Hegemonic preservation or horizontal accountability: constitutional review in Turkey

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Article

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Abstract

Does constitutional review in emerging democracies tend to enhance horizontal accountability or to preserve state-elite hegemony? The results of a quantitative analysis of abstract constitutional review in Turkey during the 1984–2007 period show: (1) that the Constitutional Court was no more likely to accept unconstitutionality claims by state-elite parties than by non-state-elite parties; and (2) that the Constitutional Court was more likely to accept unconstitutionality claims of executive transgressions than those of state-principles violations. In sum, the findings largely point to the Constitutional Court's preference for horizontal accountability over hegemonic preservation.

Keywords

constitutional review, judicial activism, horizontal accountability, democratization, Turkey

Introduction

Regarded primarily as an effective restraint on the power of parliamentary majorities (Lijphart, 1999: 223), constitutional review is expected to contribute to the consolidation of an emerging democracy. This is because one of the most important problems confronting an emerging democracy has been the lack of horizontal accountability[1] and, in particular, the violation of the legislative and judicial authorities by a democratically elected executive branch of government (O'Donnell, 1994, 1996, 1999; Diamond et al., 1999; Mainwaring and Welna, 2003). In Latin America, constitutional review that failed to assert judicial independence from the incumbent impeded democratic consolidation (Larkins, 1998; Moreno et al., 2003; Dodson and Jackson, 2003; Magaloni, 2003; Calleros, 2009: 87–113), whereas in Eastern European countries, constitutional courts contributed to the formation of horizontal accountability (Schwartz, 1999: 195–214; Schwartz, 2000).[2]

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More recently, however, scholars such as Ginsburg (2003) and Hirschl (2004) have challenged this normative interpretation. Ginsburg (2003) attributed the prevalence of constitutional review since the Third Wave of democratization to the need of the former elite to prepare for the loss of power during democratization or political uncertainty. Similarly, Hirschl (2004) argued that the minority elite[3] in societies divided by a center–periphery cleavage[4] use constitutional review to preserve their political hegemony. Hirschl's hegemonic preservation thesis implies that constitutional review leads to the tyranny of the minority rather than horizontal accountability and, thus, casts a strong doubt on the effectiveness of constitutional review for democratic consolidation.[5]

A cursory review of the literature reveals a lack of dialogue between the two contending arguments. Scholarly evaluations of the effect of active constitutional review on democracy divide into predominantly positive or negative views. The current article addresses this gap in the literature and asserts that active constitutional review contributes to democratic consolidation if constitutional review is endowed with a strong mission for securing democratic principles such as horizontal accountability. Table 1 lists major countries known for judicial activism in constitutional review and characterizes them according to factors that seem to account for the difference in scholars' evaluations of the effect of constitutional review on democracy.

For the first four countries in Table 1 (Israel, Canada, New Zealand and South Africa), the impact of constitutional review on democracy has been described as negative because of hegemonic preservation. In these countries: (1) societies are deeply divided by a center–periphery cleavage;

Table 1. Countries with active constitutional review

Country[a]	Factors for				Effect on democracy[f]
	Elite entrenchment		Institutional mission		
	Center–periphery cleavage[b]	Constitutionalization of a bill of rights[c]	Democratic revolution[d]	Constitutional Court[e]	
Israel (1992)	Yes	Yes	No	No	Negative
Canada (1982)	Yes	Yes	No	No	Negative
New Zealand (1990)	Yes	Yes	No	No	Negative
South Africa (1995)	Yes	Yes	No	Yes	Negative
Costa Rica (1989)	No	No	No	Yes*	Positive
Colombia (1991)	No	No	No	Yes*	Positive
South Korea (1987)	No	Yes	Yes	Yes	Positive
Hungary (1990/9)	No	No	Yes	Yes	Positive
Poland (1985)	No	No	Yes	Yes	Positive
Turkey (1962)	Yes	Yes	Yes	Yes	?

