Jakarta + Other Regions

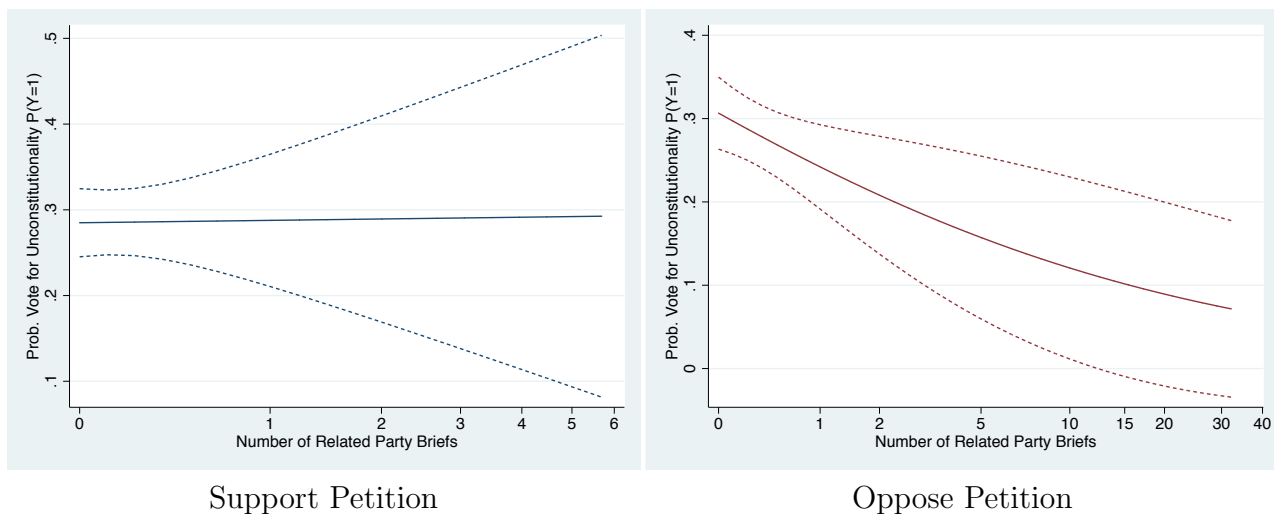
**Figure 5.7:** Probability of Unconstitutionality vs. Petitioner Coalition

The plots represent the probability that the Constitutional Court will grant a petition/vote for unconstitutionality as a function of the number of petitioners. Results are taken from model 2 in Table 5.6. All other variables are held at their means. Dashed lines represent 95% confidence intervals. Note that I only plot values for the bottom-right panel up to  $x = 31$  because none of the petitions with members from outside Jakarta had more than 31 petitioners.

24%! This contradicts much of the judicial politics literature, which argues that judges defer to the president in order to avoid retaliation or noncompliance. I discuss why presidential statements might be positively associated with constitutional review in Section 5.5.

Finally, I had tried to capture information about the underlying quality of the petitions by measuring the length of the transcripts of court proceedings. This variable has a generally positive and significant effect on the probability that the Constitutional Court grants a petition for constitutional review, indicating that higher quality petitions are more likely to succeed. None of the other variables, including the age and topic variables, had a significant





**Figure 5.8:** Probability of Unconstitutionality vs. Related Party Briefs

The plots represent the probability that the Constitutional Court will grant a petition/vote for unconstitutionality as a function of the number of related party briefs. Results are taken from model 2 in Table 5.6. All other variables are held at their means. Dashed lines represent 95% confidence intervals.

effect on case outcomes.

## 5.4 Case Narratives

In this section, I discuss examples of individual Constitutional Court cases to explore how public opinion affects judicial voting behavior, as suggested by the results in Table 5.6. I begin by discussing how and why Indonesian lawyers form coalitions to submit petitions to the Court. Next, I examine an elections case in which petitioners used a large coalition to convince the Court that they represented the public interest. I then briefly look at a case dealing with blasphemy law to see how related parties can mobilize to counteract a petition. These cases support my theoretical argument in two critical ways. First, it shows that the number of petitioners affiliated with a petition is a choice variable, often deliberately designed to convey signals about public opinion. Second, the decisions suggest that the justices themselves view the number of petitioners and related party briefs as signals of public opinion.

In 2013, I interviewed Indonesian lawyers from NGOs and business groups involved in constitutional litigation in order to understand how they made decisions about forming

coalitions. Several lawyers expressed the belief that having a larger and more diverse coalition creates the impression that the petition has widespread public support, or at least that it represents the public interest. A larger coalition could also create the appearance of momentum and help NGOs garner media attention.<sup>19</sup> NGOs have even brought hundreds of supporters to attend court proceedings in the belief that doing so would convince the justices that they had the public on their side.<sup>20</sup> In addition, with a larger group, lawyers could distribute the work and cost of litigation amongst its members.

A 2011 case challenging the appointment of political party members to the General Election Commission (KPU) provides a useful example of how petitioners can strategically form coalitions in order to send signals about public opinion. The 2011 Electoral Administration Law allowed politicians to join the KPU immediately after resigning from their party (a previous version of the law had required them to wait five years).<sup>21</sup> The petitioners saw this as an attempt by the parties to expand their influence on the nominally independent and nonpartisan commission (Butt, 2015, 173). According to several lawyers involved in the case, the petitioners wanted a large and diverse coalition in order to convey the impression that the new law sparked widespread public outrage.<sup>22</sup> To do this, they recruited 23 NGOs and 113 individuals to formally sign on to the petition. They also made sure that the coalition included individuals and organizations from different regions of the country, including 22 from Sumatra, four from Bali, three from Sulawesi, and one from Kalimantan, as well as 67 from Java outside of Jakarta.

The Constitutional Court granted the petition, arguing that partisan election commission members would undermine the credibility of elections and threaten Indonesian democ-

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<sup>19</sup>Subject #17, Interview with staff attorney at Indonesian NGO, Jakarta, Indonesia, November 1, 2013.

<sup>20</sup>In a 2012 case involving a challenge to a 2004 law on fiscal decentralization, a local NGO from East Kalimantan brought over a thousand of its supporters to attend the reading of the Court's decision. The chairman of the group told reporters, "The move is a form of our support to the panel of judges of the Constitutional Court to never hesitate to make a decision that gives us justice" (Abdi, 2012).

<sup>21</sup>Law No. 15 of 2011.

<sup>22</sup>Subjects #17 & #13, Interviews with attorneys at Indonesian NGO, Jakarta, Indonesia, November 1 & 6, 2013

racy.<sup>23</sup> They decided to impose a ban of five years on party members before they could join the KPU (effectively reinstating the 2007 Electoral Administration Law). Importantly, the Court accepted that the petitioners represented the public interest (“*kepentingan publik*”), both for the purposes of standing and for its decision on the merits.<sup>24</sup> The composition of the petitioner coalition impressed upon the justices that the petition both represented the public interest and was representative of the public. It is also worth noting that the justices did not have a general presumption against appointing party members to independent government institutions; in 2014, they declared that a law disqualifying party members from appointment to the Constitutional Court unconstitutionally stigmatized party members.<sup>25</sup> This provides further evidence that the Court’s ruling in the *KPU case* was not simply the result of ideology or firm policy preferences.

While the petitioners can try to signal public support for their case, related parties can file briefs against the petition to send a countervailing signal against the petition. The *Blasphemy Law case* provides an illustrative example. After *Reformasi*, conservative Islamic groups lobbied the government to crack down on religious minorities and “profane” behavior, such as blasphemy. From 1998 to 2011, the government brought at least 47 blasphemy cases under the 1965 Blasphemy Law, compared to just 10 cases during Suharto’s 33-year reign (Crouch, 2012, 11). In 2009, a group of eleven NGOs and public intellectuals filed a petition challenging the constitutionality of the Blasphemy Law. They argued that it discriminated against religious groups not officially recognized by the state.<sup>26</sup> Moreover, the Legal Aid Organization ran a high-profile advocacy campaign that garnered widespread media coverage (Crouch, 2016, 4-5).

In response, 18 Islamic NGOs filed related party briefs expressing their support for the Blasphemy Law. At the time, conservative Muslims worried about the increase in unorthodox

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<sup>23</sup> *KPU case*, MK Decision No. 81/PUU-IX/2011.

<sup>24</sup> MK Decision No. 81/PUU-IX/2011, p. 63.

<sup>25</sup> *MK Perpu case*, MK Decision No. 1-2/PUU-XII/2014.

<sup>26</sup> The government only officially recognizes Islam, Protestantism, Catholicism, Hinduism, Buddhism, and Confucianism.

Islamic sects, such as Ahmadiyah, and saw the law as a useful way to contain them (Crouch, 2011, 57). The FPI, a radical Islamic group known for vigilantism, claimed that annulling the Blasphemy Law would threaten national stability because it would undermine the established religions. Even Nahdlatul Ulama (NU), a more tolerant Islamic organization, expressed its fear that Indonesia would succumb to inter-religious conflict without the law (Crouch, 2012; Butt, 2016, 27-28). These groups sought to create the impression that they represented a powerful mass movement, to frame the case as a war between liberal activists and Islam (Hasyim, 2016). Some of their members attended oral arguments and chanted “*Allahu Akbar*” in support of government witnesses and shouted down the petitioners’ witnesses (Crouch, 2012, 37). Supporters even protested outside the Constitutional Court building and held up posters condemning prominent human rights activists (Menchik, 2014, 612).

The Court rejected the petitioners’ arguments, declaring that the law did not prevent the government from officially recognizing other religions, and thus did not discriminate.<sup>27</sup> It also went on to note that, unlike Western countries, the Indonesian Constitution does not erect a strict separation between church and state.<sup>28</sup> However, the most revealing part of the Court’s decision is that it accepts the related parties’ argument about the link between religious deviancy and social disorder (Crouch, 2016, 6). The Court’s emphasis on maintaining public order suggests the justices believed declaring the Blasphemy Law unconstitutional would prove unpopular with large segments of the Muslim population (over 87% of Indonesians are Muslim), and likely provoke a negative backlash (Crouch, 2012, 42). In short, by having a large group of NGOs submit briefs against the petition, the related parties showed that a sizable segment of the populace – even if only an impassioned minority – supported the Blasphemy Law.<sup>29</sup>

This section helped unpack the relationship between the composition of the litigant

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<sup>27</sup> *Blasphemy Law case*, MK Decision No. 140/PUU-VII/2009.

<sup>28</sup> MK Decision No. 140/PUU-VII/2009, p. 275.

<sup>29</sup> The recent prosecution and conviction of former Jakarta Governor Basuki Tjahaja Purnama (“Ahok”), a Christian, for allegedly citing a verse from the Qur’an shows just how controversial blasphemy remains in Indonesia (Gee, 2017).

coalition and outcomes in constitutional litigation. My interviews demonstrated that Indonesian lawyers view the size of a petitioner coalition as a potential signal to the Constitutional Court about public opinion. Second, the *KPU case* shows how having a large, diverse coalition can convince the justices that the petition represents the policy preferences of the general public. Third, the *Blasphemy Law case* shows that related parties can counteract a petition by revealing the presence of significant constituencies opposed the petition. In both cases, these signals played at least some role in influencing the Court's decision. Moreover, in their written opinions, the justices spent considerable time discussing the "public interest" and "public order," demonstrating a concern not just for the legal arguments, but also for the impact of their decisions on the public.

## 5.5 Discussion

Although scholars who study the Indonesian Constitutional Court have long claimed that public opinion influences the justices in high-profile cases (see, e.g., Mietzner, 2010), this chapter is the first empirical tests to provide evidence that it does so over a wide range of cases. As seen in Table 5.6 and Figure 5.7, the number and diversity of petitioners seem to consistently increase the probability of success in constitutional litigation (Hypotheses 5.3a & 5.3b). On the other hand, the number of related party briefs opposing the petition has a countervailing effect, signaling public opposition to the petition (Hypothesis 5.4b). This latter result is consistent with the literature on amicus briefs in the U.S., which generally finds that support from amicus curiae increases the probability of success in court (see Section 6.1 of this dissertation).

If the number and diversity of petitioners do have such an effect on case outcomes, it is fair to ask why all petitioners would not simply form large coalitions. There are several possible reasons. First, although the Constitutional Court's standing rules are relatively liberal, petitioners must still prove that they suffered a constitutional harm. The petitioners in the *KPU case* successfully argued that the health of Indonesian democracy concerned

all citizens, but the Court has dismissed individual petitioners from cases if it finds that they did not actually suffer a harm.<sup>30</sup> Second, lawyers must balance the benefits of a larger coalition against the costs. Lawyers I interviewed expressed concern that larger groups tend to be unwieldy and more difficult to coordinate.<sup>31</sup> At worst, different members could work at cross-purposes. Finally, some lawyers believe that a larger coalition risked triggering a more aggressive response from the government and other actors opposed to the petition. For example, several lawyers challenging a 2008 law on wiretapping<sup>32</sup> deliberately sought to maintain a lower profile in order to reduce the risk of confrontation with the the executive.<sup>33</sup>

One possible concern about my findings is endogeneity. In theory, the number and diversity of petitioners could be a function of the probability of winning; if petitioners perceive some benefit to joining a successful petition, then they should be more likely to join petitions that they believe will succeed on the merits.<sup>34</sup> Ultimately, I believe several factors mitigate the risk of endogeneity. First, as discussed above, Indonesian lawyers view the composition of the petitioner coalition as a choice variable. Having a larger, diverse coalition entails both costs and benefits depending on the circumstances in the case. None of the lawyers I interviewed advocated simply allowing any interested party to join a petition.

Second, petitioners receive relatively little benefit from being the  $i^{th}$  member of a petitioner coalition. As noted in Chapter II, the Constitutional Court's decisions only apply prospectively. Unlike a class action suit in the U.S., in which each plaintiff hopes to recoup monetary damages, the average Indonesian does not have a pecuniary incentive to join the petition; all Indonesians will enjoy the benefits of any constitutional decision, whether or

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<sup>30</sup>For example, in the *PKI case*, the Court granted standing to former communists who wished to overturn the ban on the Communist Party, but denied standing to individuals who had no prior affiliation with the party. MK Decision No. 11-17/PUU-I/2003.

<sup>31</sup>Subject #38, Interview with attorney at Indonesian NGO, Jakarta, Indonesia, November 12, 2013.

<sup>32</sup>*Wire-Tapping case*, MK Decision No. 5/PUU-VIII/2010.

<sup>33</sup>Subject #1, Interview with researcher at Indonesian NGO, Jakarta, Indonesia, November 6, 2013. Other lawyers dismissed this fear, noting that the government almost always responds when a petition challenges its interests. Subject #13, Interview with attorney at Indonesian NGO, Jakarta, Indonesia, November 6, 2013. Indeed, the president submitted a statement in almost two-thirds of cases adjudicated between August 13, 2003 and October 2, 2013.

<sup>34</sup>I considered several instrumental variables to overcome this potential endogeneity problem, but none satisfied the exclusion restriction (i.e., all potential  $Z$  had an effect on  $Y$  outside of  $X$ ).

not they actually sign on to the petition. If anything, the greater risk is that Indonesian citizens who do want policy change will free ride off the efforts of those willing to invest the money and resources to pursue constitutional litigation. Some prominent organizations and individuals might derive a reputational benefit from being associated with a successful petition, but in most cases the causal relationship is the opposite; petitioners want a prominent organization/individual to enhance the credibility of their petition.

It is also worth briefly discussing why my models failed to find support for the other hypotheses. As seen in Table 5.3 and Figure 5.6, elites do not have a systematic advantage over weaker parties in constitutional litigation contrary to HuMa's report and Hypothesis 5.1. Also, as seen in Table 5.6, individuals and organizations based in Jakarta do not have a systematic advantage over those outside Jakarta. Given the weak support for the party capability theory outside the U.S. (see Section 5.1), these findings are not particularly surprising. Moreover, as noted in Chapter III, having a single court with exclusive jurisdiction over constitutional claims should mitigate some of the disadvantages weaker parties face by reducing the costs of litigation, removing the possibility of appeal, and simplifying the rules of procedure.<sup>35</sup> Haynie's (1994) critique of the party capability theory also applies to Indonesia; like the Philippine Supreme Court, the Indonesian Constitutional Court avoids consistently ruling in favor of stronger parties in order to enhance its legitimacy. In fact, as noted in this chapter and Chapter II, the Court's decisions often struck a populist, anti-elitist tone.

It is perhaps more surprising that NGO support for a petition does not increase its probability of success (contrary to Hypothesis 5.2). Given former Chief Justice Asshidiqie's close ties to civil society, I would have expected the Constitutional Court to view claims from NGOs favorably. One possible explanation is that the justices believe the petitioner's coalition and number of related party briefs against the petition are more reliable signals of public opinion. In other words, despite the fact that NGOs typically claim to represent

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<sup>35</sup>Also, litigants in the Constitutional Court do not need to engage in the "bidding wars" and corruption that regularly occur in the rest of the Indonesian justice system (Buehler, 2009).

the public interest, the justices know they do not always reflect the policy preferences of the median voter. Moreover, NGOs do not always share the same policy preferences and can send competing signals. For example, as discussed above, a coalition of progressive NGOs asked the Court to declare the Blasphemy Law unconstitutional, while a coalition of Islamic NGOs submitted briefs supporting it. The null finding for NGOs is also important as it suggests that the justices' relationship with civil society is not merely based on ideological kinship.

Despite the fact that the number of related party briefs opposing a petition significantly decreased its probability of success, related party support for a petition did not significantly increase the probability that the Constitutional Court would grant it (contrary to Hypothesis 5.4a). One possible explanation is that the signal from these related parties is redundant because the justices had already received similar information about public support from the petitioners themselves. Indeed, this finding is consistent with Kearney and Merrill (2000) and Collins (2004), who find that amicus briefs in the U.S. Supreme Court tend to help respondents more than petitioners. In other words, related party briefs are more effective at countering a petition and revealing disagreement than in attempting to show consensus. I explore this question further in Chapter VI.

### **5.5.1 Presidential Statements & Public Opinion**

As seen in Tables 5.3-5.6, if the president submits a statement opposing the petition, then the Court is *more* likely to grant that petition. As noted above, this result is puzzling, especially given the strategic-institutionalist literature on judicial behavior. One possibility is that the presence of a presidential brief in an Indonesian constitutional case is highly correlated with the underlying legal merits of the petition. The president's lawyers would be less likely to bother responding to frivolous petitions. I had attempted to control for the underlying legal merits of each petition by including a variable for the length of oral arguments, but ultimately I cannot completely capture legal quality using a quantitative



measure.

Another possibility is that the mere presence or absence of a presidential statement is not a reliable indicator of political constraints because it fails to account for the intensity of the president's preferences. To check this, I reran the model substituting the *president* dummy variable with a variable counting the number of words in the president's statement. In theory, this new variable should capture information about the intensity of the president's preferences in each case. Because writing legal briefs takes time and resources, executive branch lawyers are more likely to draft longer statements in response to petitions that challenge the executive's core interests. However, using this new measure does not change the sign or significance of the results; longer presidential statements are positively correlated with favorable outcomes for the petitioner (see Appendix C).

Finally, accepting the results at face value, it is possible that the Constitutional Court accepted or even sought confrontations with the executive branch. Most of the literature on judicial voting assumes that judges care primarily about policy outcomes, so they try to avoid issuing decisions that the executive will refuse to implement. However, as I noted in Section 3.2, judges might have other incentives to rule in favor of a petition even if they have legitimate concerns about executive noncompliance. As Hendrianto (2016c) notes, Indonesia's two chief justices, Asshidiqie and Mahfud, both had reasons to rule against the executive branch. Asshidiqie believed he needed to demonstrate the Court's independence and relevance by issuing bold decisions in politically salient disputes. Mahfud was considering running for president and thus sought to elevate his public profile. Thus, at least in some cases, ruling against the president might have been a goal in and of itself.

Overall, the results for presidential statements, combined with the results for the number of petitioners, suggest that the Indonesian Constitutional Court responds to public opinion because of concerns about its institutional legitimacy rather than concerns about executive noncompliance. If the Court were concerned primarily about executive branch's compliance with its judgments, it would have been less likely to grant a petition when it

received a statement from the president. Instead, as noted above, the opposite proved true. Moreover, the justices did not try to avoid political confrontations by upholding laws recently passed by the DPR; as seen in Tables 5.3-5.6, they were not significantly less likely to declare newer laws unconstitutional.

Instead, the Constitutional Court appears to respond to signals about public opinion because of concerns about its institutional legitimacy. As noted in Section 5.1.1.2, newer courts in developing democracies cannot rely upon historical goodwill and must develop their legitimacy over time (Gibson, Caldeira and Baird, 1998). One way to do this is to issue popular decisions against political elites (Haynie, 1994), which my results indicate is the approach the justices took. Many of their major decisions, such as the *KPU case*, involved populist challenges to elite interests. The justices' attempts to increase transparency and access also make sense as steps to improve the Court's standing with the public. They relaxed standing rules and waived filing fees in order to make the court more accessible the general public. Unlike other Indonesian courts, the Constitutional Court has a modern website that regularly posts decisions and other documents. In addition, Asshidiqie and Mahfud frequently gave interviews to the media explaining major Court decisions (Hendrianto, 2017; Faiz, 2017).<sup>36</sup> These efforts to bolster the Constitutional Court's legitimacy have proven at least partially successful. In a 2005 survey, over 68% of Indonesians who were aware of the Court approved of its performance, compared to just 11% who disapproved (International Foundation for Election Systems, 2005, 53).<sup>37</sup> As discussed in Chapter II, public opinion helped thwart several government attempts to constrain the Court.