Notes: [a] Years in parentheses indicate the approximate time when constitutional review was introduced or became activated. [b] The dominant cleavage in society. [c] The concurrent introduction of a bill of rights and constitutional review. [d] Constitutional review was introduced after or during democratization initiated by mass protests against undemocratic rule. [e] The establishment of a constitutional court separately from the Supreme Court. *Constitutional review was formerly exercised by the Supreme Court. [f] Scholars' evaluation (see Sources) of the effect of active constitutional review on democracy.

Sources: Compiled by the author from Hirschl (2004) for Israel, Canada, New Zealand and South Africa; from Wilson (2005) and Gloppen et al. (2010: 63–82) for Costa Rica; Espinosa (2005), Nunes (2010) and Gloppen et al. (2010, 52–54) for Colombia; from Ginsburg (2010) for South Korea; from Schwartz (1999, 2000), Halmai (2002), Scheppele (2003), Solyom (2003) and Boulanger (2006) for Hungary; and from Schwartz (1999, 2000) and Garlicki (2002) for Poland. For Turkey see the references in the text.

and (2) constitutional review came into practice after the adoption of the bill of rights that would protect the interests of the minority (center) elite (Hirschl, 2004: 50–99). Hirschl (2004) argued that these two factors encouraged elite entrenchment. For the second five countries in Table 1 (Costa Rica, Colombia, South Korea, Hungary and Poland), scholars acknowledged a positive effect of constitutional review on democracy largely through horizontal accountability. In these countries, constitutional review: (1) was introduced after or during a democratic revolution;[6] and/or (2) is exercised by a constitutional court that stands separate from the Supreme Court. These two factors seem more often than not to strengthen the institutional mandate/mission of the court for securing horizontal accountability.

However, these two groups of countries are not directly comparable because, as shown in Table 1, all four examples of democratic deficits are from center–periphery societies, and the five examples of democratic consolidation are not. To explain the performance difference in constitutional review by the difference in institutional mandate, it is necessary to compare similar countries according to the Most Similar Systems Design. This requires examination of a center–periphery society where the introduction of constitutional review is associated with a democratic revolution or where the Constitutional Court exists separately from the Supreme Court.

Turkey presents an appropriate case study. Turkey is deeply divided by a center–periphery cleavage (Mardin, 1973; Kalaycıoğlu, 1999; Esmer, 2002; Çarkoğlu and Melvin, 2006; Çarkoğlu, 2007; Çarkoğlu and Kalaycıoğlu, 2007). In Turkey, the minority elite who represent the center of the center–periphery cleavage are called the 'state-elite', conceived as administrative and judicial bureaucrats, military officers, and certain political parties or politicians who defend the interests and values of the secular and unitary Turkish nation-state. This group remains distinct from the non-state-elite, which consists of political parties or politicians who represent specific socioeconomic groups (Özbudun, 1993a; Heper, 2002: 140). Indeed, Hirschl (2004) used Turkey as an example of hegemonic preservation. Although that claim relied solely on two cases of party dissolution by court order, Hirschl's juristocracy account resonated with Turkish scholars, who argued that the Constitutional Court tried to defend the values and interests of the state-elite, who stood for the secular and unitary nation-state (Belge, 2006; Özbudun, 2006; Özbudun, 2007; Can, 2007; Arslan, 2008; Yazıcı, 2009: 183–223; Shambayati and Kirdiş, 2009).

Yet in Turkey, constitutional review as well as the Constitutional Court were adopted following the mass protests against and the overthrow of an undemocratic government in 1960, as described below in more detail. The democratic revolution and the establishment of a court specializing in constitutional review must have strongly motivated the Constitutional Court to protect the constitutionality of laws that often had been violated by executive transgressions. Moreover, if hegemonic preservation dominates the aim and function of constitutional review in Turkey, how can we explain the non-state-elite parties' ability to obtain a substantial number of unconstitutionality decisions each year (Figure 1) and the relatively great public confidence in the Constitutional Court (Figure 2)?[7] Previous research in Turkey on this topic has not systematically examined whether constitutional review is more likely to protect elite interests or to rectify transgressions by the executive branch of government.

This paper does not purport to test the theory of juristocracy in Turkey. Instead, it examines the relative importance of hegemonic preservation versus horizontal accountability in the Turkish constitutional review process. In this regard, abstract constitutional review is of particular importance given that it is the process through which the constitutionality of new laws is examined without any case in dispute, unlike concrete constitutional review. Abstract constitutional review can thus restrain the behavior of the incumbent government. The current research has far-reaching ramifications for other emerging democracies in culturally divided societies. It also addresses a broader question of whether

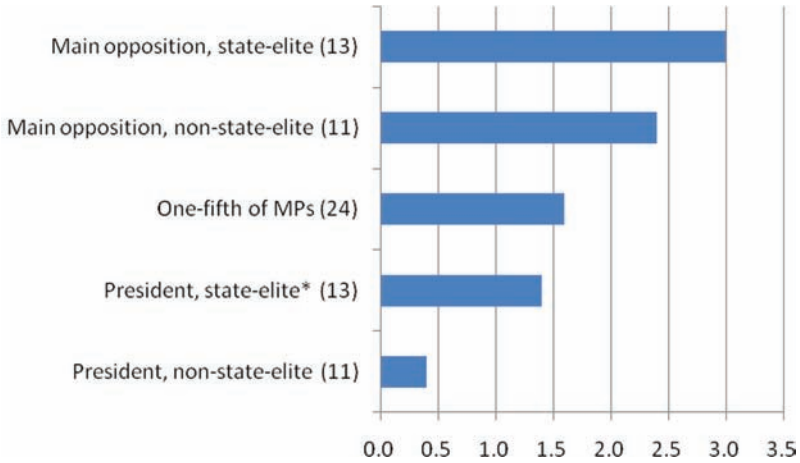

Figure 1. Mean annual annulments by referring authorities: 1984–2007 (N = 125)
Source: Compiled by the author from the dataset.
Notes: The mean number of laws partially or totally annulled by the Constitutional Court, calculated by referring authorities for their eligible years. In parentheses are cumulative numbers of years eligible for referral.
*This includes one referral joined by the main opposition party and five referrals joined by one-fifth of the parliamentarians. These six referrals were listed here because the president was the first referrer in all six referrals (the other referrers joined later in each referral).

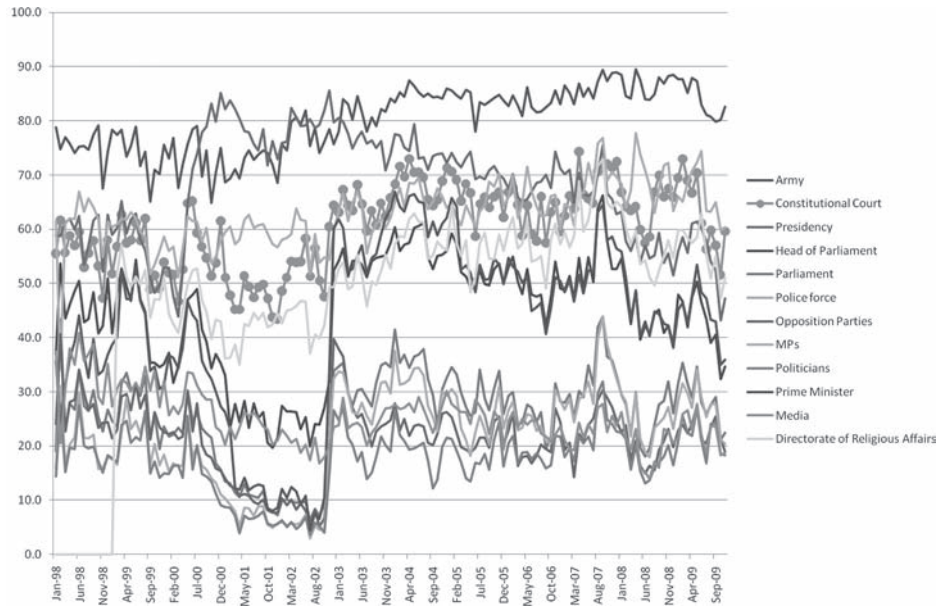

Figure 2. Confidence in institutions
Source: Compiled by the author from TNS-Turkey (2010).
Note: The percentages of respondents who have confidence in the institutions from January 1998 to November 2009. Results of nationwide face-to-face interviews with 2000 individuals.