The Court's popularity held until October 2013, when the Anticorruption Commission

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<sup>36</sup>Chief Justice Hamdan Zoelva's efforts to get reappointed for a second term present a fascinating case study in how the justices can attempt to cultivate popular opinion to erect a buffer between the Court and the elected branches of government. After he dismissed a petition from losing presidential candidate Prabowo Subianto in August 2014, Zoelva became a social media star on Twitter. However, President Jokowi refused to reappoint him to a second term, which was set to expire in January 2015. Zoelva expressed his frustration on Twitter, hoping to mobilize public opinion to pressure the president. He ultimately failed and left the Court at the end of his term (Hendrianto, 2017, 22-24).

<sup>37</sup>Relatively few Indonesians had heard of the Court at this point (just 34%). The Court's approval ratings compared favorably with the DPR and Supreme Court, which had net favorability ratings of 23% and 10%, respectively (International Foundation for Election Systems, 2005, 29).

arrested Chief Justice Akil Mochtar for bribery. The Court's approval rating dropped from 65.5% in March 2013 (International Republican Institute, 2013) to just 28% in the week following Mochtar's resignation (Warat, 2014). The Court regained some of its popularity the following summer when it successfully adjudicated a dispute between presidential candidates Joko Widodo and Prabowo Subianto, reaching 35.8% (Warat, 2014). My dataset only covers cases decided before October 2013, but the the aftermath of the scandal suggests that the relationship between public opinion and the Constitutional Court does not depend exclusively – or even primarily – on the Court's handling of individual cases. Although the public had strong opinions regarding some constitutional issues, no single decision moved the Court's approval rating by as much as 37 percentage points. News about the Court's integrity or impartiality can have a much larger impact on public opinion than individual case outcomes. The Mochtar scandal was particularly damaging because corruption has become a central criterion on which Indonesians judge political institutions.<sup>38</sup>

## 5.6 Concluding Remarks

While Chapter IV looked at how petitioners influence the Indonesian Constitutional Court's docket, in this chapter I examined the conditions under which those petitions succeed. I found evidence that the justices are more likely to grant a petition supported by a large coalition of individuals and/or organizations. By contrast, the justices are less likely to grant a petition if it is opposed by a large coalition of related parties. My statistical models confirm the widespread impression of the Court as an institution not beholden to traditional elites and more responsive to the general public. Litigants with access to more resources do not have a systematic advantage over weaker ones in constitutional litigation. Moreover, as noted by Butt (2015, 38) and others, the justices do not demonstrate deference toward the president or DPR. In fact, the Court is more likely to grant a petition if the president issued

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<sup>38</sup>According to surveys of Indonesian voters, corrupt behavior is the most important reason disqualifying a political candidate (International Foundation for Election Systems, 2010, 22).

a statement opposing it.

This chapter contributes to – and sometimes challenges – the broader literature on judicial voting behavior in three ways. First, I found no support for the party capability theory, adding to the growing consensus that it does not hold true for litigation outside the U.S. Second, my results suggest that judges do respond to signals regarding public opinion. This result is consistent with the work of Mishler and Sheehan (1993), Barnum (1985), Calvin, Collins and Eshbaugh-Soha (2011), and Friedman (2009), all of which find that judicial decisions track and are even informed by public opinion. However, I disagree with the literature about the precise mechanism through which public opinion influences judges. Most scholars posit that judges pay attention to public opinion because the public can moderate the response of the elected branches of government (see, e.g., Vanberg, 2005; Friedman, 2009). Instead, my results suggest that the justices seem to view public support as important regardless of the president’s response. In other words, the Court strategically decided cases in order to build its independence and legitimacy. Ultimately, I confirm former Chief Justice Jimly Asshidiqie’s intuition that the Court is indeed more responsive to NGOs and public opinion than to pressure from the other branches of government.

The positive effect of presidential briefs on case outcomes presents a particularly important challenge to the existing literature. The Indonesian Constitutional Court represents what should have been an “easy case” for scholars looking for evidence that judges strategically defer to the executive. The justices serve short, renewable terms and have relatively few institutional protections against the other branches of government. However, not only do justices not defer to the executive, they are actually more likely to rule in favor of a petition if the president expresses opposition. To my knowledge, this is a unique finding in the literature; no other study of judicial behavior has found a court *more* likely to declare a law unconstitutional if the executive branch supports that law. In the previous section, I provided several possible explanations for this result. At the very least, the findings suggest the need for more research into the conditions under which political institutions constrain

judges.

In assessing the generalizability of my results, two features of the Indonesian Constitutional Court are particularly important. First, the Court's lax standing doctrine means that standing rules play less of a role in filtering out cases from the general public. The petitions and related party briefs that do reach the Court should on average be more representative of the broader public, and thus more reliable signals of public opinion, compared to countries with stricter standing rules.

Second, Indonesia's first two chief justices were both political savvy leaders who strongly believed that the Court should play an active role in checking the government (Hendrianto, 2016c). Although my dataset covers the brief term of Akil Mochtar (April-October 2013), it does not cover the later chief justices, who lacked the charisma of Asshiddiqie and Mahfud. As such, it is not clear if the decade my dataset covers represents an aberration or a settled political equilibrium. Indeed, the Court has become less likely to grant petitions since Mochtar resigned; as seen in Table 2.4, during 2003-2013, the Court granted approximately 28.9% of petitions, but during 2014-2016 that number fell to 22.4% (see also SETARA, 2015, noting a decline in rulings for petitioners). I discuss the implication of these trends in Chapter VII.

As noted in Chapter IV, much of the literature on judicial behavior focuses exclusively on judicial voting. In this chapter, I addressed that literature directly using data from Indonesia. However, voting to accept or reject a petition is only part of the adjudication process. Judges also have to provide written justifications for their votes. The Court's reasoning can be as important as the final declaration of unconstitutionality because the text of the decision becomes a source of law. Litigants often want judges to accept their specific legal arguments as a way to influence the application of legal doctrine in future cases. In the next chapter of this dissertation (Chapter VI), I look at how litigants use their briefs to influence the text of judicial decisions.

## CHAPTER VI

### Credible Information

In Chapter IV, I looked at how NGOs influence the agenda of the Indonesian Constitutional Court by filing petitions. In Chapter V, I demonstrated that public opinion – as represented by the number of petitioners and related party briefs – affects the probability that the Court grants a petition. In this chapter, I focus on one specific mechanism through which briefs can influence judicial decisions: the text. In most countries, the text of a constitutional court decision constitutes binding law, so influencing the contents of the opinion could ultimately shape legal doctrine. I use a plagiarism-detection software called WCopyfind in order to determine the extent to which the text in Indonesian briefs influences the text of the Constitutional Court’s written opinions.

Other scholars have started to use plagiarism-detection software to study the effect of briefs on judicial decisions (see, e.g., Collins, 2007; Collins, Corley and Hamner, 2014), but my approach differs from the existing literature in two crucial ways. First, my study focuses on the extent to which judges view a litigant’s identity as a signal of the credibility of information in its brief. Most of the literature focuses on other signals of credibility, such as the extent to which amicus briefs repeat information from other briefs (see Section 6.1). Second, I build and test an argument about why Indonesian Constitutional Court justices might view briefs submitted by NGOs as more credible than briefs submitted by other types of litigants.

In Section 6.1 of this chapter, I begin with a short review of the literature about the effect of legal briefs on written judicial opinions. I also present a set of testable hypotheses. Next, in Section 6.2, I explain my data and the plagiarism-detection software I use. I then present my results in Section 6.3, finding that the Constitutional Court’s final opinion is more likely to incorporate text from petitions submitted by NGOs than from other types of petitioners. In Section 6.4, I discuss a constitutional challenge to the privatization of the natural gas sector, which helps illustrate how and why the Court might find petitions from NGOs more credible or persuasive. Finally, in Sections 6.5 and 6.6, I discuss my results and the broader implications for the literature.

## **6.1 Theory**

Lawyers spend considerable time and effort trying to persuade judges to cite their briefs because the judicial opinions of most constitutional courts – as well as ordinary courts in common law systems – constitute binding sources of law. However, there is relatively little research on when and why judges incorporate text from briefs instead of using their own language. In this section, I review the literature about judicial citations or quotation of briefs. I focus on the extent to which party identity serves as a signal to the court about the credibility of the brief. This literature is related to, and in some cases directly builds upon, the literature review in Section 5.1 of Chapter V. I then present a set of testable hypotheses regarding text in petitions and related party (*pihak terkait*) briefs before the Indonesian Constitutional Court.

### **6.1.1 Literature Review**

In most jurisdictions, judges are required to adjudicate disputes relying solely upon the information presented to them by the parties and amicus curiae, if any. Unlike the legislative and executive branches, which have staff to conduct research on policy issues and can call upon independent experts, judges cannot – and lack the capacity to – conduct their

own research into the facts or the policy implications of a case. A court's research capacity is typically limited to researching the law, jurisprudence, and legal doctrine. Compared to other policymakers, judges are limited in their sources of information. This creates an information asymmetry problem as judges are extremely dependent upon the quality of the information contained in the briefs and do not check the underlying sources (see Larsen, 2014).<sup>1</sup>

Judges are thus faced with the question of when to cite or quote information from a brief. Judges are expected to engage with the arguments of the parties, but they are not required to directly quote language from briefs, especially briefs submitted by non-litigants (i.e., *amicus curiae*). There are several reasons judges they might do so. First, judges might quote a legal argument that they find particularly persuasive or well explained (Collins, Corley and Hamner, 2015, 921-22). Second, they might cite information from experts about the legal, policy, economic, or scientific implications of a law rather than attempting to explain it themselves. Finally, judges might cite briefs simply to minimize the time and effort spent on any given case (Corley, Collins and Calvin, 2011). In each of these scenarios, judges must assess the credibility and quality of a brief before deciding whether or not to cite it. Judges are more likely to cite briefs that they believe to be credible or informative. That said, it is important to note that credibility does not necessarily guarantee a favorable outcome; the justices might well accept a brief's factual allegations and take the litigant's arguments seriously, but ultimately rule against them.

The identity of a party engaging in litigation can send a signal to the court about the credibility of its brief (see Kearney and Merrill, 2000, 749-50).<sup>2</sup> Judges might have prior beliefs about the credibility of some parties, and thus be more willing to trust information

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<sup>1</sup>This problem is not merely theoretical; a recent study of U.S. Supreme Court decisions between 2011-2015 found that around 8% of them contained material errors of fact, including several that might have affected the outcome of the case (Gabrielson, 2017).

<sup>2</sup>Another solution to the information asymmetry problem is the reputation of the attorney representing the party. There is some evidence that U.S. judges view an attorney's reputation as a signal of credibility (McGuire and Caldeira, 1993; McGuire, 1995; Corley, 2008). Unfortunately, I lack sufficient information about the reputation of Indonesian attorneys who appeared before the Constitutional Court to test this proposition in my dissertation.



contained in their briefs. For example, in the U.S., the Supreme Court views the Solicitor General as a particularly trusted source, with some scholars even referring to the position as a de facto “tenth justice” (Chandler, 2011). Indeed, for the 2010-2011 term, the U.S. Supreme Court cited 79% of amicus briefs submitted by the Solicitor General (Anderson and Franze, 2011). By contrast, NGOs proved far less influential; only 8% of the 628 amicus briefs submitted by NGOs during that term were cited, while the Court cited NGO amicus briefs in only 40% of its decisions. However, NGOs with a reputation for high-quality legal analysis, such as the American Civil Liberties Union, proved far more successful and were even cited in multiple cases (Lynch, 2004, 49-56).<sup>3</sup>

Information asymmetry becomes especially problematic in cases dealing with complex policy or technical issues. Most judges are generalists, not specialists; they must adjudicate many different types of legal disputes (see Legomsky, 1990). Judges do not always have the knowledge to determine the reliability of information in subject areas outside their expertise. In such circumstances, party identity can serve as a signal of credibility. If a party, such as a prominent NGO or academic expert, possesses a reputation for policy or technical expertise, judges might prefer to quote their briefs directly rather than attempt to explain the issue in their own words. The little empirical research we do have on this question is inconclusive. It does appear that organized interest groups are more likely to submit amicus briefs in low-information, high complexity cases (Hansford, 2004), but there is no evidence that judges are more likely to cite their briefs in complex cases (see Corley, 2008, 474).<sup>4</sup>

The amount of political or moral capital a litigant possesses can also affect its reputation, and thus the court’s propensity to cite its brief. For example, the U.S. Supreme Court’s decision in *Grutter v. Bollinger* extensively quoted a brief submitted by a group of retired high-ranking U.S. military officers in support of affirmative action. The fact that a respected

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<sup>3</sup>But see Salamone (2014), which finds that the four U.S. Supreme Court justices who were members of the Federalist Society were not significantly more likely to quote amicus briefs submitted by Federalist Society members.

<sup>4</sup>Another solution to the information asymmetry problem is for courts to issue evidentiary rules governing the conditions under which they will accept scientific evidence as credible (e.g., Nardi, 2008b).

institution not traditionally identified with progressive policy preferences nevertheless supported the policy lent credence to the respondent's claims (see Leach, 2004). Bryant (2008) argues that moral capital is particularly important for NGOs because a "good reputation" can help it obtain donor funding, increase membership, and influence policy debates. When NGOs engage in constitutional litigation, they claim to do so in order to advance the public interest, not for a pecuniary reward or to political office. As such, judges might view NGOs as having reputational incentives to provide the court with accurate and credible information.

In theory, the relative strength and capability of the parties engaged in litigation could affect the extent to which judges cite their briefs. Galanter (1974) argues that parties with greater access to legal resources, such as better lawyers, are more likely to obtain favorable outcomes in litigation. However, as noted in Chapter V, there is little evidence that party capability plays a determinative role in litigation outside the U.S. (see Dotan, 1999; Smyth, 2000; Flemming and Krutz, 2002; Haynie and Sill, 2007; Hanretty, 2013*b*). The party resources theory seems particularly inappropriate in explaining why judges cite briefs from non-litigants. Non-litigants generally do not have a direct stake in the case and thus do not expect to bear the primarily financial burden of litigation. Indeed, according to Songer, Kuersten and Kaheny (2000), U.S. amicus briefs seem to provide more support to parties that are one-shot players and "have-nots" as opposed to repeat players and "haves." This suggests that amicus briefs level the playing field rather than enhance the position of more powerful litigants.

One prominent debate in the literature focuses on the extent to which non-litigant briefs provide unique information/arguments as opposed to simply repeating information/arguments already presented by the parties. On the one hand, non-litigants could maximize the information value of their briefs by raising new arguments or providing information that the judges have not already received.<sup>5</sup> Non-litigants are often uniquely positioned to advance arguments that the parties themselves cannot or chose not to include in their briefs, such

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<sup>5</sup>Indeed, Rule 37.1 of the U.S. Supreme Court invites amici to raise matters not already included in the appellant and respondent's briefs.

as the policy or ethical implications of a lawsuit (Epstein, 1993). Moreover, the preferences of non-litigants do not always overlap exactly with those of the litigants, and amicus briefs allow them to nudge the court closer to their ideal point. On the other hand, by repeating information contained in the parties' briefs, non-litigant briefs can reinforce their credibility; seeing the same information from multiple sources helps convince judges that it is reliable (see Arkes, Hackett and Boehm, 1989; Boehm, 1994).

Several studies of amicus curiae briefs in U.S. litigation confirm that most do contain at least some new information (Spriggs and Wahlbeck, 1997; Collins, 2007). Collins, Corley and Hamner (2014) use the plagiarism-detection software WCopyfind to measure the similarity between briefs and find that the language in amicus briefs rarely repeated the same information as other briefs in the case. Despite this, the most effective amicus briefs were those that did repeat information from other briefs. Spriggs and Wahlbeck (1997) find that the U.S. Supreme Court was more likely to cite and accept arguments from amicus briefs that reiterated arguments from the parties' briefs. Collins, Corley and Hamner (2015, 920-21) reach a similar conclusion; using WCopyfind, they find the Court was more likely to quote language from amicus briefs that repeat information contained in other briefs.

The Indonesian Constitutional Court seems especially likely to view litigant identity as a signal of credibility. As discussed in Chapter II, several of the justices had close ties to civil society groups. Chief Justice Jimly Asshidiqie invited NGOs to review laws for constitutional defects and file challenges with the Court.<sup>6</sup> He also recruited lawyers and activists from NGOs to work at the Court as research assistants and staff.<sup>7</sup> Given this familiarity, the justices and staff have more reason to trust NGOs than individuals or organizations with which they have less direct experience. In fact, many of the justices shared the progressive policy preferences of the NGO community,<sup>8</sup> making them more likely to give more credence

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<sup>6</sup>Subject #19, Interview with attorney at Indonesian NGO, Jakarta, Indonesia, July 20, 2012.

<sup>7</sup>Subject #32, interview with former justice, Jakarta, Indonesia, November 21, 2013.

<sup>8</sup>According to one lawyer familiar with the Court, during the first term the progressive faction held a majority over the conservative justices. By the second term, all of the justices were progressives. Subject #28, interview with former Constitutional Court staff attorney, Jakarta, Indonesia, July 20, 2012.

information from groups already aligned with their worldview. Thus, even if the Court does not always accept the legal arguments proposed by NGOs, the justices are more likely to treat them as worthy of their attention.

### 6.1.2 Hypotheses

In this section, I present a set of hypotheses about the conditions under which the Indonesian Constitutional Court adopts text from petitions, government statements, and related party briefs. The party capability theory predicts that stronger parties are more likely to submit high-quality briefs that get cited by the Court because they have greater access to legal resources. This leads to the first hypothesis:

**Hypothesis 6.1 (Litigant Strength):** The Constitutional Court's written opinion is *more likely* to adopt text from briefs submitted by relatively stronger litigants than from briefs submitted by relatively weaker litigants.

In other words, the justices are more likely to quote briefs submitted governments and corporations than those submitted by NGOs or individuals.

As discussed above, the justices will likely view some types of litigants as inherently more credible than others. In particular, several justices on the Constitutional Court, including the first two chiefs, had close ties with civil society groups. Moreover, NGOs typically develop policy expertise in a specific field of law. Even if the Court disagrees with their arguments, it should still be more likely to find them credible and worth discussing at length in its final opinion. This leads to the following hypothesis:

**Hypothesis 6.2 (NGOs):** The Constitutional Court's written opinion is *more likely* to adopt text from briefs submitted by NGOs than from briefs submitted by other types of litigants.

This hypothesis applies to both petitions and related party briefs submitted by NGOs, although I do not predict if one effect will be larger than the other.

Another signal of credibility is public support. The justices might be more likely to treat a brief as credible if they believe that it has the support of the general public. As with repetition in amicus briefs, validation from multiple independent sources can help reassure judges about the credibility of the brief. As discussed in Chapter V, one observable signal of public support – at least for judges in a low-information environment – is the number and diversity of individuals and/or organizations that sign onto the brief. This leads to the final hypotheses:

**Hypothesis 6.3a (Litigant Number):** The Constitutional Court’s written opinion is *more likely* to adopt text from briefs submitted by a larger number of individuals and/or organizations than from briefs submitted by smaller coalitions.

**Hypothesis 6.3b (Litigant Diversity):** The Constitutional Court’s written opinion is *more likely* to adopt text from briefs submitted by a more diverse coalition of litigants than from briefs submitted by less diverse coalitions.

In other words, the more individuals/organizations vouch for a brief, the less likely there exists other individuals/organizations that would consider its contents unreliable or false. These hypotheses potentially apply to both petitioners and related parties.

## 6.2 Methodology & Data

Although a written judicial decision is important both for explaining the court’s reasoning and as a binding source of law, we know relatively little about when and why judges decide to incorporate text from briefs into their opinions. One reason is because, until relatively recently, it was impractical to quantitatively assess the similarity between all texts in a large corpus. With plagiarism-detection software, such as WCopyfind, we can now calculate the percentage of text in a legal brief that is similar or identical to text in a court’s written decision (Collins, Corley and Hamner, 2014). In this section, I describe my data and how I compare documents using WCopyfind. I also describe the statistical models I use to test the hypotheses presented in the previous section.

### 6.2.1 Data & Measurement: WCopyfind

The primary data for this chapter are the written briefs in each Constitutional Court case between August 13, 2003 and October 2, 2013 (the terms of the first three chief justices). The unit of analysis is the brief, either petitions, government statements, or related party briefs. During this time, the Court received 560 petitions, but several were withdrawn before the Court reached final written decision on the merits. For the remaining 460 cases, the Court received 483 petitions, 249 written statements from the president, 243 written statements from the legislature (DPR), 62 briefs from related parties in support of the petition, and 141 briefs from related parties against the petition.<sup>9</sup> Only around 20% of cases received any submissions from related parties.

I use WCopyfind to compare each brief with the Constitutional Court's decision and all other briefs in the same case. WCopyfind was originally developed to detect plagiarism in college papers, but has since been used in studies of amicus briefs in the U.S. (Collins, Corley and Hamner, 2015), policy diffusion amongst states (Hinkle, 2015), and Senate press releases (Grimmer, 2010). The program systematically searches through strings of text in two documents to find matches. The user can set the minimum string length to a certain number of words such that WCopyfind will only report phrases at least that long. WCopyfind then reports the total number of matching words, as well as the number of matched words as a percentage of the total number of words in the document.<sup>10</sup>

I adopt the WCopyfind settings used by Collins, Corley and Hamner (2015), but deviate in two important ways. First, they use the default setting, which sets the shortest string of words to match at six; allows up to two non-matching words in a phrase (“imperfections”); and only requires 80% of a phrase to contain a perfect match.<sup>11</sup> They tolerate some imperfections because one document might refer to information in another without

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<sup>9</sup>Note that there is some missingness as some documents were not in the case files. Also, a handful government statements were presented orally during court hearings rather than in writing.

<sup>10</sup>For more, see WCopyfind instructions at <http://plagiarism.bloomfieldmedia.com/>.