constitutional review is an effective system for ensuring horizontal accountability in emerging democracies.[8] Is the Turkish Constitutional Court more inclined to preserve the hegemony of the state-elite than to rectify executive transgressions regardless of who is in government?

Coded data of the Turkish Constitutional Court's abstract review decisions during the 1984–2007 period were analyzed with two-level logistic regression models. The dependent variable is the binary decision of the Court either to accept or to reject each of the unconstitutionality claims included in a referral. The independent variables are litigants or referring authorities (of a state-elite or non-state-elite background) and referral reasons (based on secular-unitary state principles or horizontal accountability). The results largely point to the Court's preference for horizontal accountability over hegemonic preservation.

Abstract constitutional review in Turkey

In Table 2, the major institutional features of abstract constitutional review in Turkey are summarized in terms of factors affecting the frequency of referral and a decision of nullity.[9] The current literature shows that the frequency of referral is positively associated with access to review (i.e. the range of authorities or individuals eligible to refer laws to the Court) (Ginsburg, 2003) and with the level of elaboration and clarity of constitutional provisions (Sieder et al., 2005), but it points to a negative association of that frequency with the number of veto points (Sweet, 2002: 54).[10] The probability of decisions of unconstitutionality increases as the level of competition rises between the legislature and executive branches (Figueiredo et al., 2006: 207–212; Weingast, 2002: 676; Chavez, 2004; Epstein et al., 2001), within the party system (Smithey and Ishiyama, 2002; Herron and Randazzo, 2003), or within the political elite (Ginsburg, 2003: 106–157; VonDoepp, 2006, 2008, 2009). The Court is also likely to strike down laws when the judiciary has its own policy (Segal and Cover, 1989; Segal et al., 1995; Steunenberg, 1997) and when the judiciary enjoys public support (Vanberg, 2008: 106–111; Durr et al., 2000; McGuire and Stimson, 2004; Vanberg, 2001; Staton, 2006). In general, these features point to a tendency for relatively frequent and independent review. These qualities are necessary for both hegemonic preservation and horizontal accountability because both are contrasting interpretations of judicial activism, as discussed in the Introduction.

From majoritarian abuse to juristocracy?

The initial conditions, a democratic revolution and the establishment of the Constitutional Court, seem to have motivated the Turkish Constitutional Court (as well as referring authorities) to secure horizontal accountability. Turkish constitutional review originated from the reaction to the abuse of the legislative majority (Aliefendioğlu, 1996: 73). The Democrat Party (Demokrat Parti, DP), which came to power in Turkey's first democratic election in 1950, became repressive toward the end of the 1950s. According to Özbudun, the absence of checks and balances in the 1924 constitution was 'the main reason for the collapse of the first Turkish experiment with democracy' (2000: 53). Özbudun further notes that: 'In the absence of effective legal guarantees of basic rights and judicial review of the constitutionality of laws, the DP government passed a series of laws that severely restricted the rights of the opposition' (2000: 53), which aroused opposition protests and led to a mass demonstration. When the government ordered the army to quell the demonstration, the army refused and overthrew the government. The single most important aim of the 1961 constitution, which was drafted jointly by the military and civilians, was to transform Turkey from a majoritarian democracy into a pluralistic democracy, the institutional underpinnings of which

Table 2. Constitutional review in Turkey: Factors affecting review frequency and decision of nullity*

Factors	Description (Effect)[a]	Evidence
For review frequency:		
Veto points	Few (+)	Unicameral parliamentary system
Access	Limited (–)	President, PM, main opposition, and 1/5 of MPs
Centralization	High (+)	Court decision being final and binding
For decision of nullity:		
Appointment	Judiciary dominant (+)	Higher courts providing three candidates for each of the 7 of the 11 regular member posts to be appointed by the nonpartisan president[b]
Court positioning/policy	Rigid (+)	Secularism, unitary nation-state
Public support	Strong (+)	Public opinion polls (see Figure 2)
Party competition	Strong (+)	Fragmented, right-wing parties stronger (until 2002)

Notes: * Abstract constitutional review, 1984–2007. [a] A generalized description in light of the literature review and in comparison with other countries. Plus and minus signs indicate supposedly positive and negative effects on review frequency or a decision of nullity. [b] All eleven regular and four substitute members of the Constitutional Court are appointed by the president, who is required by the constitution to remain politically independent. The president's authority to appoint court members is restricted in that he must (1) choose seven of the eleven regular members and all four of the substitute members from candidates nominated by and from the judges of the higher courts, with three candidates nominated for each of the seven regular and four substitute posts, and (2) choose an eighth member from three candidates who are law professors nominated by the Higher Education Council; only for the remaining three posts can the president appoint bureaucrats or lawyers at his own discretion (Turkish Constitution, 1982: Article 146). Once appointed, a Constitutional Court member keeps his own post until the retirement age of 65, unless convicted of an offense, which terminates his position in the legal profession, or because of ill health (Turkish Constitution, 1982: Article 147).
Source: Compiled by the author.

included the supremacy of the constitution, the separation of powers and support for a pluralistic and participatory society (Özbudun, 1993b: 17–21).[11]

One might well argue that constitutional review could evolve into a tool for hegemonic preservation over time.[12] The post-1980 period in Turkey witnessed a growth of identity politics and issues representing periphery values, such as the Islamic movements and Kurdish nationalism. Between the years 1983 and 1991 and particularly 2002 to the present, non-state-elite parties held single-party governments and attempted to expand freedom of religion. During this same period, the Constitutional Court struck down the law and constitutional amendment (in 1989 and 2008, respectively) permitting headscarves in universities.[13] In 2007, the Court also canceled parliamentary voting for the next president, during which the candidate from the non-state-elite incumbent party was expected to win. Arguments critical of juristocracy and hegemonic preservation in Turkey multiplied in response to these and other events (Belge, 2006; Özbudun, 2006, 2007; Can, 2007; Arslan, 2008; Yazıcı, 2009: 183–223; Shambayati and Kirdiş, 2009). Although treating cases as diverse as party closures, the constitutional review of laws and constitutional amendments and the Court's interpretation of the parliamentary rules of procedure, the analyses cited above reflect primarily exemplary cases rather than long-term analysis.[14]

Before engaging in systematic analysis to answer the question of the relative importance of hegemonic preservation versus horizontal accountability in the constitutional review process in Turkey, it is important to identify those members of the state-elite who might seek hegemonic preservation. Regarding referring authorities – which consist of the president, the main opposition party and one-fifth of the parliamentarians (see 'Access' in Table 2) – past affiliation to a non-elected state institution or current or past membership in a state-elite party, to be defined below,

distinguishes the state-elite from the non-state-elite. The Republican People's Party (Cumhuriyet Halk Partisi, CHP, 1923–1981) led to the establishment of republican Turkey and is considered a state-elite party (Özbudun, 1993a). Its descendant parties – the Social Democratic Populist Party (Sosyal Demokratik Halkçı Parti, SHP, 1983–1995), the Democratic Left Party (Demokratik Sol Parti, DSP, 1985–present), and the CHP, which adopted the same name as its predecessor (1992–present) – represent the center of the center–periphery cleavage according to various survey results (Kalaycıoğlu, 1999; Esmer, 2002; Çarkoğlu and Melvin, 2006; Çarkoğlu, 2007; Çarkoğlu and Kalaycıoğlu, 2007). For these reasons, this paper refers to the SHP, DSP and CHP as state-elite parties[15] and to any other parties in the parliament as non-state-elite parties. Among the four presidents who were indirectly elected by the parliament and served between 1982 and 2007, two were non-elected officials before being elected president: Kenan Evren (1982–1989, former chief of the general staff) and Ahmet Necdet Sezer (2000–2007, former president of the Constitutional Court). The other two, Turgut Özal (1989–1993) and Süleyman Demirel (1993–2000), were former prime ministers from non-state-elite parties. Evren and Sezer are thus categorized as state-elite presidents and Özal and Demirel as non-state-elite presidents. In addition, Constitutional Court judges are also considered part of the state-elite.