<sup>11</sup>I also turn off the default settings for ignoring letter case, numbers, outer punctuation, and nonwords.

directly quoting it or using the same language (i.e., paraphrasing). I chose a more conservative threshold of ten words with no imperfections (i.e., only perfect matches). Compared to English, Indonesian is a relatively sparse language with a smaller vocabulary and fewer synonyms.<sup>12</sup> This increases the risk of false positives because two documents addressing the same issue could coincidentally end up using similar language. In other words, the Court could use language similar to that in a brief even if the justices did not actually intend to cite or quote that brief. The higher threshold for WCopyfind matches should reduce the risk of false positives.

Second, Collins, Corley and Hamner (2015) use the proportion of text in the decision that matches text in the brief. This measure is problematic because it is not independent of the length of the documents. All else equal, a court is more likely to quote more text from a longer brief than a shorter one, so their measure is likely biased in favor of longer briefs. Moreover, the proportion of a judicial decision matching a brief depends upon the length of the decision. For example, if the Court receives a large number of related party briefs, it will have to allocate proportionately less text to summarizing each brief. Instead, I use the proportion of text in the brief – petition or related party – that matches text in the written judicial decision as my dependent variable. For each brief, I found the number of matching words and then divided by the total number of words in that brief. This effectively measures how much of the brief was “quoted” or “cited” by the court, i.e. how informative the judges found the brief.<sup>13</sup>

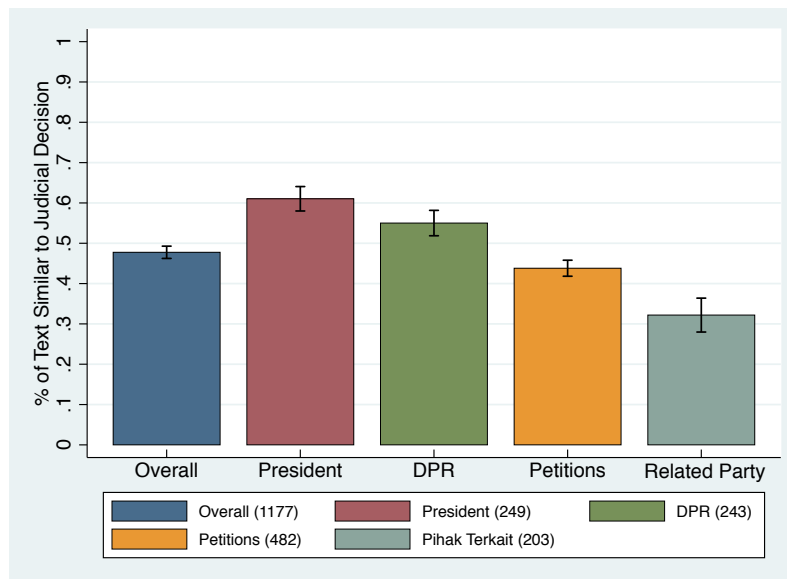
In Figure 6.1, I plot the average proportion of text from each type of brief that matches text in the Constitutional Court’s written opinion in that case. Overall, the Court adopted just under 48% of the text of the average brief in its opinion. At first glance, this number

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<sup>12</sup>As a point of comparison, the Oxford English Dictionary contains 252,200 entries, whereas the Great Dictionary of the Indonesian Language of the Language Center, the Department of Education’s official dictionary, contains around 90,000 entries. See <http://public.oed.com/history-of-the-oed/dictionary-facts/> and <https://kbbi.kemdikbud.go.id>.

<sup>13</sup>This measure is not completely independent of the length of the brief because longer briefs are more likely to have substantive text worth quoting. However, there is less risk of substantial inferential error than with Collins, Corley and Hamner’s (2015) measure, which also depends upon the length of the judicial decision and all other briefs submitted in the case.

seems extremely high. However, the Indonesian Constitutional Court summarizes almost all of the briefs it receives. Thus, at least some of the matched text comes from these sections. Figure 6.1 also shows that the Court is much more likely to adopt text from statements submitted by the president (61%) or DPR (55%) than other types of briefs. The Court adopts text from petitions at around the same rate as the overall average (43.8%). This makes sense as petitions constitute the majority of documents in the corpus. Finally, the Court is much less likely to adopt text from related party briefs.



**Figure 6.1:** Similarity between Briefs and Constitutional Court Decisions

WCopyfind was used to calculate the similarity between each brief and the Constitutional Court’s decision in that same case. If there were more than two briefs in the case, the average was used. The histogram shows the average percentage of text in each type of brief similar to the text in the Court’s decision. Bars represent 95% confidence intervals.

### 6.2.2 Empirical Strategy: Fractional Logit

To test my hypotheses, I use a fractional logit model. Fractional logit is a quasi-likelihood method estimated as a generalized linear model (Collins, Corley and Hamner, 2015), which accounts for the fact that the dependent variable – the percentage of the brief quoted in the written judicial opinion – is a proportion bounded from 0 to 1. To account for unobserved effects of the Constitutional Court’s leadership on the court’s proclivity to quote briefs, I use a fixed-effects model grouped by the chief justice who presided over each case



(Jimly Asshidiqie, Mohammad Mahfud, or Akil Mochtar). I also cluster standard errors by docket number to account for unobserved heterogeneity between cases because some cases received more than one petition or related party brief. I again conducted a diagnosis using Cook’s method to identify highly influential cases, but as in Chapter V ultimately decided against removing outliers.

To test the hypotheses from Section 6.1.2, I used the same coding scheme as in Section 4.2 of Chapter IV (see also Appendix A) to classify each petitioner/related party as one of the following: 1) individual unaffiliated with any organization; 2) political party/candidate; 3) nongovernmental organization; 4) private business/corporation; 5) local government institution; or 6) national government institution. I then used this information to create four different measures of litigant identity. First, I ranked the litigant types from 1 to 6 in order to create an ordinal measure of party resources, with individuals being the weakest type and national government the strongest. If a brief has more than one individual/organization attached to it, I rank it based on the strongest party associated with it. In Table 6.1, I provide summary statistics for each category. Although the Court is more likely to adopt text from briefs submitted by governments, the overall rate of adoption is not clearly correlated with party strength, providing preliminary evidence against Hypothesis 6.1.

Party Strength $\geq$	1	2	3	4	5	6	Total
<i>Number of Petitions</i>	195	95	114	30	38	11	483
<i>% Text Adopted</i>	41%	47%	48%	40%	43%	47%	44%

**Table 6.1:** Summary Statistics of Party Resources Variable

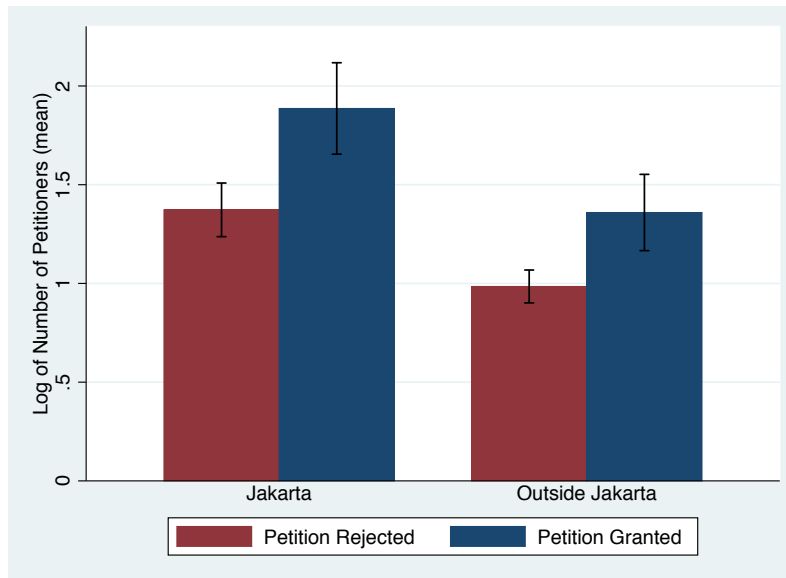
Second, I created a dummy variable for each category of litigant, with  $x_{identity\_type_i} = 1$  if at least one of that type officially signed on to the brief. I also counted the number of each type of litigant associated the brief. In Table 6.2, I provide summary statistics of the types of petitioners involved in each case. This provides preliminary support for Hypothesis 6.2 in that the Court is more likely to adopt text from briefs submitted by NGOs than those submitted by other types of litigants.

Finally, counted the total number of litigants associated with the brief and interacted

	Individual	Political	NGO	Business	Local gov.	National gov.	Total
<i>Number of Cases</i>	266	117	129	30	39	11	483
<i>Number of Petitioners</i>	1204	845	473	98	103	11	2734
<i>% Text Adopted</i>	44%	47%	48%	40%	42%	47%	44%
<i>Number of Cases</i>	9	16	78	20	37	46	206
<i>Number of Related Parties</i>	41	16	81	21	48	46	253
<i>% Text Adopted</i>	20%	29%	24%	32%	30%	40%	32%

**Table 6.2:** Summary Statistics of Litigant Identity Variables

that variable with a dummy for geographic diversity, for which  $x_{diversity} = 1$  if at least one of the litigants resided outside Jakarta. As noted in Chapter V, there are still considerable differences between Jakarta and the rest of the country. As seen in Figure 6.2, there is a small correlation between the size of the petitioner coalition and proportion of text matching that of the Court’s decision. This provides preliminary support for Hypotheses 6.4a & 6.4b in that the Court is more likely to adopt text from briefs submitted by a larger and more diverse group of litigants.



**Figure 6.2:** Histogram of Number and Diversity of Litigants

The plot represent the log of the proportion of text that the Constitutional Court adopted from a brief as a function of the number of individuals and/or organizations associated with that brief. The log was transformed to avoid taking the log of 1. Bars represent 95% confidence intervals.

In each model, I include a dummy variable to see if judges are more likely to cite from briefs in cases dealing with complex issues. As in Chapter V, I follow Vanberg (2005) by coding economic, socioeconomic rights, or environmental law as complex issues

(*complex\_issue* = 1). Other issues, such as elections, government processes, the legal system, and human rights, are considered “not complex” because these issues are easier for the public to understand and monitor (*complex\_issue* = 0). If the justices are more likely to cite briefs in complex cases, then a change from 0 to 1 should increase the proportion of text cited.

As an alternative measure of legal issues, I used a latent topic model to obtain information about the percentage of text in each brief associated with each topic. For petitions, I simply used the results of my topic model from Chapter IV (see Section 4.2). For related parties, I developed a new topic model using the same parameters, but with 14 topics. The results, as well as labels for each topic, are included in Appendix D. I dropped several topics in the fractional logit models because they covered information not relevant to legal arguments/information, such as the addresses of the individuals associated with the brief, as well as because of collinearity with other variables.<sup>14</sup> I exclude the dummy variable for issue complexity when I add the latent topic variables.

To test the effect of repetition in non-litigant briefs, I used WCopyfind to create three variables that measure the similarity between each related party brief and other briefs in the same case. The first variable measures the average proportion of each related party brief that matches text in other related party briefs in the same case that take the same stance towards the petition. For example, if a related party brief supports the petitioner, then the variable would indicate the average proportion of text matching all other related party briefs that also support the petition. The second variable measures the proportion of text in each related party brief that matches text in the petition. The third variable measures the proportion of text in each related party brief that matches text in the presidential statement, if any. If the justices are more likely to cite related party briefs that repeat information from other briefs as opposed to presenting new information, then those briefs should contain more text that matches the Court’s final decision.

I then interact each of these three variables with a dummy indicating whether that

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<sup>14</sup>Topics 3, 15, and 16 for petitions, and Topics 3 and 7 for related parties.

particular related party supported or opposed the petition. I do this because I expect differential effects for those related party briefs that support a petition versus those that oppose it. It also helps capture information about the context of matching text. If a related party brief supporting the petition contains a high proportion of text that matches the petition, any such similarity likely indicates favorable treatment of the petitioner's argument.

I also include several control variables in the models. Because longer briefs contain more text, there is a higher chance the Court will find some portion of text that it decides to adopt in its decision. As such, I control for length with a variable that takes the log of the total number of words in the brief (*length*). There is also a possibility that the Court will generally be more inclined to adopt text from briefs in some cases than others. To account for this proclivity to cite on a case-by-case basis, I include a variable measuring the proportion of the DPR statement – if any – in the case matching text in the Court's decision (*DPR\_text*). If the Court extensively quotes the DPR statement, it should also be more likely to cite other briefs as well. I include a dummy variable indicating if the Court ultimately decided to grant the petition in case (*case\_outcome*) because the justices might believe they need to provide a more thorough justification for a decision declaring a law unconstitutional than for a decision upholding a law. For models in which I focus on petitions, I include a variable containing the length of the transcripts of court proceedings as a proxy for the legal quality of the petition (*hearing\_length*). As I argued in Chapter V, constitutional claims that have more merit should require more consideration, including longer hearings to consider evidence and hear arguments.

### **6.3 Results**

In Tables 6.3-6.7, I present the results of my models for matching text in judicial decisions and briefs. The expected direction/sign (if any) for each independent variable is indicated in brackets. The first model in each table includes only the primary independent variable(s), the second model adds controls, and the third incorporates the latent topic

variables. For each model, I also show the marginal effect for each independent variable, holding all other variables at their means. I focus first on petitions and then address related party briefs in a separate section.

### 6.3.1 Petitioners

% Similar	(1)		(2)		(3)	
	Coefficient	% Change	Coefficient	% Change	Coefficient	% Change
<b>Petitioners:</b>						
<i>Party Strength</i> [+]	0.033 (0.03)	+0.85%	0.024 (0.03)	+0.58%	0.064 <sup>o</sup> (0.03)	+1.56%
<b>Brief Attributes:</b>						
<i>Length</i> [+]			0.356* (0.16)	+8.77%	0.348* (0.16)	+8.55%
<i>Complex issue</i> [+]			-0.150 <sup>o</sup> (0.09)	-3.70%		
<b>Case Attributes:</b>						
<i>Case Outcome</i> [+]			0.019 (0.09)	+0.48%	-0.001 (0.09)	-0.02%
<i>DPR Text</i> [+]			0.539*** (0.14)	+0.13%	0.518*** (0.14)	+0.13%
<i>Hearing length</i> [+]			-0.002 (0.12)	-0.05%	0.019 (0.12)	+0.48%
<b>Constant</b>	-0.325*** (0.08)		-1.493* (0.63)		-1.564* (0.89)	
<i>Term</i>	NO	NO	YES	YES	YES	YES
<i>Topics</i>	NO	NO	NO	NO	YES	YES
<i>N</i>	483		482		482	
Pseudo <i>R</i> <sup>2</sup>	0.000		0.013		0.032	
Model $\chi^2$	1.16		46.53		113.21	

**Table 6.3:** Model of Similarity between Petitions and Judicial Opinions with Party Strength Variables

<sup>o</sup>  $p < 0.1$ , \*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$ . The unit of analysis is each petition in each case that resulted in a final decision from August 13, 2003 to October 2, 2013. The dependent variable is the percentage of words from the petition that matches the final decision according to WCopyfind. The model is a fractional logit indicating that the dependent variable is a percentage ranging from 0 to 1. Coefficients for topic variables not shown. The expected direction of the coefficients appears in brackets. Percent change indicates the marginal effect on the dependent variable of a 0-1 increase in dummy variables or one standard deviation increase in continuous variables, holding all other variables at their mean or modal values.

To test the party resources/capacity theory, I estimated the following model:

$$Prob(text_{petition} = text_{decision}) = \beta_1 + \beta_2 \text{ party strength} + \beta_i \text{ controls} + \epsilon \quad (6.1)$$

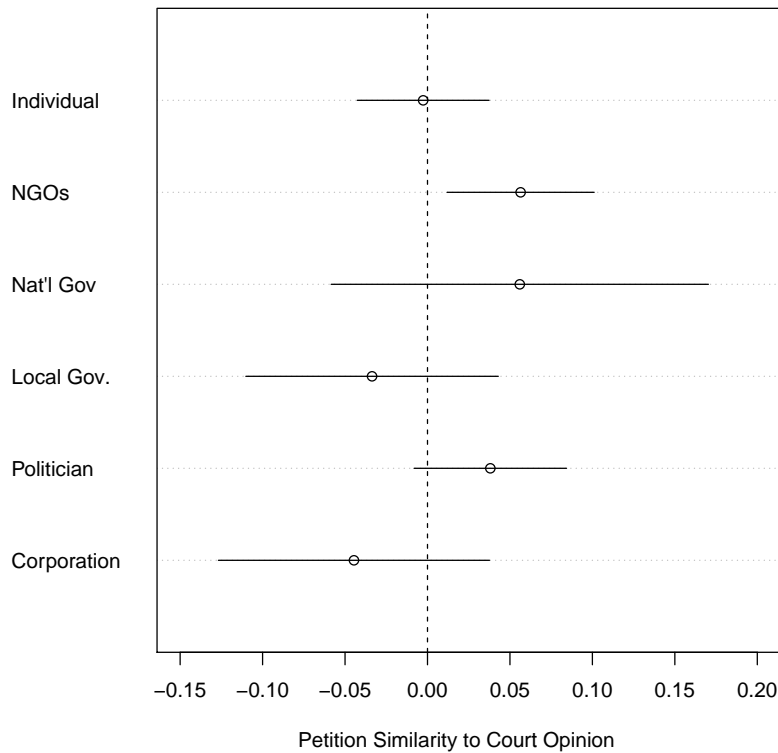
, where  $\beta_2$  should be positive if greater access to legal resources increases the probability that the Court quotes text from a petition. Table 6.3 presents the results of this model. The estimated effect of *party strength* is consistently positive across all three models, indicating that the Constitutional Court is more likely to adopt text from stronger petitioners, such as the national government. However, the effect is only significant in model 3, suggesting the possibility of bias due to collinearity with one of the controls. Moreover, the marginal effect of the variable only increases significantly in going from an individual petitioner (level 1) to political party (level 2); it does not increase significantly for values above 2. As such, the evidence for Hypothesis 6.1 is weak, at best; it appears that having greater access to legal resources does not increase the probability that the justices will quote or cite text from a petition.

Next, I look at how party identity affects the amount of text that the Constitutional Court adopts from a petition. If the Court believes that some types of parties are more credible than others, it should be more likely to quote their briefs. Figure 6.3 depicts the differences between means for each type of petitioner. Each row indicates the average proportion of text from petitions that included at least one of that party type minus the average proportion of text from all other petitions. As seen in the second row, the Court is significantly more likely to adopt text from petitions supported by NGOs. This suggests that the justices view NGOs as having higher levels of credibility.

To better measure the credibility effect of party identity, I estimated the following model:

$$\begin{aligned}
 Prob(text_{petition} = text_{decision}) = & \beta_1 + \beta_2 NGO + \beta_3 nat. gov. + \beta_4 local gov. \\
 & + \beta_5 political party + \beta_6 business + \beta_i controls + \epsilon
 \end{aligned}
 \tag{6.2}$$

, where  $\beta_2$  should be positive if the Constitutional Court is more likely to to adopt text from petitions submitted by NGOs. Table 6.4 presents the results of this model using dummy variables for each type of petitioner. Even after controlling for other features in the case, the



**Figure 6.3:** Similarity between Petitions and Judicial Opinions

WCopyfind was used to calculate the similarity between each petition and the Constitutional Court's decision in that same case. The plot shows the difference in means for each type of petitioner. A positive number indicates greater similarity with judicial decisions, while a negative number indicates less similarity. Bars represent 95% confidence intervals.

Court is still more likely to adopt text from petitions submitted by NGOs. If a petition has the support of at least one NGO, the proportion of the text adopted increases from around 42% to 47.5% – a difference of almost six percentage points.

Table 6.5, which uses the number of each type of petitioner supporting a petition, likewise shows that the proportion of text matching the Court's written opinion is higher for petitions supported by a larger group of NGOs. Moreover, the magnitude of the effect grows larger as the number of NGOs increases. I plot the marginal effects in Figure 6.4. The largest change comes from the addition of a single NGO (around 3%). After that initial jump, the marginal effect of each additional NGO decreases. If the number of NGOs in a petition increases from 1 to 2, the proportion of text that the Court adopts from the petition

<i>% Similar</i>	(1)		(2)		(3)	
	<i>Coefficient</i>	<i>% Change</i>	<i>Coefficient</i>	<i>% Change</i>	<i>Coefficient</i>	<i>% Change</i>
<b>Petitioners:</b>						
<i>NGO</i> [+]	0.266** (0.10)	+6.56%	0.211* (0.11)	+5.19%	0.219* (0.11)	+5.39%
<i>National gov.</i> [+]	0.160 (0.26)	+3.95%	0.071 (0.25)	+1.74%	0.075 (0.30)	+1.85%
<i>Local gov.</i> [+]	-0.064 (0.15)	-1.58%	-0.051 (0.15)	-1.26%	0.148 (0.15)	+3.63%
<i>Political party</i> [?]	0.215* (0.10)	+5.29%	0.191° (0.10)	+4.69%	0.193 (0.12)	+4.75%
<i>Business</i> [?]	-0.121 (0.20)	-2.98%	-0.134 (0.20)	-3.30%	0.129 (0.20)	+3.17%
<b>Brief Attributes:</b>						
<i>Length</i> [+]			0.308° (0.17)	+7.58%	0.325° (0.17)	+7.99%
<i>Complex issue</i> [+]			-0.119 (0.10)	-2.93%		
<b>Case Attributes:</b>						
<i>Case Outcome</i> [+]			0.028 (0.09)	+0.69%	0.013 (0.09)	+0.31%
<i>DPR Text</i> [+]			0.544*** (0.14)	+0.13%	0.528*** (0.13)	+0.13%
<i>Hearing length</i> [+]			-0.028 (0.12)	-0.70%	0.010 (0.13)	+0.24%
<b>Constant</b>	-0.363*** (0.06)		-1.270° (0.68)		-1.413° (0.76)	
<i>Term</i>	NO	NO	YES	YES	YES	YES
<i>Topics</i>	NO	NO	NO	NO	YES	YES
<i>N</i>	483		482		482	
Pseudo <i>R</i> <sup>2</sup>	0.004		0.015		0.033	
Model $\chi^2$	11.59		58.72		122.07	

**Table 6.4:** Model of Similarity between Petitions and Judicial Opinions with Party Type Dummy Variables

°  $p < 0.1$ , \*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$ . The unit of analysis is each petition in each case that resulted in a final decision from August 13, 2003 to October 2, 2013. The dependent variable is the percentage of words from the petition that matches the final decision according to WCopyfind. The model is a fractional logit indicating that the dependent variable is a percentage ranging from 0 to 1. Coefficients for topic variables not shown. The expected direction of the coefficients appears in brackets. Percent change indicates the marginal effect on the dependent variable of a 0-1 increase in dummy variables or one standard deviation increase in continuous variables, holding all other variables at their mean or modal values.

increases by 2.5%, while going from 14 to 15 NGOs increases the proportion of text by less than 0.3%. Taken with Table 6.4, these results provide considerable support for Hypothesis 6.2 in that the Court is more likely to adopt text from NGO petitions.