Hypotheses

The preceding discussion has shown that a relatively independent Constitutional Court that has frequently annulled laws passed by the incumbent executive branch exists in Turkey. One motive for such court decisions may be hegemonic preservation, such as preventing the non-state-elite incumbent's policy by a stretched interpretation of the constitution, but another may be horizontal accountability, such as rectifying executive transgressions of either the state- or non-state incumbent. This article addresses the relative importance of hegemonic preservation (HP) and horizontal accountability (HA) in Turkey's abstract constitutional review and tests two hypotheses: (1) that HP is dominant; and (2) that HA is dominant. For each hypothesis to be supported, the following effects of the independent variables on a decision of nullity must be found, as shown in Table 3.

First, to support the HP hypothesis, a decision of nullity (on each of the contested sections of the referred law) must occur more frequently: (1) when the law is referred by a state-elite president or party than when it is referred by a non-state-elite president or party; and (2) when the referral reason (for the contested section of the law) pertains to secular-unitary state principles than when the reason pertains to horizontal accountability. In addition to the fact that secular-unitary state principles embody the values and interests of the state-elite, provisions regarding those principles are less clear than others and therefore give greater discretion to the Court (Özbudun, 2007: 264–265).[16] Second, to support the HA hypothesis: (1) the likelihood of a decision of nullity must not be significantly affected by whether the referral authorities are state-elite or non-state-elite presidents or

Table 3. Two hypotheses and expected effects of independent variables on decision of nullity

	Effects of independent variables[b]	
Hypothesis[a]	**Referring authorities**	**Referral reasons**
HP	State-elite > Non-state-elite	State principles > Horizontal accountability
HA	State–elite ≒ Non-state-elite	State principles < Horizontal accountability

Notes: [a] HP: Hegemonic preservation dominant. HA: Horizontal accountability dominant. [b] ≒ indicates no statistically significant difference.
Source: Compiled by the author.

parties; instead, (2) decisions of nullity must be more likely when referral reasons pertain to horizontal accountability than when they pertain to secular-unitary state principles. According to this hypothesis, the Constitutional Court treats state-elite and non-state-elite referring authorities fairly because it is more concerned with horizontal accountability than with hegemonic preservation.

Research design

Research on judicial activism has defined judicial independence as 'the autonomy of the court to overturn statutes or executive decisions' (Vanberg, 2008: 102). While adopting this conceptual definition, this study examines court decisions for each unconstitutionality claim concerning particular articles of a law. Most of the previous studies do not sufficiently explore the reasons for decisions of unconstitutionality largely because their analysis was confined to the character of annulled laws (Epstein et al., 2001; Herron and Randazzo, 2003). In practice, however, the Court makes decisions on diverse claims of unconstitutionality for various parts of the referred law. The current research coded unconstitutionality claims by the constitutional articles to which they referred. This resulted in a classification of unconstitutionality claims into three basic groups: secular-unitary state principles; individual or group rights; and horizontal accountability.

Data and the unit of analysis

The period of this study runs from 1984 through 2007, following Turkey's second and last military rule (1980–1983) and ending with the most recent available volume of records. The 1962–1980 period of constitutional review was not included because this study focused on more recent claims regarding Turkish juristocracy and because institutional features differ somewhat between the two periods. For example, constitutional review was more accessible in the former period (see note 9). For the 1984–2007 period, this study drew from the *Anayasa Mahkemesi Kararlar Dergisi* (*The Record of Constitutional Court Decisions*, Vols. 22–44), referral and review numbers, law numbers, articles of the constitution cited as reasons for referral, referring authorities, the Court's decisions and reasons thereof, for its dataset. The results of the constitutional review of the rules of procedure for the parliament and the Decrees Having the Force of Law were excluded from the dataset. Authorizing Laws that empowered the government to issue Decrees Having the Force of Law, constituting 10 of the total 175 sample laws reviewed, were included in the dataset because their deletion otherwise yielded very little change in the results of statistical analysis. Those referrals that were rejected due to procedural defects during the Court's initial examination (*ilk inceleme*) and before the examination of essence (*esasın incelenmesi*) were also excluded.

The dataset structure is illustrated in Table 4. There are two units of analysis. The first unit is a claim of unconstitutionality (hereafter, 'unconstitutionality claim'). In *Anayasa Mahkemesi Kararlar Dergisi*, unconstitutionality claims with respect to specific parts of the law are stated with reference to the relevant article of the constitution. The Court decides to accept or reject each unconstitutionality claim contained in the referral. If these claims are accepted or rejected, the relevant part of the law is declared unconstitutional or constitutional. If an unconstitutionality claim was based on more than one article of the constitution, then the original claim statement was divided into separate claims. The number of unconstitutionality claims (m) varies for each referral (n); the total number of unconstitutionality claims ($mn = N$) is 3153. The second unit is a referral ($n = 175$), corresponding to a law referred to the Court. The first unit level (unconstitutionality claims) measures referral reasons and Court decisions, whereas the second unit level (referrals) measures referring authorities.

Table 4. Dataset structure

Level 2 Unit	IV: Referral authority	Level 1 Unit	IV: Referral reason	DV: Court decision
Referral 1 (Law A)	State-elite main opposition	Unconstitutional claim 1-1	State principles	Rejection
		Unconstitutional claim 1-2	Horizontal accountability	Acceptance
		Unconstitutional claim 1-3	Individual/group rights	Acceptance
		Unconstitutional claim 1-4	State principles	Acceptance
		Unconstitutional claim 1-5	Horizontal accountability	Rejection
Referral 2 (Law B)	State-elite president	Unconstitutional claim 2-1	State principles	Acceptance
		Unconstitutional claim 2-2	Horizontal accountability	Acceptance
		Unconstitutional claim 2-3	Horizontal accountability	Rejection

Note: Entries are for illustrative purposes only and do not reflect actual values.
Source: Compiled by the author.

Coding rules for referring authorities

Referring authorities consist of state-elite presidents, non-state-elite presidents, main opposition parties, state-elite main opposition parties, non-state-elite main opposition parties and one-fifth of the parliamentarians. Presidents were distinguished from the main opposition parties and one-fifth of the parliamentarians[17] for three reasons related to their less frequent use of constitutional review than the parties or parliamentarians eligible for referral. First, there is little incentive to win a case for publicity or popularity given that the president is indirectly elected for a single term, and the potential cost of referral includes the rejection of an incorrect constitutional interpretation by the Constitutional Court. A more certain cost is that a referral would expose a rift within the executive branch of government. For the main opposition party or the parliamentarians, however, a referral may accrue popularity if it succeeds in drawing a decision of nullity. Because publicity would still be generated if the Court rejected the referral, losing a case does not pose risks to those who are mandated to challenge the government.

Second, the president has the authority to veto any law passed by the parliament before its promulgation.[18] In other words, he or she has a chance to block government legislation prior to constitutional review, effectively reducing the need to refer to the Constitutional Court. However, constitutional review provides virtually the only veto point available to the opposition parties and members of parliament in the Turkish legislative processes, in which the unicameral parliamentary system allows the incumbent party to dominate the executive branch and legislature. The opposition's effort to block government policy focuses on this single veto point.