I then disaggregated the NGO category to see if certain types of NGOs were more likely

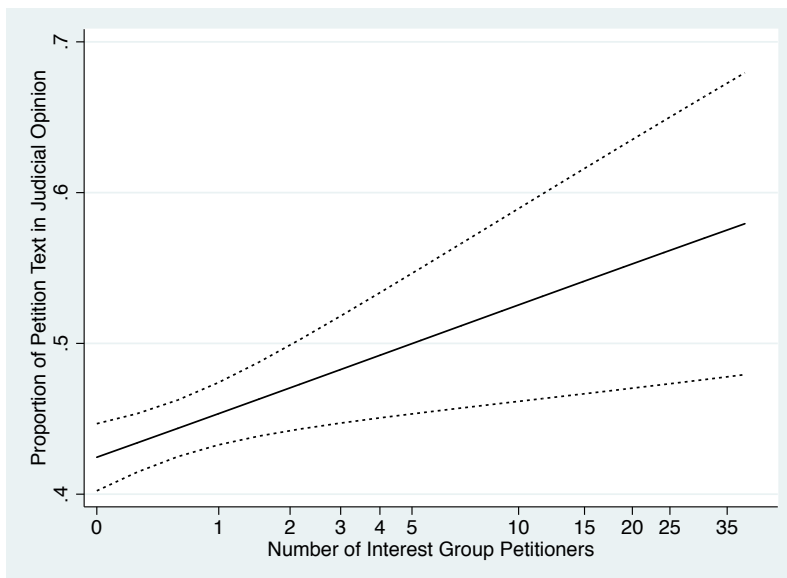


% Similar	(1)		(2)		(3)	
	Coefficient	% Change	Coefficient	% Change	Coefficient	% Change
<b>Petitioners:</b>						
# NGO [+]	0.461** (0.14)	+11.3%	0.392** (0.15)	+9.65%	0.406* (0.17)	+9.98%
# National gov. [+]	0.460 (0.88)	+11.3%	0.243 (0.86)	+5.98%	0.240 (1.02)	+5.90%
# Local gov. [+]	0.150 (0.26)	+3.70%	0.138 (0.27)	+3.39%	0.565* (0.24)	+13.9%
# Political party [?]	0.191 (0.16)	+4.71%	0.085 (0.17)	+2.09%	0.017 (0.19)	+0.42%
# Business [?]	-0.024 (0.33)	-0.59%	-0.137 (0.34)	-3.37%	0.274 (0.35)	+6.74%
<b>Brief Attributes:</b>						
Length [+]			0.261 (0.17)	+6.42%	0.276 (0.18)	+6.78%
Complex issue [+]			-0.173 <sup>o</sup> (0.10)	-4.25%		
<b>Case Attributes:</b>						
Case Outcome [+]			0.008 (0.09)	+0.19%	-0.024 (0.09)	-0.60%
DPR Text [+]			0.557*** (0.14)	+0.13%	0.539*** (0.13)	+0.13%
Hearing length [+]			-0.052 (0.12)	-1.28%	-0.018 (0.13)	-0.45%
<b>Constant</b>	-0.344*** (0.05)		-0.960 (0.69)		-1.112 (0.82)	
<i>Term</i>	NO	NO	YES	YES	YES	YES
<i>Topics</i>	NO	NO	NO	NO	YES	YES
<i>N</i>	483		482		482	
Pseudo <i>R</i> <sup>2</sup>	0.003		0.014		0.033	
Model $\chi^2$	11.71		60.12		129.55	

**Table 6.5:** Model of Similarity between Petitions and Judicial Opinions with Number of Party Type Variables

<sup>o</sup>  $p < 0.1$ , \*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$ . The unit of analysis is each petition in each case that resulted in a final decision from August 13, 2003 to October 2, 2013. The dependent variable is the percentage of words from the petition that matches the final decision according to WCopyfind. The model is a fractional logit indicating that the dependent variable is a percentage ranging from 0 to 1. Coefficients for topic variables not shown. The expected direction of the coefficients appears in brackets. Percent change indicates the marginal effect on the dependent variable of a 0-1 increase in dummy variables or one standard deviation increase in continuous variables, holding all other variables at their mean or modal values.

to succeed in persuading the Constitutional Court to quote text from their petitions. I used the coding scheme from Table 4.2 of Chapter IV (see also Appendix A). I present the results in Figure 6.5. Petitions with at least one education NGO saw the largest significant increase in the proportion of text the Court adopted in its final decision (around 20%). Petitions with



**Figure 6.4:** Similarity between NGO Petitions and Judicial Opinions

WCopyfind was used to calculate the similarity between each petition and the Constitutional Court’s written opinion in that same case. Using the results from Model 3 in Table 6.5, the plot shows the marginal effect of the number of interest group petitioners associated with a petition on the amount of text associated with the Court’s opinion. All other variables are held at their mean or modal values. Dashed lines represent 95% confidence intervals.

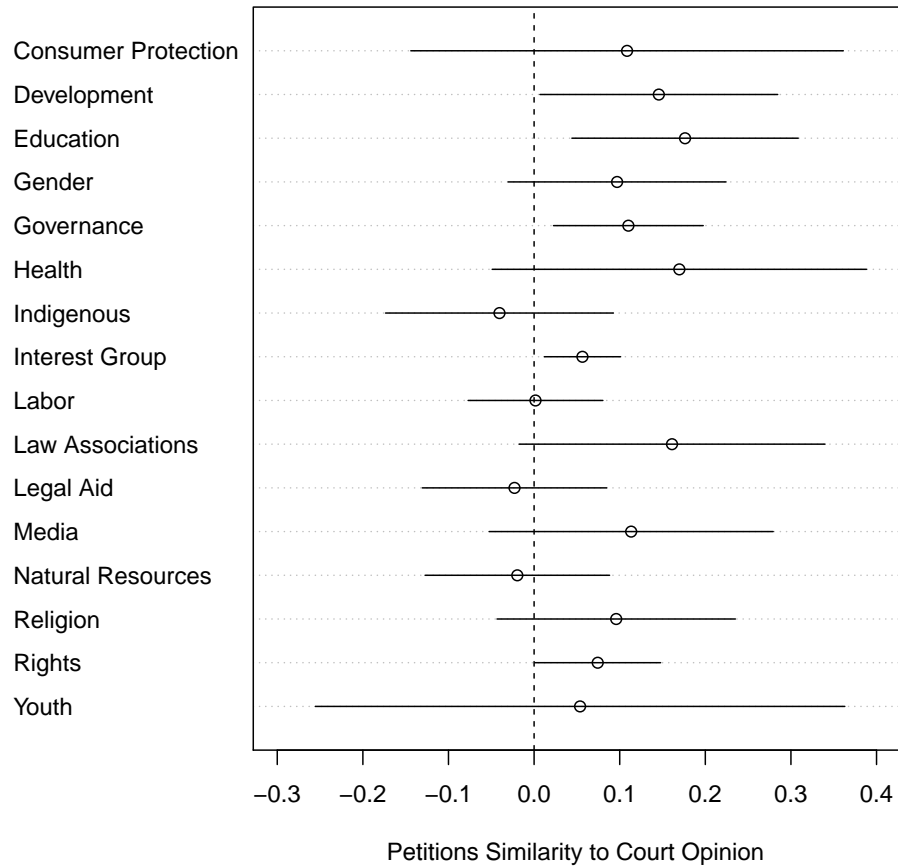
at least one development or governance NGO also saw significant increases (approximately 15% and 10%, respectively). None of the other types of NGOs were associated with a significant change in the proportion of text adopted.

None of the other types of petitioners, including national government institutions, had a consistently significant effect on the proportion of text that matched the Constitutional Court’s decision.

Finally, to measure the effect of public opinion on text matches, I estimated the following model:

$$\begin{aligned}
 Prob(text_{petition} = text_{decision}) = & \beta_1 + \beta_2 \# \text{ petitioners} + \beta_3 \text{ geographic diversity} \\
 & + \beta_4(\# \text{ petitioners} * \text{ geographic diversity}) + \beta_i \text{ controls} + \epsilon
 \end{aligned}
 \tag{6.3}$$

, where  $\beta_2 + (\beta_4 * \text{ geographic diversity})$  should be positive if signals of public support for a petition increase the proportion of text that the Court adopts in its written opinion. Table 6.6 presents this model. The results are neither substantively large nor robust. Indeed,



**Figure 6.5:** Similarity between NGO Petitions and Judicial Opinions

WCOPYFIND was used to calculate the similarity between each petition and the Constitutional Court’s written opinion in that same case. The plot shows the difference in means for each type of petitioner. A positive number indicates greater similarity with judicial decisions, while a negative number indicates less similarity. Bars represent 95% confidence intervals.

upon adding the topic variables in model 3, the best estimate of the marginal effect for the size and diversity of the petitioner coalition is negative – the opposite of what Hypotheses 6.3a and 6.3b had predicted. As such, although public opinion influences the justices’ votes (see Chapter V), it appears that it does not influence how the justices write their opinions.

### 6.3.2 Related Party Briefs

The identity of related parties had no significant effect on the proportion of text from the related party brief that the Constitutional Court adopted in its written decision. Unlike

<i>% Similar</i>	(1)		(2)		(3)	
	<i>Coefficient</i>	<i>% Change</i>	<i>Coefficient</i>	<i>% Change</i>	<i>Coefficient</i>	<i>% Change</i>
<b>Petitioners:</b>						
<i># Petitioners</i> [+]	0.159 (0.14)	+5.85%	0.033 (0.15)	+2.19%	0.013 (0.15)	+1.40%
<i>Diversity</i> [+]	-0.247 (0.16)	-3.65%	-0.202 (0.16)	-3.25%	-0.207 (0.16)	-3.73%
<i>Number * Diversity</i> [+]	0.176 (0.27)		0.126 (0.28)		0.099 (0.28)	
<b>Brief Attributes:</b>						
<i>Length</i> [+]			0.334 <sup>°</sup> (0.17)	+8.21%	0.333 <sup>°</sup> (0.18)	+8.18%
<i>Complex issue</i> [+]			-0.157 <sup>°</sup> (0.09)	-3.88%		
<b>Case Attributes:</b>						
<i>Case Outcome</i> [+]			0.006 (0.09)	+0.14%	-0.011 (0.09)	-0.03%
<i>DPR Text</i> [+]			0.523 <sup>***</sup> (0.14)	+0.13%	0.495 <sup>***</sup> (0.14)	+0.12%
<i>Hearing length</i> [+]			-0.030 (0.12)	-9.74%	0.016 (0.14)	+0.40%
<b>Constant</b>	-0.264* (0.11)		-1.188 <sup>°</sup> (0.69)		-1.294 <sup>°</sup> (0.88)	
<i>Term</i>	NO	NO	YES	YES	YES	YES
<i>Topics</i>	NO	NO	NO	NO	YES	YES
<i>N</i>	483		482		482	
Pseudo <i>R</i> <sup>2</sup>	0.002		0.014		0.032	
Model $\chi^2$	8.82		51.86		109.61	

**Table 6.6:** Model of Similarity between Petitions and Judicial Opinions with Petitioner Coalition Variables

<sup>°</sup>  $p < 0.1$ , \*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$ . The unit of analysis is each petition in each case that resulted in a final decision from August 13, 2003 to October 2, 2013. The dependent variable is the percentage of words from the petition that matches the final decision according to WCopyfind. The model is a fractional logit indicating that the dependent variable is a percentage ranging from 0 to 1. Coefficients for topic variables not shown. The expected direction of the coefficients appears in brackets. Percent change indicates the marginal effect on the dependent variable of a 0-1 increase in dummy variables or one standard deviation increase in continuous variables, holding all other variables at their mean or modal values.

for petitions, there is no evidence that the Court is more likely to quote text from related party briefs submitted by NGOs (table not presented). This suggests that whatever credibility the justices attach to NGOs only applies to petitioners, not related parties. I discuss several possible explanations for this differing treatment in Section 6.5.

In this section, I briefly discuss how repetition in related party briefs affects the extent to which the Constitutional Court adopts text from that brief. To measure the effect of

repetition, I estimated the following model:

$$\begin{aligned}
\text{Prob}(\text{text}_{\text{petition}} = \text{text}_{\text{decision}}) = & \beta_1 \\
& + \beta_2 \text{ match}_{\text{otherrelated}} + \beta_3 \text{ support petition} + \beta_4(\text{match}_{\text{related}} * \text{support petition}) \\
& + \beta_5 \text{ match}_{\text{petitions}} + \beta_6 \text{ support petition} + \beta_7(\text{match}_{\text{petitions}} * \text{support petition}) \\
& + \beta_8 \text{ match}_{\text{president}} + \beta_9 \text{ support petition} + \beta_{10}(\text{match}_{\text{president}} * \text{support petition}) \\
& + \beta_i \text{ controls} + \epsilon
\end{aligned}
\tag{6.4}$$

, where each *match* variable measures the proportion of matching text between the related party brief and other related party briefs, the petition, and president’s statement, respectively. If the Court is more likely to quote related party briefs that support the petition (*support petition* = 1) when they repeat information from other related parties, then  $\beta_2 + \beta_4$  should be positive. By contrast, for related party briefs that oppose the petition (*support petition* = 0),  $\beta_2$  should be positive.

Table 6.7 presents the results of this model. None of the three text-matching variables is significant, although the best estimate is positive. Repeating information from either the petition, president’s statement, or other related party briefs does not significantly increase the probability that the Court will quote that information. In other words, repetition does not have a significant effect on the credibility of the brief.<sup>15</sup>

### 6.3.3 Other Variables

Some scholars had expected courts to cite more text from briefs in cases dealing with complex issues. However, my results provide no indication that holds true for the Indonesian Constitutional Court. In Tables 6.3-6.7, the best estimate for the dummy variable for issue

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<sup>15</sup>When I plotted the marginal effects for the text-matching variables, it did appear that, at extremely high levels, repetition had a significant and positive effect on the similarity between the related party brief and the Court’s decision, but only for related party briefs that supported the petition. However, these higher values did not actually exist as observations in the dataset (the model had projected based on existing observations), so I discount these results.

% Similar	(1)		(2)		(3)	
	Coefficient	Coefficient	% Change	Coefficient	Coefficient	% Change
<b>Matching Text:</b>						
<i>Related Parties</i> [+]	-0.051 <sup>°</sup> (0.03)	-1.11%	-0.069* (0.02)	+0.65%	-0.061 <sup>°</sup> (0.03)	+0.78%
<i>Related * Support</i> [+]			0.294 (0.25)		0.346 <sup>°</sup> (0.18)	
<i>Petitions</i> [+]	0.089* (0.04)	+1.93%	0.093* (0.05)	+1.20%	0.092 (0.08)	+0.92%
<i>Petitions * Support</i> [+]			-0.124 (0.11)		-0.160 (0.10)	
<i>President</i> [+]	0.059 (0.04)	+1.28%	0.046 (0.04)	+1.44%	0.015 (0.02)	+1.16%
<i>President * Support</i> [-]			0.065 (0.06)		0.129** (0.05)	
<b>Brief Attributes:</b>						
<i>Length</i> [+]					0.334 (0.31)	+7.07%
<i>Support Petition</i> [?]			-0.410 (0.31)	-0.06%	-0.375 (0.31)	-2.91%
<b>Case Attributes:</b>						
<i>Case Outcome</i> [+]					-0.048 (0.40)	-1.01%
<i>DPR Text</i> [+]					0.022** (0.01)	+0.46%
<b>Constant</b>	-1.038*** (0.22)		-0.902*** (0.27)		-2.545* (1.26)	
<i>Term</i>	NO	NO	NO	NO	YES	YES
<i>Topics</i>	NO	NO	NO	NO	YES	YES
<i>N</i>	203		203		203	
Pseudo $R^2$	0.031		0.041		0.119	
Model $\chi^2$	9.03		21.23		74.15	

**Table 6.7:** Model of Similarity between Related Party Briefs and Judicial Opinions

<sup>°</sup>  $p < 0.1$ , \*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$ . Robust standard errors clustered on docket number in parentheses. The unit of analysis is each related party brief in each case that resulted in a final decision from August 13, 2003 to October 2, 2013. The dependent variable is the percentage of words from the brief that matches the final decision according to WCopyfind. The model is a fractional logit indicating that the dependent variable is a percentage ranging from 0 to 1. Coefficients for topic variables not shown. The expected direction of the coefficients appears in brackets. Percent change indicates the marginal effect on the dependent variable of a 0-1 increase in dummy variables or one standard deviation increase in continuous variables, holding all other variables at their mean or modal values.

complexity is negative, indicating that the Court is *less* likely to adopt text from a brief in complex cases. Moreover, this result is significant (at  $p < 0.1$ ) for all except Table 6.4. Likewise, the topic variables from the latent topic models do not provide any evidence that the Court is more likely to adopt text in complex cases. For example, only three topics have

statistically significant effects for petitions – agriculture (Topic 6), regional issues (Topic 8), and taxes (Topic 10) – and all three are negative. This suggests the Court does not deal with issue complexity by relying heavily on the text in the briefs.

The fixed effects for each chief justice’s term show that the Constitutional Court was significantly less likely to adopt text from a petition under Chief Justice Jimly Asshidique than under his two successors. Two of the other controls in Tables 6.3-6.7 – the length of briefs and adoption of text from DPR statements – proved significant in the expected directions. In general, longer briefs were overall more likely to contain text adopted by the Constitutional Court. The proportion of text adopted from DPR briefs was a highly significant predictor of the proportion of text in a brief that matches the Court’s decision, indicating that there is heterogeneity across cases in the Court’s propensity to cite text from briefs.

## **6.4 Case Narrative**

In this section, I provide a qualitative example to explore how the identity of the petitioner influences the Court’s willingness to quote that text. I begin by summarizing a series of cases challenging the 2001 Petroleum & Natural Gas Law. I then look at how the petitioners presented their arguments to the Court. These cases support my theoretical argument in two ways. First, I show that the Court was more inclined to quote arguments from NGOs. The cases involve challenges to the same law, but filed by different petitioners, so I can compare the Court’s willingness to quote a petition across different types of petitioners. Second, the reason the Court quoted more text from the NGO briefs was because the NGOs’ reputation lent their brief greater credibility.

Indonesia’s 1945 Constitution reflects the economic nationalism of the country’s founding fathers. Article 33 of the Constitution mandates “state control” over the country’s natural resources in order to maximize prosperity for the people. In particular, paragraphs 2 and 3 of Article 33 read:

(2) Sectors of production which are important for the country and affect the life of the people shall be under the powers of the State.

(3) The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.

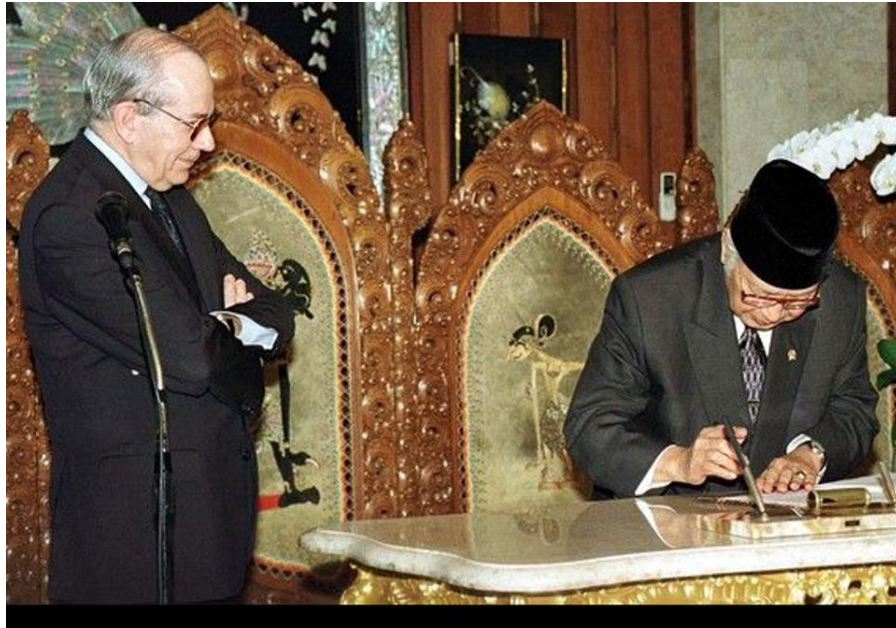
However, because the country lacked a mechanism for constitutional review at the time, this article served more of a statement of ideology than a constraint on government action.

During the early New Order, the oil and natural gas sectors were particularly important sources of economic growth. In 1974, oil and gas accounted for 58% of government tax revenue and three-fourths of all commodity exports (Davidson, 2015, 113). Indonesia was the only Asian member of OPEC. Given the lucrative rents at stake, it is not surprising that political elites sought to control fossil fuel resources. In 1957, the government created Pertamina – later Pertamina – to act as a state-owned enterprise with a monopoly over oil and gas production. The company acted as both a market participant and a regulator, but mostly outsourced extraction through production-sharing agreements with foreign companies. However, critics alleged that Pertamina was corrupt and inefficient, acting as a lucrative source of patronage for the Suharto regime (see Hertzmark, 2007; Leith, 2003).

The 1997 Asian Financial Crisis prompted market-based economic reforms in the oil and gas sector, but also laid the foundations for a resurgence in economic nationalism. When the Rupiah crashed, the Indonesian government sought assistance from the International Monetary Fund (IMF). The IMF imposed several conditions on its rescue package, including privatization of the petroleum sector and reduction in fuel subsidies. The legislature passed the Petroleum & Natural Gas Law in 2001 to meet these conditions. The law allowed domestic businesses to compete in upstream (exploration and exploitation) and downstream (processing, transport, storage, and trade) activities. The law also transformed Pertamina into a state-owned limited liability company, PT Pertamina (Persero). Finally, it established an independent regulatory authority, BP Migas, to oversee licenses and concessions in the oil and gas sector. In order to protect the new agency from politicians and rent seekers, BP Migas derived its funding from a 1% administrative charge applied to production sharing



contracts, rather than the general state budget. The IMF and Indonesian reformers hoped making BP Migas independent would reduce the risks of corruption and inefficiency that had plagued its predecessor.



**Figure 6.6:** Photograph of IMF Managing Director Michel Camdessus & President Suharto (Jan. 15, 1998)  
Source: Associated Press

Economic nationalists saw these reforms as a threat not just to the country's oil resources, but also to its independence.<sup>16</sup> Progressive NGOs worried market reforms would let foreign companies exploit Indonesia's resources without generating benefits for local communities (Rosser and van Diermen, 2016, 344). Moreover, with democratization, Indonesian politicians now had an incentive to openly oppose market reforms as a way to win over poorer voters, especially those who relied upon the fuel subsidies (Davidson, 2015, 117-18).

Not surprisingly, one of the first petitions to reach the new Constitutional Court involved a challenge to the 2001 Petroleum & Natural Gas Law. A group of four NGOs, a labor union representing Pertamina employees, and a professor argued that the law violated Article 33. The Court refused to disband BP Migas, stating that regulation, administration,

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<sup>16</sup>An infamous photograph (see Figure 6.6) of IMF Managing Director Michael Camdessus hovering over President Suharto as he signed a Letter of Intent captured this nationalist sentiment (Stockmann, 2007, 53).

management, and supervision of the oil and gas sector remained in government control.<sup>17</sup> However, it did grant three related claims.<sup>18</sup> In 2007, a group of eight DPR members filed another constitutional challenge against the law, but the Court rejected it.<sup>19</sup>

In 2012, a different coalition of NGOs filed another challenge to the constitutional authority of BP Migas. The petitioners in this case were ten Islamic organizations and 32 prominent individuals. The group was led by Muhammadiyah, a modernist Islamic organization famous for its charitable work. In 2009, the organization's leadership board decided to investigate laws that violated the Constitution, calling for a "constitutional jihad" (Habir, 2013, 127). The petitioners claimed BP Migas violated Article 33 in three ways. First, any production-sharing agreements BP Migas signed with private foreign companies legally bound the government in a way that reduced its control over the resources. Second, the arbitration clauses in the contracts exposed the government to binding rulings from private international arbitration panels. Finally, state-owned enterprises were forced to compete with private companies.

In a surprising decision, the Constitutional Court accepted the petition and disbanded BP Migas.<sup>20</sup> As a matter of law, the Court found that allowing BP Migas to enter into binding contracts unconstitutionally bound the government because it would lose the ability to later pass regulations or policies that contradicted those contracts.<sup>21</sup> The Court spent much of its decision discussing the policy merits of 2001 law. It concluded that the arrangement with BP Migas did not maximize public welfare. It also noted allegations against BP Migas for abuse of power and corruption (see Butt and Siregar, 2013). In short, this decision, in addition to the Court's jurisprudence in other natural resource cases, all strongly suggest that

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<sup>17</sup>*Oil & Gas case I*, MK Decision No. 2/PUU-I/2003, pp. 220-22.

<sup>18</sup>First, it forbade private businesses from upstream activities because it would deprive the state of control over those resources. Second, it rejected the limit on the percentage of crude oil and/or natural gas that the government could force private companies to divert for domestic consumption. Third, the Court held that prices should be regulated by the government rather than determined by the market. MK Decision No. 2/PUU-I/2003, pp. 227

<sup>19</sup>*Oil & Gas case II*, MK Decision No. 20/PUU-V/2007.

<sup>20</sup>*Oil & Gas case III*, MK Decision No. 36/PUU-X/2012.

<sup>21</sup>MK Decision No. 36/PUU-X/2012, p. 105.

that Court believes privatization is incompatible with the state's obligations under Article 33(2) (see Butt and Lindsey, 2008; Venning, 2008).<sup>22</sup>

Why did the Court reach different outcomes in three cases challenging the same statute? Part of the answer might be that oil and gas had decreased in economic importance by the 2010s (Davidson, 2015). Oil production had fallen below 1 million barrels per day by 2004 and Indonesia withdrew from OPEC in 2008.<sup>23</sup> However, despite the relative decline, fossil fuels still constitute an important part of the economy. Fossil fuels still accounted for around 20% of government revenue around the time of the decision (Habir, 2013, 121). By 2012, BP Migas had been in operation for about decade and signed over 350 contracts worth around \$70 billion per year (Butt and Siregar, 2013, 108). Another factor was the rise of economic nationalism during President Yudhoyono's second term (2009-2014) and increased criticism of foreign oil firms. Yet, while this created political space for the Court to declare BP Migas unconstitutional, it does not explain why the Court decided to overturn its previous two decisions on the subject.

A crucial piece of the puzzle is that the petitioners in each case had different levels of credibility and moral authority. As (Davidson, 2015, 123-24) notes, the petitioners in the 2007 case – the least successful of the three – were politicians whom the Court likely saw as motivated by political interest rather than the public good. Davidson also points out that the NGOs in the 2003 case, primarily labor organizations representing Pertamina employees, not only lacked the gravitas of more established NGOs, but also had a financial stake in the case because competition from the private sector would threaten their jobs. Thus, they had little credibility as champions of the public interest. By contrast, Muhammadiyah is one of the most reputable organizations in Indonesia.<sup>24</sup> It claims around 30 million members and

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<sup>22</sup>Several hours after the decision, President Yudhoyono issued a regulation to comply with the Court's order and transferred all BP Migas functions to the Energy and Mineral Resources Ministry. The Ministry in turn established a temporary unit, SKSP Migas, which performed some of the same functions as BP Migas.

<sup>23</sup>It rejoined a few years later, only to leave again in 2016. Recent news reports suggest it is currently seeking to once again rejoin the organization.

<sup>24</sup>Menchik (2014, 617) even calls Muhammadiyah and Nahdlatul Ulama, another large Islamic NGO, the "backbone of civil society."

runs thousands of nonprofit schools, hospitals, and youth organizations across the country.<sup>25</sup> Davidson (2015, 126) claims that Hatta Rajasa, Yudhoyono’s Coordinating Minister of Economic Affairs and head of the National Mandate Party (PAN), worked behind the scenes to encourage Muhammadiyah to file the case because the organization had “vastly more social and moral authority in the country than any political party.”<sup>26</sup>

Indeed, the effect of Muhammadiyah’s credibility and moral authority is reflected in the Constitutional Court’s treatment of the petition. The Court quoted around 63% of the text in the petition – nearly 20% higher than the average for petitions (c.f., Figure 6.1). Moreover, this was not simply a case in which the Court tended to quote briefs at a higher rate; for comparison, the Court only adopted 51% of the text in the president’s statement, around 10% less than the overall average. By contrast, in the 2007 Oil & Gas case, the Court adopted more text from the government’s statement than from the petition.<sup>27</sup>

Some of the text that the justices copied – and ultimately accepted – contains charged rhetoric and broad claims about the political motivations behind the 2001 Petroleum & Natural Gas Law. For example, the Constitutional Court copied the following block of text almost exactly as it appeared in the petition:

Therefore, one of the factors driving the formation of Oil and Gas Law in 2001 was to accommodate foreign pressure and even foreign interests[...] The international interests that infiltrate every political consideration underlying the Oil and

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<sup>25</sup>Justices Akil Mochtar and Ahmad Fadlil Sumadi even attended Muhammadiyah schools in Pontianak and Yogyakarta, respectively. Despite their affiliation with Muhammadiyah, Hosen (2016) points out that the justices’ views did not necessarily reflect those of the organization.

<sup>26</sup>Only Judge Harjono questioned the standing of Islamic groups to challenge a law about oil and gas. Muhammadiyah responded that the group had a long history of engaging in nationalist politics going back to the colonial era, framing its lawsuit as part of its broader activism on behalf of nationalist causes (Habir, 2013, 127).

<sup>27</sup>In the 2007 case, the Court quoted around 72% of the brief. By contrast, in the section of the Court’s decision dedicated to explaining its legal reasoning as opposed to summarizing the briefs, the justices quoted 9 sentences or phrases from Muhammadiyah’s petition in the 2012 Oil & Gas case, compared with only two in the 2007 decision. However, because multiple factors influence the rate at which the Court adopts text from a brief, it is difficult – and probably misleading – to compare the 2012 and 2007 cases directly. For example, the Court also seemed to adopt text at a higher rate in the 2007, also quoting around 72% of the president’s statement and 76% of the DPR’s statement. Moreover, the 2007 case was decided by a different group of justices at a different time in the Court’s history.

Natural Gas Law make the formation of Oil and Gas Law, even though it was adopted through the formal legislative procedures, flawed because the intention behind the formation of Oil and Gas Law is injurious Article 33 of the 1945 Constitution. The branch of production which controls the livelihood of the people is merely a constitutional illusion[...]<sup>28</sup>

Although this text comes from the Court's summary of the petitioners' arguments, it is notably not surrounded by quotation marks or framed as the petition's words. Nor do the judges ever challenge these assertions elsewhere in the decision. The Court implicitly accepts the petitioners' assertions about the politics and policy surrounding the law.

This section helped explain how petitioner identity might influence the justices' opinion of a brief, and in turn their willingness to quote it. Although it is difficult to isolate one specific factor that made the petition in the 2012 challenge to the Petroleum & Natural Gas Law more effective than its predecessors, having an NGO petitioner with a high level of moral authority likely primed the justices to view the petition as more credible. Moreover, the justices not only quoted the petition at a higher rate than average, but also cited some of the petition's more incendiary allegations about the politics behind the law. Unlike the previous petitioners, Muhammadiyah's history and reputation gave the Court little reason to doubt its motives.

## 6.5 Discussion

My results reveal several interesting facts about how Indonesian Constitutional Court decisions utilize text from briefs. The Court is more likely to adopt a higher proportion

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<sup>28</sup>The original Indonesian text is:

Oleh karena itu salah satu faktor pendorong pembentukan UU Migas di tahun 2001 adalah untuk mengakomodir tekanan asing dan bahkan kepentingan asing[...] Kepentingan Internasional yang menyusupi dalam setiap pertimbangan politik yang diambil dalam UU Migas menjadikan pembentukan UU Migas meskipun dianggap melalui prosedur formal yang telah ditentukan. tetapi bisa menjadi cacat ketika niat pembentukan UU Migas adalah untuk mencederai amanat Pasal 33 UUD 1945. Sehingga penguasaan negara terhadap cabang-cabang produksi yang menguasai hajat hidup orang banyak hanyalah menjadi sebuah ilusi konstitusional semata[...]

of text from petitions submitted by NGOs (see Figure 6.3 and Table 6.4). The magnitude of this effect increases as the number of NGOs associated with the petition increases (see Table 6.5). Of course, quoting text from NGO petitions does not necessarily imply that the Court accepts their arguments; as seen in Chapter V, the Court was not significantly more likely to grant petitions submitted by NGOs. However, it does strongly imply that the justices tend to view petitions submitted by NGOs as more credible and informative than those submitted by other types of litigants. Even if the justices do not ultimately accept the arguments in the brief, they do allocate more time and space in the decision to addressing them.

The most obvious objection to this interpretation of my findings is that WCopyfind merely measures the similarity between the brief and the Constitutional Court's decision, not the intent of the justices. Ultimately, I believe my interpretation is the most plausible explanation of the results for several reasons. First, it is important to distinguish between credibility and persuasiveness. The justices can find a brief informative and worth addressing without ultimately accepting its conclusions. By contrast, if they find a brief uninformative or unreliable, they will likely spend less time quoting and discussing it in their opinion. The justices should be far more likely to quote a brief that they find credible and informative, even if only to reject its claims.<sup>29</sup>

Second, the Constitutional Court usually quotes text from briefs simply to summarize the brief, not to assess its validity (see Appendix E). The majority of text in each Constitutional Court decision consists of detailed summaries of the petition, government statements, and related party briefs, as well as any evidence presented during hearings (upwards of 90% of the Court's written decision in some cases). Moreover, these summaries present each party's claims and evidence in an objective manner. This means that, for the most part, matching text indicates that the justices included text from a brief in its summary of the

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<sup>29</sup>In fact, other works that use WCopyfind to study legal briefs do not even make this distinction. For example, Collins, Corley and Hamner (2014) assume that matching text indicates favorable treatment, i.e. that the court accepted the brief's argument.

brief, not to accept or reject the brief's claims. The question then becomes why does the Court rely more on the text of a brief when summarizing some briefs but not others. This difference in treatment suggests the justices perceive some briefs to be of higher quality than others. All else equal, the justices should rely more on the text of a brief when they find that brief to be more credible and informative, even if simply summarizing its contents.

This raises the question of what factors influence the credibility of NGO briefs. Part of the answer stems from the unique role of NGOs play as litigants. On average, NGOs possess more legal resources and policy expertise than individuals unaffiliated with any organization. As repeat players who have an incentive to protect the reputation of the organization, they also realize that filing frivolous or unreliable briefs could undermine their credibility. As such, the judges can reasonably expect NGOs to act as a filter by refusing to file low-quality petitions with the Court.

However, unlike other types of organizations, such as private businesses or political parties, NGOs typically claim to pursue constitutional litigation on behalf of the public interest, or at least a segment of the public.<sup>30</sup> As with Muhammadiyah in the BP Migas case, they rely heavily on moral capital when making the claim that their policy preferences would benefit the public interest (see Bryant, 2008). In other words, the justices have greater reason to believe that the arguments put forward by reputable NGOs are not simply self-interested and might in fact raise legitimate constitutional objections to the law.

The topic model from Chapter IV hints at another possible explanation. In Section 4.3, I had found that petitions submitted by NGOs were significantly more likely to be associated with certain legal issues, particularly education, labor, agriculture, and economic topics. As NGOs focus on these issues, they gain experience and knowledge. As such, it is possible that certain NGOs gain a reputation as "policy experts" in the eyes of the Court. Education, development, and governance NGOs are significantly more likely to have text adopted from

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<sup>30</sup>This is less clear when dealing with NGOs that promise its members club goods, such as labor unions or professional associations that confer benefits to their members. However, they constitute a minority of NGOs involved in constitutional litigation.

their petitions (see Figure 6.4). Indeed, the Court has come to view certain NGOs and their expert witnesses as credible voices on policy. For example, in economic and environmental cases, NGOs regularly call upon the same left-leaning economists to testify, whom the Court now views as authoritative experts in their fields.<sup>31</sup>

It is not immediately clear why the Constitutional Court did not quote related party briefs submitted by NGOs at the same level as petitions. Related parties play a secondary role in constitutional litigation and overall the Court did quote related party briefs less frequently than petitions. It is possible the justices focus on briefs submitted by NGOs with strong reputation for expertise or moral capital. Moreover, the distribution of NGOs that act as related parties differs qualitatively from those that act as petitioners (see Figure 6.2). For example, religious, health, and legal aid organizations were the largest related parties NGO categories (at 11%, 4%, and 2% of the total, respectively). By contrast, for petitions, human rights, labor, and governance organizations were the largest groups of NGOs (see Figure 4.2). Therefore, it is possible that the justices have different beliefs about the credibility of the types of NGOs that tend to act as petitioners versus those that participate as related parties.

My results also support claims in the literature about how courts tend to find briefs submitted by the national government to be more credible. Figure 6.1 shows that the Constitutional Court cites a much higher proportion of text from the president and DPR's statements than from petitions or related party briefs. Initially, this appears to contradict my findings in Chapter V about presidential statements and how they do not affect judicial voting behavior. However, as noted above, adopting text from a brief does not necessarily imply that the Court agrees with its arguments, just that it finds them credible and relevant. Indeed, government statements are important as a source of argumentation against the petition because there is no designated respondent in constitutional cases to rebut the petition.

Interestingly, the president and DPR's credibility do not extend to other types of national government institutions. As seen in Figure 6.3 and Tables 6.4-6.5, the Court is

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<sup>31</sup>E.g., Subject #7, interview with staff at international NGO, Jakarta, Indonesia, October 13, 2013.



not more likely to adopt text from petitions submitted by other government actors. One reason is that the petitioners from national government institutions are generally independent commissions and as such cannot claim to represent the entire government. In fact, the president and DPR sometimes submit statements opposing petitions submitted by these commissions.<sup>32</sup> This potential for conflict within the national government and differences in institutional strength suggests another yet another reason why the party capacity theory might not hold true for Indonesia.

Surprisingly, the Court is not more likely to adopt text from petitions or related parties in cases dealing with complex issues. On the one hand, the literature makes a persuasive case for why judges should in theory rely more on briefs in complex cases (Hansford, 2004, see). On the other hand, my result is consistent with Corley (2008), which also finds no effect for complex issues. One possible explanation for the result is that, as a specialized court focused on constitutional issues, the Constitutional Court justices are more likely to possess relevant expertise than judges in courts of general jurisdiction. However, even within the field of constitutional law, the justices faced questions about natural gas exploitation, social security reform, and a variety of other policy issues outside their immediate legal expertise.

It is possible that my data simply do not capture sufficiently nuanced information about issue complexity. I coded issue complexity based on Vanberg (2005), but this dummy variable might not align with how Indonesian judges view complexity. The latent topic models provide more refined measures of topics, but I still found no correlation between complex topics and the amount of text quoted from the brief. Indeed, the justices were less likely to cite text from petitions if they contained more text about taxation, arguably one of the more complex fields of law. Moreover, it is possible that the most salient information in complex cases is conveyed through expert witness testimony rather than the briefs, so the judges will cite that testimony if they need to rely upon external information to deal

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<sup>32</sup> *Juvenile Justice case*, MK Decision No. 1/PUU-VIII/2010 (in which the Indonesian Child Protection Commission, or *Komisi Perlindungan Anak Indonesia* (KPAI), challenged the 1997 Juvenile Justice Law over the objections of the president).

with complex issues. Future research should try alternative measures of issue complexity, as well as conduct in-depth qualitative case studies to better understand where judges get their information about policy issues.

Another puzzling finding is that Constitutional Court decisions were less likely to quote text from briefs during the term of the first chief justice (Asshidiqie) than under the later chief justices (Mahfud & Mochtar). One might have expected the justices to rely less upon the briefs as they gained more experience and confidence, but the opposite proved true. Moreover, the proportion of text in the decisions allocated to explaining the Court's legal reasoning decreased over time. This accords with Butt's (2015, 62) claim that the quality of legal reasoning in the Court's decisions actually decreased under Mahfud and his successors.

## **6.6 Concluding Remarks**

Where Chapter V explored the conditions under which the Indonesian Constitutional Court grants petitions for constitutional review, this chapter examined when and why the Court quotes or cites text from briefs. Just as NGO petitions were the most effective in setting the Court's agenda (see Chapter IV), I find that NGO petitioners are also the most effective in influencing the text of the Court's written opinion. The Court is also more likely to adopt text from statements submitted by the president and DPR, if any.

My results confirm some findings from the judicial politics literature, but also raise new questions. First, this chapter contributes to our understanding of how judges obtain and process information. Judges face an information asymmetry problem and lack the resources to conduct their own research into the facts of each case. My results suggest that judges attempt to ameliorate this problem by treating the identity of the litigant as a signal about the credibility of the information in its brief. That said, it is far from clear if litigant identity actually provides a reliable signal of quality. Indeed, recent studies of errors in U.S. Supreme Court decisions suggest that judges rely too heavily on the briefs and do not check the information presented to them rigorously enough (see Larsen, 2014; Gabrielson, 2017).

Second, unlike Anderson and Franze's (2011) study of U.S. amicus briefs, I find that the Indonesian Constitutional Court is more likely to quote text from petitions submitted by NGOs. Unlike Lynch (2004), which found that the U.S. Supreme Court focused on amicus briefs submitted by NGOs with a preexisting reputation for quality, my finding holds true for NGOs as a broad class of litigants. In assessing the generalizability of my results, it is important to acknowledge the Indonesian Constitutional Court's unique relationship with NGOs. As discussed in Chapter II, the first two chief justices had close ties to civil society groups, so they might have been more likely than judges in other countries to view NGO briefs as credible. At the least, my results suggest the need for more comparative research on the relationship between NGOs and credibility in constitutional litigation.

Finally, in line with Anderson and Franze (2011) and Chandler (2011), I find that the Indonesian Constitutional Court is more likely to adopt text from briefs submitted by the president and DPR. At the same time, in Chapter V, I found that the Court is not more likely to rule in favor of the government. Taken together, the results strongly suggest that the decision to quote text from a government brief and the decision to rule in favor of that brief, while related, are not the same. The justices take the national government's lawyers seriously without necessarily agreeing with their arguments.

The past three empirical chapters have attempted to show the influence of non-state actors at various stages of litigation, including the Constitutional Court's agenda (Chapter IV), the Court's verdict (Chapter V), and the Court's written opinion (Chapter VI). In the next chapter, I situate the importance of these findings within the broader literature, as well as address limitations of this dissertation and potential for future research.

## CHAPTER VII

### Conclusion

In February 2016, around the time I started writing this dissertation, U.S. Supreme Court Justice Antonin Scalia passed away. Obituaries regularly called Scalia one of the most influential justices in recent memory, largely for his promotion of originalism. At the same time, Scalia failed to achieve many of his policy goals, such as overturning *Roe v. Wade* or *Miranda* rights. His insistence on ideological purity often meant that he failed to forge coalitions with other justices to shift the law closer to his ideal point (see, e.g., Savage, 1996; Rosen, 2016).<sup>1</sup> Tellingly, media coverage often focused on his sharply worded dissents. This presents a fascinating paradox: how could Scalia both be one of the most influential justices in history and consistently fail to influence the development of the law?

I soon realized that the embedded autonomy model could help explain part of the puzzle. Scalia's place in jurisprudential history makes much more sense after considering his engagement with non-state actors. Scalia hoped to convince lawyers, activists, and the general public of the benefits of originalism. He wrote his opinions, especially his dissents, with a clarity that made them accessible and even entertaining. He also regularly gave talks to the Federalist Society, Christian universities, and other conservative groups (Hollis-

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<sup>1</sup>Even in the majority, his tendency to focus on bright-line legal rules sometimes had the unintended consequence of allowing governments to circumvent his rulings with slight modifications to policies. For example, Scalia's decision in *Lucas v. South Carolina Coastal Council* sought to make it easier for citizens to receive compensation for regulatory takings. However, his emphasis on how the regulation completely denied all value of the property in question allowed lower courts to avoid awarding compensation by finding that a regulation did not *completely* wipe out the value of the property.

Brusky, 2015; Murphy, 2015). These groups in turn have become key stakeholders in the U.S. judicial system. They regularly mobilize voters to support politicians who promise to appoint judges “in the mold of Scalia.” They also file briefs challenging U.S. government actions. In short, Scalia might not have authored as many majority opinions as his colleagues, but he did cultivate a large network of stakeholders who could advocate for and defend his policy preferences.

Although I initially conceived of the embedded autonomy model when studying the Indonesian Constitutional Court, the example above hints at how it could provide theoretical insights into judicial systems around the world. Judges are not isolated in an ivory tower, but rather embedded in a larger social milieu. My dissertation focuses on the ways that NGOs and public opinion influence judges, but both Scalia and Jimly Asshidiqie also took steps to try to influence civil society’s perception of the law and their respective courts. In judicial systems as different as the Indonesian Constitutional Court and the United States Supreme Court, judges had an incentive to engage with non-state actors.

In the concluding chapter of this dissertation, I explore this potential for embedded autonomy to improve our understanding of judicial behavior. I begin by summarizing my major contributions to the literature on judicial behavior. I then discuss several theoretical and practical limitations, especially those that might undermine the generalizability of my findings. Finally, I conclude by discussing potential directions for future research on the role of non-state actors and judicial behavior.

## **7.1 Major Contributions**

This dissertation makes five major contributions to the comparative politics literature. First and foremost, it offers a new theoretical explanation for judicial behavior. Previous models of judicial behavior have tended to focus on constraints – or lack thereof – imposed on courts by other branches of government (e.g., Segal and Cover, 1989; Maltzman, Spriggs and Wahlbeck, 1999). With embedded autonomy, I shift the focus to non-state litigants.

In Chapters IV and VI, I found that Indonesian NGOs had a significant effect on the Constitutional Court's agenda and jurisprudence, while in Chapter V I found that the Court responds to public opinion when deciding cases. In fact, the Court during this period was more responsive to NGOs and public opinion than to the president or legislature. At the very least, my findings indicate that judicial behavior is not merely the result of interactions between the judiciary and the elected branches.

The embedded autonomy model could prove especially useful to understanding new constitutional courts in developing countries. As noted in Chapter III, much of the existing literature on judicial behavior originates from studies of courts in the U.S. or Western Europe (e.g., Segal and Cover, 1989; Maltzman, Spriggs and Wahlbeck, 1999). There has been far less research on how to adapt existing models of judicial behavior to the unique political and economic circumstances in developing democracies.<sup>2</sup> For example, my work on the Indonesian Constitutional Court suggests public opinion is more important to new courts still trying to establish their legitimacy than to established courts. Moreover, the policy preferences of NGOs in developing countries might differ from those of NGOs in developed economies. In Chapter IV, I found Indonesian NGOs tended to focus far more on socio-economic issues than on civil and political rights. Hopefully, this dissertation will prompt more examination of the implicit assumptions underlying existing models of judicial behavior.

Second, this dissertation contributes to the literature on social movements and their ability to affect policy through constitutional litigation. In theory, constitutional courts reduce power asymmetries, allowing even the weakest members of society to hold the government accountable. Epp (1998) argued NGOs that can engage in sustained litigation are a necessary precursor to a rights revolution. However, such arguments have proven difficult to test empirically (see Urribarri et al., 2011*a*). Moreover, scholars have cast doubt on the ability of weaker parties to win against opponents with greater access to legal resources (Galanter, 1974) or, if they do win, enforce court judgments against recalcitrant governments

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<sup>2</sup>Although comparative politics scholars have increasingly turned their attention to courts in Latin America (e.g., Helmke, 2004; Wilson and Cordero, 2006; Staton, 2010; Carroll and Tiede, 2012).

(Rosenberg, 1991). This has been a concern in Indonesia as well. As noted in Chapter V, a recent report by an Indonesian NGO argues that the Constitutional Court primarily benefits elites because most litigants are either political parties or corporations, not marginalized groups (HukumOnline, 2010).

My dissertation results provide reason for optimism. I found considerable evidence that social movements can change policy through litigation. Indonesian NGOs set the judicial agenda by filing socioeconomic and human rights cases that might not otherwise have reached the Constitutional Court. They also influence the text of written judicial opinions by filing credible briefs. Meanwhile, I found no evidence that petitions filed by elites like political parties or corporations had a greater probability of success. Instead, the Court was more likely to grant petitions perceived to have broad public support. Moreover, despite the fact that the Court has declared a law unconstitutional in over 26% of cases, there is no evidence that the Indonesian government regularly evades or undermines adverse decisions (Butt, 2015).<sup>3</sup> In short, unlike so many Indonesian political institutions, the Constitutional Court has not fallen victim to elite capture.

Third, this dissertation advances the use of natural language processing (NLP) tools in comparative politics research. My dissertation is one of the first political science studies to utilize NLP on non-English language court documents. I also demonstrate several new applications of NLP. In Chapter IV, I used a latent topic model to derive clusters of topics in petitions submitted to the Indonesian Constitutional Court. I employed this information in a novel test of agenda-setting in constitutional litigation. In Chapter VI, I built upon studies of plagiarism-detection software on U.S. amicus briefs (Collins, 2007; Collins, Corley and Hamner, 2015) to track the extent to which the justices quote briefs in their written opinions. In addition, I address several unique challenges that arose when applying existing

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<sup>3</sup>My dissertation does not focus on the implementation of Constitutional Court judgments so I cannot assess whether or not its decisions actually improved the lives of marginalized groups. Moreover, some economists worry that the Court's economic nationalism could in fact undermine economic growth and poverty alleviation over the long term (see Butt and Lindsey, 2008). Nevertheless, the Court's policy preferences on major economic issues are more closely aligned with leftist NGOs than with the country's traditional elites.

NLP tools to Indonesian documents. As such, my dissertation can serve as a guide for other scholars interested in using NLP to study judicial behavior.

Fourth, the research done for this dissertation resulted in the first publicly available dataset of coded Indonesian judicial decisions.<sup>4</sup> The dataset includes basic metadata for each of the 524 cases adjudicated between August 13, 2003 and October 2, 2013, such as the name of the law being challenged and the outcome of the case. I also coded information about party identity and document length for each of the 541 petitions, 253 presidential statements, 245 DPR statements, and 205 related party statements (see Appendix A). This dataset is especially important because it will help make the Indonesian Constitutional Court more accessible to American political scientists.

Finally, this dissertation has important lessons for policymakers, particularly international donors that fund rule of law projects in developing countries. Traditionally, donors and practitioners have focused on supply-side reforms, such as providing technical assistance to courts. In recent years, there has been a greater focus on the potential of demand-side reforms, such as helping key stakeholders and the media better understand the legal system (see Golub, 2006; USAID, 2008). My results suggest that demand-side factors are important – and potentially crucial – for strengthening the rule of law. The Indonesian Constitutional Court has been one of the few policy forums through which marginalized groups can consistently influence government policy. Moreover, as noted in Chapter II, civil society groups have been important stakeholders in the institution and played a key role in thwarting government attempts to circumscribe the Court’s jurisdiction. Thus, rule of law projects that teach local citizens and NGOs about constitutional remedies could not only improve access to justice, but also create a set of stakeholders for judicial reform.

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<sup>4</sup>Available at [www.domnardi.com](http://www.domnardi.com).



## 7.2 Limitations

Although this dissertation makes important contributions to the literature, it is necessary to acknowledge the limitations of my research in order to better understand what conclusions we can – and cannot – draw from my findings. Some of these limitations are simply endemic to the broader judicial behavior literature, while others are more specific to my methodological approach and data. In this section, I outline several limitations in my methodology, and then discuss the generalizability of my results.

First and foremost, my empirical tests cannot definitively identify the causal mechanisms linking the identity of litigants and case outcomes. Although I did identify several strong correlations, correlation does not equal causation. This becomes particularly worrisome if litigants select cases strategically and only join those they believe have the greatest probability of success (McCammon and McGrath, 2015, 133). Ideally, one would utilize a experiment to establish a causal relationship between case outcomes and litigant identity (see Holland, 1986), but my research questions are not amenable to experimental methods. There would be serious practical and ethical barriers to randomizing petitioners in constitutional cases. Moreover, I could not find an instrumental variable to reduce concerns about endogeneity because none of the IVs I considered satisfied the exclusion restriction (see Angrist, Imbens and Rubin, 1996). I attempted to compensate by using a multi-method approach, presenting statistical models alongside qualitative case studies that helped unpack the causal relationships. I also noted how institutional design features of the Indonesian Constitutional Court, such as the lower standing threshold and lack of appeals, reduced the risk of endogeneity by posing less of a barrier to low-quality cases.

A related limitation concerns my data and measurement strategy. Many of the variables I use involve latent concepts that cannot be directly measured. For example, I have no way to directly measure the legal merits of a petition, arguably one of the most important factors determining the petition's success. I ultimately used the length of court transcripts on the assumption that the justices would need to hold more hearings to adjudicate more meritorious

claims, but this is at best an indirect proxy for legal quality.<sup>5</sup> This is also true of litigant identity; I based my categories of litigant identity on previous scholarship, but ultimately cannot guarantee that the categories I used are those that best capture information about the litigants who appear before the Constitutional Court. When appropriate, such as for presidential preferences in Chapter V, I tested alternative measures of the same concept to see how much the results depend on particular measures of latent concepts.

Even if had been able to conduct an experiment, the single-country approach I took in this dissertation limits my ability to generalize any findings. In Chapter I, I explained why I believed this approach suited my dissertation better than a cross-national approach, but the tradeoff means that my results might be tied to the unique political and social context of Indonesia. Throughout the dissertation, I tried to highlight when a result might be driven by Indonesia-centric factors. However, the design of my dissertation simply does not allow me to examine cross-national differences that could potentially affect a court's relationships with civil society. For example, I cannot directly test my argument in Chapter III that newer courts in developing democracies rely more on public support than older, more established courts. I also do not know how much the institutional design of the Indonesian Constitutional Court might have affected its behavior in individual cases (see Section 7.4 below).

### **7.3 Recent Developments**

In addition to the limited geographic scope, this dissertation also has a narrow temporal scope. My dataset only covers Indonesian Constitutional Court cases adjudicated between August 13, 2003 and October 2, 2013, the terms of the first three chief justices. Any study of modern political institutions can at best provide a snapshot in time as institutions grow and change. I conducted my fieldwork during the fall of 2013 and do not have case files for later cases. As such, it is possible that the conclusions I draw in this dissertation will not

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<sup>5</sup>To my knowledge, most other studies of judicial behavior do not even attempt to control for the quality of legal briefs.

hold true for the Court under later chief justices. Indeed, there have already been several recent developments that might affect the Court's role as a political actor.

First, it is entirely possible that the first decade of the Constitutional Court does not represent a stable political equilibrium. The first two chief justices – Jimly Asshidique and Mohammad Mahfud – were charismatic and politically savvy leaders who had strong incentives to push the Court toward more activist outcomes (Hendrianto, 2016*c*). Moreover, other political actors were still adjusting their expectations and beliefs about the new court. Before 2003, many believed that it would be a relatively weak institution with a limited role in politics. After 15 years, political elites have had a chance to observe the Court's behavior and update their strategies accordingly. There is evidence that the DPR and president have taken greater care in recent years to screen potential justices to find those who will support their policy preferences (Hendrianto, 2015*b*). For their part, the justices have now had several years to observe the appointment process; having seen the government not reappoint justices because of their performance on the Court, future justices might view the threat of not being reappointed as more credible.

However, by 2017, the Constitutional Court had already demonstrated that it could serve as a credible forum for non-state actors to challenge government policy. As predicted by the embedded autonomy model, by being receptive to claims from NGOs and responding to public opinion, the Court developed a reputation for independence and political activism. While the later chief justices have adopted a quieter leadership style, there has been no indication that the Court has or plans to retreat from its politically active role; between 2014-17, the Court granted around 22% of petitions, only slightly less than the average rate for the preceding decade. The Court is still willing to issue judgments in politically controversial disputes and to declare major government policies unconstitutional (Hendrianto, 2016*b*).<sup>6</sup>

Corruption has also undermined the public's perception of the Constitutional Court

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<sup>6</sup>In fact, in March 2015, the Court struck down the 2004 Water Resources Law (*Water Resources Law case II*, MK Decision No. 85/PUU-XI/2013), which it had declined to do in 2005 (*Water Resources Law case I*, MK Decision Nos. 58-59-60-63/PUU-II/2004 & 8/PUU-III/2005).

and the extent to which NGOs view it as an ally. In October 2010, Refly Harun, a lawyer and former Court employee, accused Justice Arsyad Sanusi's daughter of having received bribes from a losing candidate in a regional elections case. Although the Constitutional Court's Honour Council found no evidence that Sanusi himself knew about or participated in the bribery, it reprimanded him for allowing family members to interact with litigants. Sanusi ultimately resigned without admitting to any wrongdoing. On October 3, 2013, the Anticorruption Commission (KPK) arrested Chief Justice Akil Mochtar for taking Rp. 60 billion in bribes during the adjudication of 15 regional elections disputes. In addition, investigators found narcotics in his office. He was sentenced to life imprisonment in June 2014. The Court under Hamdan Zoelva regained some of the public's confidence with its handling of the dispute over the 2014 presidential election (Butt, 2015). However, in January 2017, the KPK arrested another justice, Patrialis Akbar, on suspicion of having taken Rp. 2 billion in bribes from an from a meat company while presiding over a case involving the review of a food safety law (McBeth, 2017).

It is not yet clear how much these scandals will undermine the Constitutional Court as an institution. When Mochtar was arrested, many NGOs seemed willing to accept that the problem stemmed from the individual justice rather than the institution.<sup>7</sup> In fact, legal activists, including Refly Harun, had raised concerns about Mochtar before his appointment (Wijaya, 2013). Likewise, they had raised concerns about Patrialis Akbar, even having gone so far as to file a lawsuit in the Jakarta Administrative Court challenging his appointment (Parlina, 2013*a*; Faiz, 2016*a*). As such, the problem could be seen as one of a few "bad apples" rather than a rotten institutional core. On the other hand, there is growing concern about the appointment process and the quality of justices (see Faiz, 2016*a*). As long as the short term length and the possibility of reappointment remain part of the institutional design, there is a risk that justices will be susceptible to political pressure. In addition, Hendrianto (2016*a*) worries that Indonesia has relatively few people who possess the expertise and stature to

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<sup>7</sup>E.g., Subject #35, interview with NGO staff, Jakarta, Indonesia, November 15, 2013.

serve on the Court, so forcing justices to retire after just 5-10 years severely reduces the pool of potential candidates. Thus far, reform efforts have focused on policing judicial ethics once justices arrive on the bench, but future reforms might do well to focus more on the selection and reappointment of justices.

## **7.4 Potential for Future Research**

This dissertation will hopefully encourage more research into the influence of non-state actors on judicial behavior, both in Indonesia and in other countries. In this section, I propose four directions that have the potential to prove particularly fruitful. First, there is still much we need to learn about litigation strategies. As noted in Chapter V, Indonesian lawyers were divided over the benefits of having a large coalition of petitioners. Although I found that a larger coalition significantly improved the petition's probability of success, the optimal litigation strategy might depend on other conditions, such as the features of the case or the political environment. Another question that arose from Chapter IV is why some NGOs focus on a narrow set of legal issues while others participate in a broader range of cases. Are these decisions driven primarily by ideology, strategy, or financial concerns? A better understanding of litigants' strategic choices would also help allay concerns about endogeneity in studies of judicial behavior.

Throughout this dissertation, I have implicitly presented relations between judges and civil society as mutually supportive. This is primarily because in Indonesia that has been the case. Although Indonesia is a democracy, corruption and unaccountable political parties mean that unelected institutions like the Constitutional Court and Corruption Eradication Commission end up acting as popular checks on the elected branches. However, other scholars might want to explore what happens when civil society constrains courts by protesting or retaliating against unpopular decisions. If a court issues too many unpopular decisions, NGOs might even lobby the government to curtail judicial independence. This happened in the United States during the early 1900s, when courts regularly struck down redistributive

socioeconomic policies. The progressive movement sought – and in many states succeeded – to make judges more accountable to the public through elections (Baum, 2003). Future research might focus on what embeddedness means for judges who do not share the policy preferences of the general public.

As noted above, this dissertation does not address any of the cross-national variation that could affect a court’s relationship with civil society. For example, in Chapter III I had speculated that NGOs would have more influence in civil law systems with a single constitutional court, as opposed to in common law systems that permit any court to exercise constitutional review. I did not pursue a cross-national approach because of the obstacles outlined in Chapter I. Hopefully, as scholars develop better cross-national datasets, we will be able to better test theories of judicial behavior across countries. In the meantime, a more productive approach would be to replicate the empirical tests from Chapters IV-VI of this dissertation with data from a different country, such as the Philippines. While technically a civil law system, the Philippine Supreme Court is a court of general jurisdiction with heavy influence from the U.S. common law. In addition, Indonesia and the Philippines share common historical, linguistic, and cultural roots,<sup>8</sup> and both have reached similar levels of economic and political development. This allows us to minimize potentially confounding variables and isolate any differences in judicial behavior to differences between the two judicial institutions.

Finally, this dissertation focused on embedded autonomy as it applies to litigants. However, judges and civil society can interact outside the formal litigation process in a variety of ways. In systems where judges are selected by elected representatives, interest groups often play an important role in the appointment process by providing information about judicial candidates and mobilizing support or opposition (Caldeira and Wright, 1998). They can also provide information to judges through scholarship and conferences (Hollis-Brusky, 2015,0). Finally, interest groups might try to send signals about public opinion by

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<sup>8</sup>To such an extent that in 1963 they briefly formed a confederation with Malaysia called *Maphilindo*.

issuing statements to the media (Barkan, 1980), organizing protests outside the courthouse (Bernstein, 2013; Silverstein, 1996), or even issuing threats against judges (Bó, Bó and Tella, 2006). For their part, judges can try to actively mobilize political support by giving speeches to certain stakeholders or issuing statements to the media (Trochev and Ellet, 2011). These types of interactions are more difficult to quantify, so their absence from the literature is understandable, but unraveling them could significantly deepen our understanding of judicial behavior.

## APPENDIX A

### Coding of Petitioner Identity

The empirical tests in Chapters IV-VI rely heavily on information about the identity of the petitioners and related parties in each case. A team of four Indonesian law students assigned each petitioner/related party to one of the following six categories: 1) national government institution; 2) local government institution; 3) private business/corporation; 4) nongovernmental organization (NGO); 5) political party/candidate; or 6) individual unaffiliated with any organization.<sup>1</sup> I then had coders group any NGOs into one of the following categories: 1) commercial; 2) consumer; 3) development; 4) education; 5) environment; 6) gender; 7) governance; 8) health; 9) human rights; 10) indigenous; 11) labor union; 12) lawyers; 13) legal aid; 14) media/journalism; 15) religion; or 16) youth. I gave the coders a handbook with instructions on how to distinguish between the categories.

There were three sources of ambiguity that potentially undermined intercoder reliability. First, I treated the categories as mutually exclusive in that petitioners/related parties could not be members of more than one category. This usually did not prove problematic for the six litigant identity categories, but did sometimes prove difficult when classifying different types NGOs. Some Indonesian NGOs have broad mission statements that encom-

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<sup>1</sup>I had asked coders to categorize litigants based on even more refined categories (i.e., “unemployed individual,” “student,” etc.). I ended up not using these categories in the final dissertation, so I only calculated intercoder reliability for the six broader identity categories.



pass a variety of potential issue areas. For example, according to its website, the Epistima Institute’s work touches upon “democratic values, social justice, environmental protection, and cultural pluralism.”<sup>2</sup> In such cases, coders were asked to make a judgment as to the organization’s primary mission as reflected in its charter – if any – and its legal claims in the relevant case.

Another source of ambiguity arose when petitioners and related parties used lawyers affiliated with an NGO as their legal counsel, even though the NGO itself did not file the brief. For example, the Legal Aid Society (LBH), frequently provides legal assistance to indigent or marginalized petitioners without actually joining the petition. In such cases, I asked coders to only code the identity of the individuals or organizations formally listed as litigants, not their counsel. I treated NGOs serving as counsel like law firms in that the firm might submit a brief on behalf of a client, but the brief does not necessarily represent its own policy preferences.

Finally, coders had to unpack principal-agent relationships. Constitutional Court decisions list the name, address, and profession of each petitioner. Thus, it is not always clear if an individual affiliated with an organization was in fact acting as a duly authorized agent of that organization. Individuals were classified as organizations (categories 1-5) if they formally represented the organization and acted on its behalf. Otherwise, that litigant would be classified as an individual (category 6). For example, if a CEO filed a petition on behalf of a company, then he/she would be coded as a “private business.” By contrast, if the CEO’s petition involved a personal matter, such as a divorce, then he/she would be coded as an “individual.” Some organizations require at least two officers – usually the head and deputy – to authorize a legal brief on behalf of the organization. In such situations, coders were instructed to count the litigant as one organization rather than as two separate individuals.

These coding rules helped reduce discretion in coding, but likely did result in underestimating the number of NGOs indirectly involved in constitutional litigation. For example,

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<sup>2</sup>See <http://epistema.or.id>.

coders recognized prominent activists who were affiliated with NGOs, but had joined the petition without claiming any affiliation. Although they did not formally represent their NGO, they had the opportunity to contribute legal knowledge and advice. This likely biased the results against my hypotheses because some of the potential strengths associated with NGOs might spill over into the “individuals” category. Individuals receiving informal support from NGO staff would likely perform better than expected relative to NGOs, thus minimizing the difference between NGOs and other types of litigants.

I assigned about 10% of the total dataset (56 cases) to multiple coders to assess intercoder reliability. I took the percentage agreement between all of the coders for both the litigant identity and the NGO identity variables (see Neuendorf, 2016, 168). The percentage agreement averaged 92.2% for litigants generally and 74.6% for NGO litigants (see Table A.1). As expected, there was less consensus for NGO identity. However, because percentage agreement is a lenient measure that does not account for agreement by chance (see Suen and Lee, 1985; Popping, 1988), I also used Krippendorff’s alpha coefficient. Krippendorff’s alpha is a widely used measure of intercoder reliability in content analysis and calculates the observed disagreement in coding as a percentage of the expected disagreement (see Krippendorff, 1987, 2011). The alpha for litigant identity was 0.861, while the alpha for NGO identity was much lower at 0.697, indicating more difficulty in ascertaining the true identity of NGOs. Although the alpha for NGO litigants is lower than ideal, it is still within the range of tolerance for coding, especially given the challenges described above.

	Litigant Identity	NGO Identity
Percentage Agreement	92.2%	74.6%
Krippendorff’s Alpha	0.861	0.697

**Table A.1:** Intercoder Reliability for Identity Variables

Upon examining the results for intercoder reliability, I noticed that one of the coders consistently coded principal-agent relationships incorrectly, coding individuals representing organizations as “individuals” rather than as one of the five types of organizations. I decided to omit that coder’s results and recode them myself. I also checked principal-agent relations

in all other coding. When there was ambiguity over whether or not a litigant represented an organization, I checked the the brief (not available to the coders) to see if it was printed on the organization's official letterhead. I did use all four coders' results for the identity of organizations.

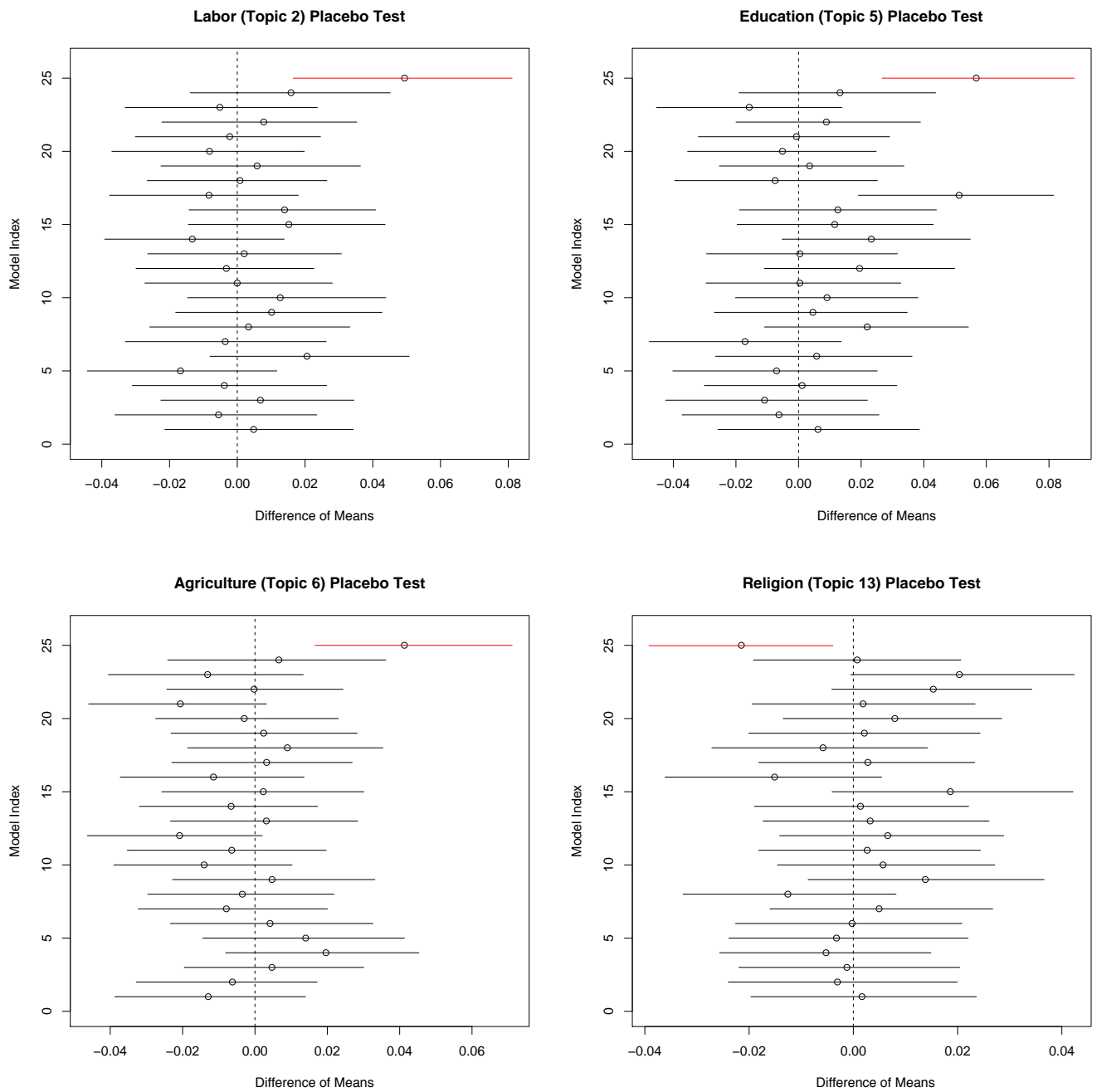
## APPENDIX B

### Permutation Tests for Topic Models

As mentioned in Chapter IV, one concern about Structural Topic Models (STM) is that combining the measurement model with the estimation of a covariate effect risks fitting a relationship onto the covariates, “baking in” the conclusion. This would increase the chances of obtaining spurious results. It is important to note that STM simply uses the covariate as additional information in calculating the latent variable; it does not “fit” the topic clusters to the covariate. As seen in my results, not all covariates were significantly associated with a topic.

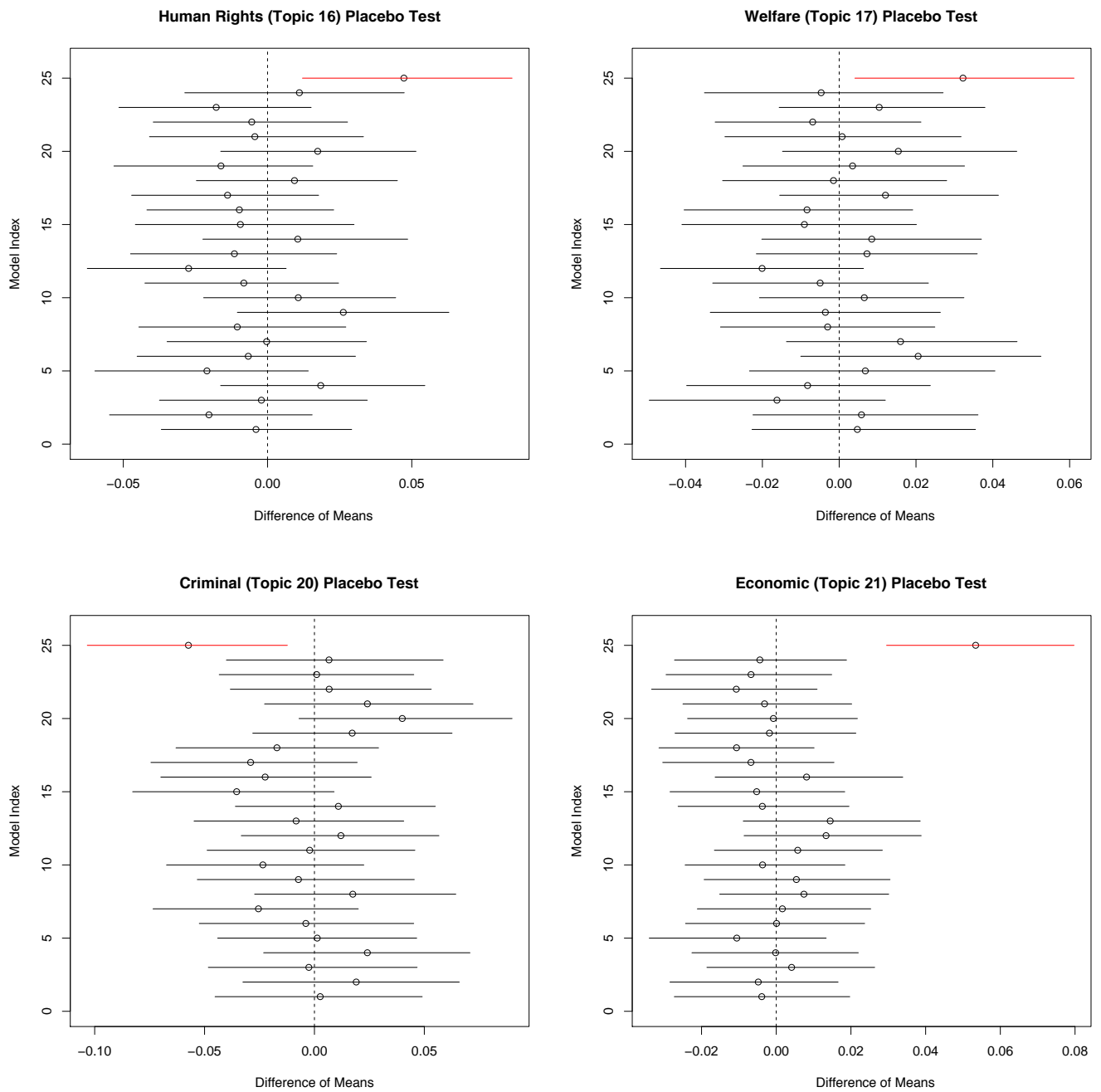
Nevertheless, I used a permutation test as a robustness check whenever I found a significant relationship between a petitioner identity variable and topic posterior (Figure 4.8 and Figures ??-??). The permutation test compares the estimated covariate effect with 24 random dummy variables in the same model (i.e., “placebos”). If any of the placebo runs shows a result significantly different from zero in the same direction as the covariate, it means that there was at least a  $\frac{1}{24}$  chance that the relationship between the covariate and the topic could have arisen due to chance.

Figures B.1-B.2 show the permutation tests for topics associated with NGO petitioners. The red line shows the best estimate and confidence interval for the covariate, i.e., the difference between the mean topic posterior for petitions with at least one NGO and petitions



**Figure B.1: Permutation Test for NGO Petitioners and Select Topic Proportions**

The plot shows the permutation test for covariates and topic posteriors that demonstrated a significant relationship in the difference of means test. The red dot shows the relationship between the petitioner identity variable and the topic. The 24 black dots show the the expected difference in topic posterior probability for the random dummy variables. The bars represent 95% confidence intervals.



**Figure B.2: Permutation Test for NGO Petitioners and Select Topic Proportions**

The plot shows the permutation test for covariates and topic posteriors that demonstrated a significant relationship in the difference of means test. The red dot shows the relationship between the petitioner identity variable and the topic. The 24 black dots show the the expected difference in topic posterior probability for the random dummy variables. The bars represent 95% confidence intervals.

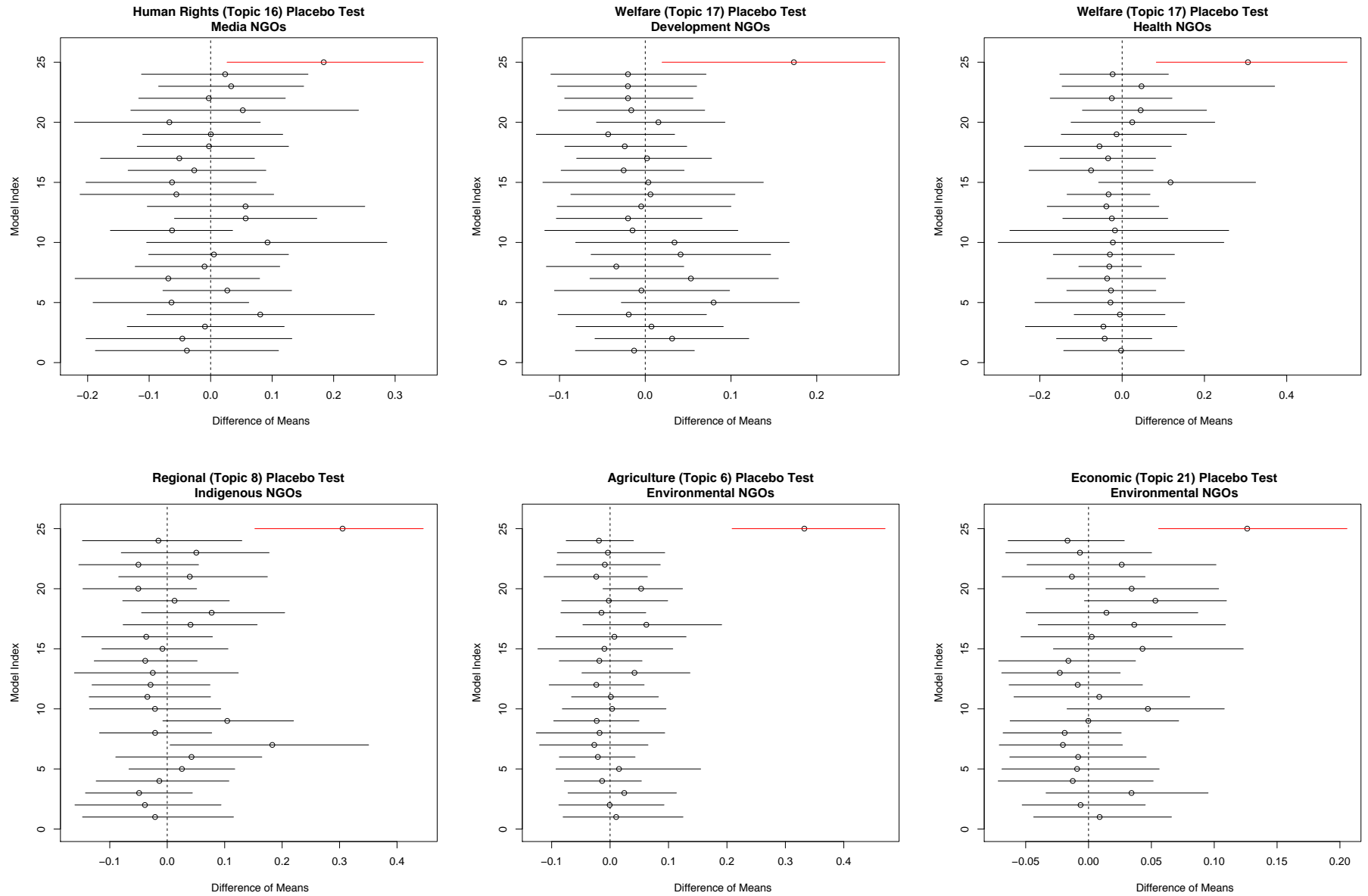
without any NGOs. The 24 black lines show the effect and confidence intervals for the placebos. The estimated effect of NGOs on all of these topics differs significantly from zero. However, the result for the education topic does not pass the permutation test because the result for one of the placebos (#17) was also significant and positive.

When looking at specific types of NGOs, there are several in Figures B.3-B.4 that pass the permutation test in that none of the placebos differs significantly from zero:

- Media NGOs for the human rights topic (Topic 16)
- Health NGOs for the welfare topic (Topic 17)
- Development NGOs for the welfare topic (Topic 17)
- Environmental NGOs for the agriculture and economic topics (Topics 6 & 21)
- Education NGOs for the education and legislative topics (Topics 5 & 18)
- Labor unions for the labor, welfare, and economic topics (Topics 2, 17, & 21)

I discussed the implications of these findings in Chapter IV.

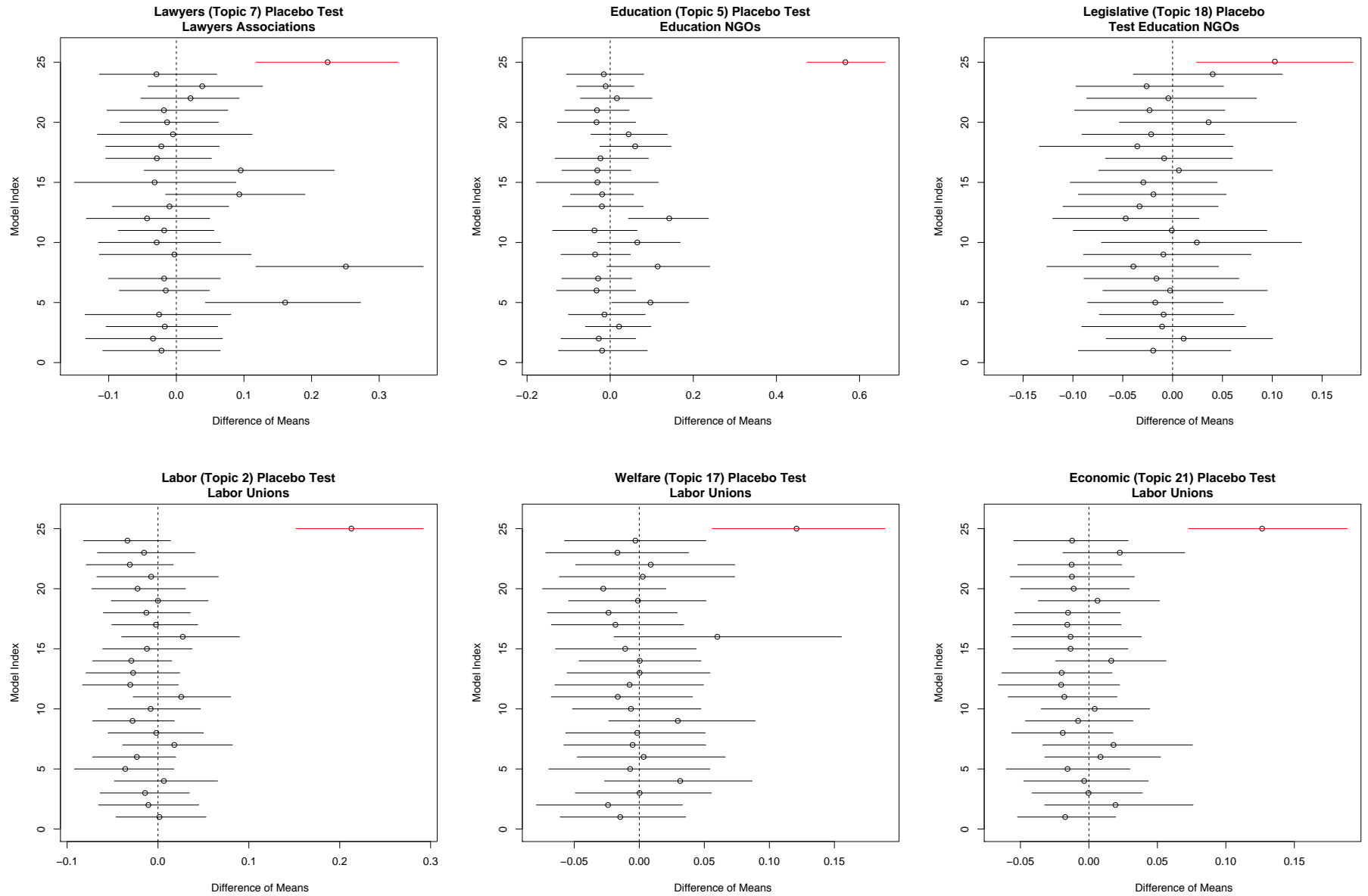
Lawyers associations and indigenous groups were significantly associated with topics (the “lawyers” and “regional” topics, respectively), but in both cases one of the placebos was also yielded a significant positive result, indicating that those results might have been due to chance.



**Figure B.3:** Permutation Test for Types of NGO Petitioners and Select Topic Proportions

The plot shows the permutation test for covariates and topic posteriors that demonstrated a significant relationship in the difference of means test. The red dot shows the relationship between the NGO petitioner identity variable and the topic. The 24 black dots show the the expected difference in topic posterior probability for the random dummy variables. The bars represent 95% confidence intervals.





**Figure B.4:** Permutation Test for Types of NGO Petitioners and Select Topic Proportions

The plot shows the permutation test for covariates and topic posteriors that demonstrated a significant relationship in the difference of means test. The red dot shows the relationship between the NGO petitioner identity variable and the topic. The 24 black dots show the the expected difference in topic posterior probability for the random dummy variables. The bars represent 95% confidence intervals.

## APPENDIX C

### Alternative Measure for Presidential Statements

In Chapter V, I used a dummy variable in my judicial voting behavior models to indicate if the president had submitted a written statement opposing the petition. I found a strong and significant *positive* relationship between the presence of a presidential statement and the likelihood that the Constitutional Court grants the petition. This seemed counterintuitive because the judicial politics literature tends to find that courts are more reluctant to declare a law unconstitutional if the government expresses its support for the law (Vanberg, 2005; Bergara, Richman and Spiller, 2003).

However, I also mentioned two potential problems. First, there is a risk of endogeneity if the president's decision to submit a statement depends on his or her assessment of the petition's probability of success. In other words, if the likely outcome of the case affected the president's decision to submit a statement, not vice versa. This does not necessarily seem to be the case in Indonesia (the president submitted a statement in almost two-thirds of cases), and presidential statements seem tied more to the importance of the legislation being challenged than the probability of success. This leads to a second problem. The dummy variable simply indicated the presence of a presidential statement; it did not capture any information about the intensity of the president's preferences. All else equal, the Court should be less likely to grant a petition when confronted with strong signals of presidential

opposition.

	party strength (Table 5.3)	petitioner ID dummy (Table 5.4)	petitioner ID number (Table 5.5)	petitioner coalition (Table 5.6)
...	...	...	...	...
<b>President (words) [-]</b>	0.452** (0.15)	0.464** (0.16)	0.462** (0.15)	0.446** (0.16)
...	...	...	...	...
<i>Term</i>	YES	YES	YES	YES
<i>Topics</i>	YES	YES	YES	YES
<i>N</i>	447	447	447	447
Pseudo $R^2$	0.166	0.174	0.159	0.174
Model $\chi^2$	84.55	84.56	75.18	82.71

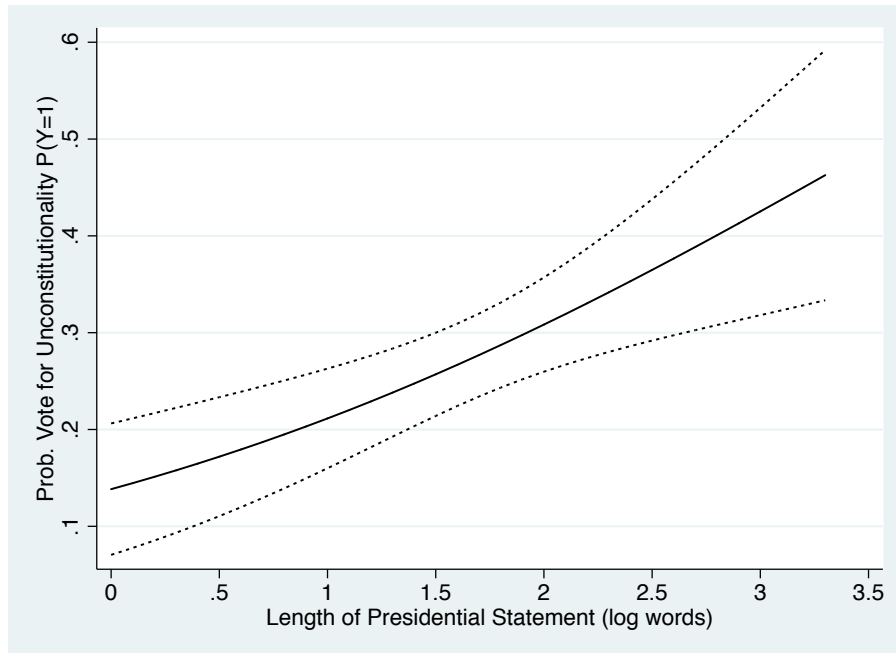
**Table C.1:** Model of Constitutional Case Outcomes with Number of Words in Presidential Statement

<sup>o</sup>  $p < 0.1$ , \*  $p < 0.05$ , \*\*  $p < 0.01$ , \*\*\*  $p < 0.001$ . The unit of analysis is each constitutional review case from August 13, 2003 to October 2, 2013. The dependent variable is binary indicating if the Constitutional Court voted for unconstitutionality. The entries are logit coefficients with robust standard errors in parentheses. Coefficients for other variables not shown. Constants are omitted. The expected direction of the coefficients appears in brackets.

In this Appendix, I utilize an alternative measure of presidential preferences to address both problems.<sup>1</sup> I take the log of the number of words in the president’s statement as a sign of the intensity of the president’s preferences in the case. This measure has three benefits. First, because it costs time and effort to write a longer brief, the president’s lawyers are more likely to invest those resources when they feel strongly about a policy. Second, because the length of the brief is observable, it can communicate information about the president’s preferences to the justices. Finally, it is less likely that the length of the president’s brief will be driven primarily by the president’s beliefs about the likelihood of petitioner success. Multiple factors, such as the complexity of the legal issues involved and amount of supporting evidence required, influence the length of the brief.

In Table C.1, I rerun the models from Tables 5.3-5.6, but substitute the new variable for presidential briefs in place of the dummy variable (I omit the other variables from the table for ease of reference). Just as for the dummy variable, the effect of presidential briefs on the probability that the Court grants a petition is positive. In other words, the Court is *more* likely to grant a petition for constitutional review if it receives a longer statement from

<sup>1</sup>I also considered several instrumental variables to overcome this potential endogeneity problem, but none satisfied the exclusion restriction (i.e., all potential  $Z$  had an effect on  $Y$  outside of  $X$ ).



**Figure C.1:** Probability of Unconstitutionality vs. Presidential Statements

The plots represent the probability that the Constitutional Court will grant a petition/vote for unconstitutionality at given lengths of presidential briefs (as measured by the log of the number of words). Results are taken from model 4a in Table C.1. All other variables are held at their means. Dashed lines represent 95% confidence intervals.

the president. I plot the results in Figure C.1, which shows that the effect of presidential statements is larger for longer briefs. This shows that the effect is not simply driven by cases without any presidential statements as the positive relationship remains even for longer briefs. Overall, these results suggest that my findings in Chapter V were not driven merely by endogeneity or measurement issues.

## APPENDIX D

### Topic Model for Related Parties

In Chapter VI, I used topic variables as controls when testing the extent to which the Indonesian Constitutional Court adopts text from briefs. I derived the topic variables from the posteriors of a latent topic model. For petitions, I simply used the results of the Structural Topic Model from Chapter IV. For related parties (*pihak terkait*), I needed to create a new topic model to capture information about topics in related party briefs. In this appendix, I briefly summarize the results of that topic model.

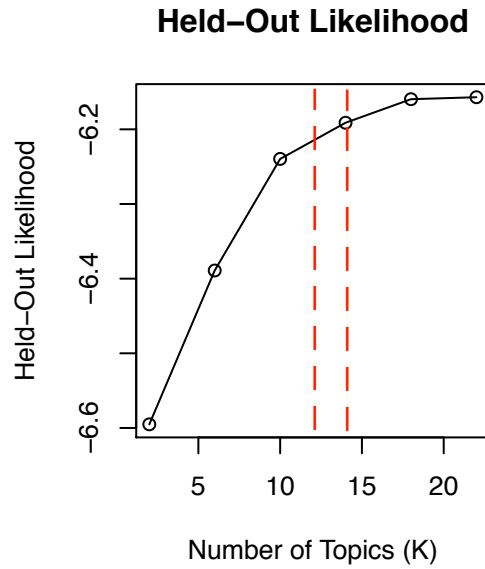
I generally used the same procedure and parameters for the related parties topic model that I had used for petitions in Chapter IV.<sup>1</sup> However, this is a different model utilizing data from a different corpus of documents. As such, the topic clusters will not be the same as those for petitions. Moreover, I set the number of topics to 14 rather than 22. As seen in Figure D.1, the perplexity score – held-out likelihood – for the related party model increases rapidly until around  $k = 14$ , after which the rate of increase flattens out.

The topic clusters for related party briefs are presented in Table D.1.<sup>2</sup> These topics differ from those in Table 4.3 (see Section 4.3). In general, the topics for related party briefs tend to be less refined. For example, there are no distinct topics for subfields like

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<sup>1</sup>I added a few stopwords, such as “petition” (“*mohon*”) and “law” (“*hukum*”), that were automatically removed from the petitions due to frequency, but not from the related party briefs.

<sup>2</sup>For ease of reference, I only show the five most frequent terms and omit the FREX terms.



**Figure D.1:** Perplexity Analysis of Structural Topic Model Results

election or environmental law (Topics 10 & 14, respectively). On the other hand, the model yields several niche topic clusters, such as “narcotics” (Topic 6) and “religion” (Topic 4), that were not found amongst the topic clusters for petitions. These differences likely reflect the different priorities of related parties. For example, fully 11.3% of related parties were religious organizations, compared to just 1.8% for petitioners.<sup>3</sup>

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<sup>3</sup>*P.B.B.* in Topic 7 is an acronym for for “*Pajak Bumi dan Bangunan*,” a type of property tax.

Topic 1 <i>Constitution</i>	hukum ( <i>law</i> )	mahkamah ( <i>court</i> )	hak ( <i>rights</i> )	rugi ( <i>loss</i> )	konstitusi ( <i>constitution</i> )
Topic 2 <i>Government</i>	negara ( <i>country</i> )	daerah ( <i>area</i> )	perintah ( <i>command</i> )	dpr ( <i>dpr</i> )	dewan ( <i>board</i> )
Topic 3 <i>Business</i>	siar ( <i>broadcast</i> )	lembaga ( <i>agency</i> )	atur ( <i>set</i> )	milik ( <i>property</i> )	hukum ( <i>law</i> )
Topic 4 <i>Religion</i>	agama ( <i>religion</i> )	orang ( <i>people</i> )	islam ( <i>islam</i> )	beba ( <i>beba</i> )	negara ( <i>country</i> )
Topic 5 <i>Professions</i>	dokter ( <i>doctor</i> )	hukum ( <i>law</i> )	profesi ( <i>profession</i> )	layan ( <i>service</i> )	praktik ( <i>practice</i> )
Topic 6 <i>Narcotics</i>	rokok ( <i>cigarettes</i> )	tembakau ( <i>tobacco</i> )	sehat ( <i>healthy</i> )	zat ( <i>substances</i> )	adiktif ( <i>addictive</i> )
Topic 7 <i>Tax</i>	pusat ( <i>center</i> )	pbb ( <i>PBB</i> )	hak ( <i>rights</i> )	raya ( <i>highway</i> )	pajak ( <i>taxes</i> )
Topic 8 <i>Criminal</i>	pidana ( <i>criminal</i> )	hukum ( <i>law</i> )	hakim ( <i>judge</i> )	laku ( <i>behavior</i> )	tindak ( <i>acts</i> )
Topic 9 <i>Regional</i>	kabupaten ( <i>district</i> )	daerah ( <i>county</i> )	provinsi ( <i>province</i> )	perintah ( <i>command</i> )	camat ( <i>camat</i> )
Topic 10 <i>Elections</i>	daerah ( <i>area</i> )	pilih ( <i>select</i> )	kepala ( <i>head</i> )	wakil ( <i>representative</i> )	kpu ( <i>KPU</i> )
Topic 11 <i>Education</i>	didik ( <i>students</i> )	nasion ( <i>nations</i> )	negara ( <i>countries</i> )	bangsa ( <i>nations</i> )	ajar ( <i>teach</i> )
Topic 12 <i>Lawyers</i>	advokat ( <i>advocate</i> )	organisasi ( <i>organization</i> )	hukum ( <i>law</i> )	profesi ( <i>profession</i> )	mahkamah ( <i>tribunal</i> )
Topic 13 <i>Rights</i>	hak ( <i>right</i> )	anak ( <i>child</i> )	hukum ( <i>law</i> )	perempuan ( <i>woman</i> )	cara ( <i>way</i> )
Topic 14 <i>Environmental</i>	usaha ( <i>business</i> )	tambang ( <i>mining</i> )	perintah ( <i>orders</i> )	hutan ( <i>forest</i> )	laku ( <i>behavior</i> )

**Table D.1:** Topics 1-22 from Structural Topic Model of Related Party Briefs  
The top five stemmed Indonesian words are listed in the first row of each topic, with translations below.

## APPENDIX E

### Text-Matching Content Analysis

In Chapter VI, I used WCopyfind to measure the similarity between legal briefs and the Constitutional Court's final decision. I use the similarity between texts as an approximation of the extent to which one document might have influenced another. In particular, I argued that the Court was more likely to quote or adopt text from a brief if it found that brief to be credible and/or informative.

However, WCopyfind quantifies language in texts, not ideas or legal arguments *per se*. Thus, not all text matches necessarily imply influence. This leads to three possible inferential errors. First, WCopyfind might not find a match even if the Constitutional Court directly discusses a brief if it does so by paraphrasing the brief's contents. This would lead to false negatives and fewer matches. Second, because Indonesian is a relatively sparse language, there is a risk of text matching because the brief and the Court independently use similar language to discuss the same concept. Finally, because WCopyfind does not and cannot directly capture information about the context or sentiment of the matching text, it is possible that the Court will cite a brief not because it finds it persuasive, but rather to critique it.

The first two problems should pose less of a risk to my research. False negatives should bias the results against my hypotheses, meaning that WCopyfind will not detect matches



even when the Court discusses a brief it finds credible or informative. I attempt to minimize this risk of false positives by only using perfect matches (see above). The third problem raises a greater concern. Collins, Corley and Hamner (2015, 928) find that the U.S. Supreme Court rarely cites amicus briefs simply to criticize them, so they presume that quoting text from a brief indicates favorable treatment. I do not go so quite far as I merely use text-matching to gain insight into the justices’ perceptions of a brief’s information value. Nevertheless, it is unclear if their presumption holds true for petitions in Indonesia.

To get a sense of the context in which the Indonesian Constitutional Court quotes petitions, I randomly selected five cases from the corpus and observed where matching text appeared in the Court’s written opinion (see Figure E.1 for example paragraphs from each decision).<sup>1</sup> In Table E.1, I provide summary statistics for how much text from the petition matched that of the Court’s decision, as well as the context in which that text was quoted. For all but the 2003 case, over 50% of the text in the petition matched text in the decision. However, the overwhelming majority of this text was quoted in the Court’s summary of the petition. The Court summarizes almost all of the petitions, government statements, and related party briefs it receives in an objective manner.

Case No.	10/2003	31/2006	49/2012	55/2012	114/2009
<i>Matching Words</i>	162	1510	2691	3708	2290
<i>% Matching</i>	5%	57%	58%	65%	56%
<i>Words in Reasoning</i>	59	81	44	62	125
<i>% in Reasoning</i>	36.4%	5.4%	1.6%	1.7%	5.5%
<i>% Positive</i>	0.0%	3.7%	0.0%	0.0%	0.0%
<i>% Negative</i>	0.0%	0.8%	0.0%	0.0%	1.0%

**Table E.1:** Summary Statistics of Text-Matching Examples

*Match words* indicates the total number of words from the petition that appeared in the Constitutional Court’s written decision in that case. *Words in Reasoning* indicates the number of matched words that appeared in the section of the Court’s opinion explaining its legal reasoning (*pertimbangan hukum*). The percentages are out of the total number of matched words.

For positive and negative treatment, I coded instances in which the Court explicitly affirmed or disagreed with information and/or arguments in the quoted text.

The justices only provide their assessment of information and/or arguments in the briefs in the section explaining the Court’s legal reasoning (*pertimbangan hukum*), if at all.

<sup>1</sup>The five petitions are from MK Decision Nos. 10/PUU-I/2003; 31/PUU-IV/2006; 49/PUU-X/2012; 55/PUU-X/2012; & 114/PUU-VII/2009.

With the exception of the 2003 case, between 1-5% of the quoted text appeared in the legal reasoning section. Even here, the Court did not usually adopt a clear stance on quoted text. Only twice did the Court quote text and then clearly state that it disagreed with the argument in the text (less than 1% of the total text), and in both cases the Court ultimately ruled against the petition.<sup>2</sup>

These results suggest that the Constitutional Court generally quotes a brief to summarize it, not to comment on its legal arguments or information. This means that text matches do not necessarily indicate favorable treatment, but there is also relatively little risk that that indicate negative or unfavorable treatment. As noted above, at best we can interpret text matches as evidence that the Court finds the brief credible or informative, even if not ultimately persuasive. Because the Court consistently summarizes the briefs it receives, we can still use WCopyfind to make inferences about the information value of the brief. If the Court quotes text from a brief, even if to summarize it, at a higher rate than average, then presumably it does so because it finds that brief relatively credible or informative.

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<sup>2</sup>MK Decision Nos. 31/PUU-IV/2006 & 114/PUU-VII/2009.

Case No. 10/PUU-I/2003		Case No. 31/PUU-IV/2006		Case No. 49/PUU-X/2012	
<p>[...] kemudian berdasarkan Surat Bupati dan DPRD Kabupaten Kampar tersebut diusulkan oleh Gubernur Riau kepada Menteri Dalam Negeri dan DPR-RI melalui surat tanggal 15 Juni 1999 Nomor 136/TP/1433 [...] (p. 30)</p>	<p>[...] then based on the Letter of Regent and DPRD of Kampar Regency proposed by the Governor of Riau to the Minister of Home Affairs and the House of Representatives by letter dated June 15, 1999 Number 136/TP/1433 [...]</p>	<p>Pengaturan penyiaran dengan dengan Peraturan Pemerintah sebagaimana diperintahkan oleh Pasal 62 Ayat (1) dan (2) UU Penyiaran yang menurut Pemohon menimbulkan ketidakpastian hukum dan karenanya bertentangan dengan Pasal 28D Ayat (1) UUD 1945, adalah pandangan yang keliru [...] (p. 129)</p>	<p>Broadcasting arrangements with the Government Regulation as mandated by Article 62 Paragraphs (1) and (2) of the Broadcasting Law which, according to the Petitioners, create legal uncertainty and therefore contradictory to Article 28D Paragraph (1) of the 1945 Constitution, is a false view [...]</p>	<p>Bahwa ketentuan Pasal 66 ayat (1) UU JN [bukti P-1] tersebut sepanjang frasa/kalimat "dengan persetujuan Majelis Pengawas Daerah" adalah sangat bertentangan dengan ketentuan Pasal 27 ayat (1) dan Pasal 28D ayat (1) UUD 1945 [bukti P-2], karena apabila frasa/kalimat "dengan persetujuan Majelis Pengawas Daerah" pada Pasal 66 ayat (1) UU JN [bukti P-1] tersebut tetap berlaku, maka tidak menutup kemungkinan pelaku-pelaku kejahatan dengan modus menggunakan Akta Authentik yang dibuat oleh Notaris berlingkup dibalik Pasal 66 ayat (1) UU JN [bukti P-1] dengan harapan Notaris yang bersangkutan tidak dapat diperiksa oleh Penyidik Kepolisian Republik Indonesia sehingga tidak terungkap pelakunya; (p. 16)</p>	<p>Whereas the provision of the a quo article is contradictory to Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution because if the article remains in force then does not rule out the perpetrators of crime by mode using the authentic acts made by Notaries taking cover behind article a quo, in the hope that the notary concerned can not be examined by the police investigator so that the perpetrator is not disclosed so that it can cripple / remove the constitutional rights and human rights of justice seekers;</p>
Case No. 55/PUU-X/2012		Case No. 114/PUU-VII/2009			
<p>Bahwa praktik demokrasi justru menjadi sumber konflik, karena yang berkembang bukan lagi kesejatan makna demokrasi, tetapi varian-varian penyakit demokrasi. Demokrasi dilihat sebagai peluang dan proses perebutan kekuasaan. Rakyat tidak diposisikan sebagai subjek, tetapi alat/sarana perebutan kekuasaan, baik di tingkat pusat maupun di daerah. Partai politik yang ada saat ini hanya menjadi mesin alat kekuasaan, bukan untuk mengabdikan pada kepentingan rakyat banyak dalam mencapai tujuan berbangsa dan bernegara. (p. 23)</p>	<p>That the practice of democracy is the source of conflict, because the developing is no longer the authenticity of the meaning of democracy, but the variant of democracy. Democracy is seen as an opportunity and a process of power struggles. The people are not positioned as subjects, but the means to seize power, both at the central and regional levels. Political parties that exist today is only a machine tool of power, not to serve the interests of ordinary people in achieving the goals of nation and state.</p>	<p>Bahwa sepanjang petitem para Pemohon yang meminta agar Pasal 74 ayat (3) UU MK harus dibaca bahwa hal tersebut tidak menghalangi pemohon perselisihan hasil pemilihan umum untuk mengajukan permohonan setelah selesainya tenggat waktu 3 x 24 (tiga kali dua puluh empat) jam sepanjang permohonan yang diajukan benar-benar signifikan mempengaruhi hasil Pemilu dan meminta agar Mahkamah menyatakan Pasal 74 ayat (3) tidak berlaku khusus bagi para Pemohon. (p. 18)</p>	<p>Whereas in the petition of the Petitioners requesting that Article 74 Paragraph (3) of the Constitutional Court Law should be read that it does not prevent the applicant from dispute over the results of the general election to file an application after the completion of the 3 x 24 (three times twenty four) significantly affects the election results and requests that the Court declare that Article 74 paragraph (3) shall not apply exclusively to the Petitioners.</p>		

**Figure E.1:** Examples of Text Matching for Petitions and Judicial Decisions

Each box contains a representative text from the petition next to the corresponding judicial decision for each case. WCopyfind was used to calculate the similarity between the brief and the Constitutional Court's decision in MK Decision Nos. 10/PUU-I/2003; 31/PUU-IV/2006; 49/PUU-X/2012; 55/PUU-X/2012; 114/PUU-VII/2009. The text underlined and highlighted in red indicates imperfections.

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