Third, those presidents who share the same ideology as the incumbent party or parties have fewer objections to government policy than do those whose values differ from the governing party or parties. From 1989 to 1991, Özal, and from 1993 to 1995, Demirel, enjoyed concordance with the parties in power, the Motherland Party (ANAP) and the True Path Party (DYP), respectively, of which they were former chairmen. The other years witnessed discordance due to differing political values. Although the constitution requires the president to be politically neutral, the record shows that a president rarely refers laws that were passed by his or her party to the Court.

Coding rules for referral reasons

Referral reasons are defined as the articles of the constitution that the referring authority cited as reasons for referral. To code referral reasons, the articles of the 1982 constitution were divided into three major categories according to the most distinct principle that each article represents: (1) secular-unitary state principles; (2) individual or group rights; and (3) horizontal accountability. While the secular-unitary state principles can be a distinct category for Turkey, the other two categories are also found in other studies, including Epstein et al.'s (2001) analysis of Russian constitutional review, which used three categories related to federalism, individual rights and the separation of powers.

The 'secular-unitary state principles' category pertains to the fundamental characteristics and values of the Turkish state, consisting of the: Preamble; Form of the State (Article 1); Characteristics of the Republic (Article 2); Integrity of the State; Official Language; Flag; National Anthem; Capital (Article 3); Irrevocable Provisions (Article 4); Fundamental Aims and Duties of the State (Article 5); Sovereignty (Article 6); Supremacy and Binding Force of the Constitution (Article 11); and the Preservation of Reform Laws (Article 174). As already noted, the vague expression used in the constitution to define these state principles allows the Court significant discretion for interpretation (Özbudun, 2007: 264–265).

'Individual or group rights' include Equality before the Law (Article 10) and all articles in Part Two: Fundamental Rights and Duties (Articles 12 to 74). These articles pertain to the fundamental rights and duties of the individual, the social and economic rights and duties, and the political rights and duties.

The 'horizontal accountability' category consists of two subcategories: the authorities of state institutions and fiscal and economic provisions. The authorities of state institutions are stipulated by Legislative Power (Article 7), Executive Power and Function (Article 8), Judicial Power (Article 9), and all articles in Part Three: Fundamental Organs of the Republic (Articles 75 to 160). Fiscal and economic provisions are embodied in Part Four: Financial and Economic Provisions (Articles 161 to 173), which stipulates rules for public finance and economic policy that the government (incumbent party) must observe.

The constitutional provisions for horizontal accountability do not simply list the authorities of legislative, executive and judicial bodies of the government but aim to prevent the aggrandizement of the executive branch. Provisions regarding the executive branch clarify the limitations of its power. In particular, Article 8 underscores the fundamental principle that any decision of the executive branch must be based on preexisting law, and Articles 123, 126, 127 and 128 are firmly founded on this principle (Özbudun, 1993b: 154–155).[19] On the contrary, the constitution protects the legislative and judicial authorities by defending the principles of the non-fungibility of legislative power and judicial independence.

Estimation model

The hypotheses are tested using a two-level logistic regression model with an unconstitutionality claim as the unit of analysis. The Court's decision, acting as the binary dependent variable, is measured for each of the unconstitutionality claims lodged in one referral. The value for the dependent variable is one if the Court accepts the referral reason and zero if the Court rejects it, requiring a binary logistic regression model.

The independent variables include two groups of dummy variables at two different aggregation levels. The first group of dummy variables, operating on the unconstitutionality-claim level of

aggregation, pertains to three types of referral reasons, including violations of: (1) secular-unitary state principles; (2) individual/group rights; and (3) horizontal accountability as the basis of comparison. The second group of dummy variables, at the referral level of aggregation, consists of five types of referring authorities, including: (1) a state-elite president; (2) a non-state-elite president; (3) a state-elite main opposition; (4) one-fifth of the parliamentarians; and (5) a non-state-elite main opposition as the basis of comparison. The two-level model was combined with the binary logistic regression because referral reasons of unconstitutionality claims are nested in referrals.

The final estimation model, which corresponds to Model 4 in Table 6, takes the following form:

$$\ln(D_{ij} / 1 - D_{ij}) = \alpha + \beta_1 (S_{ij}) + \beta_2 (R_{ij}) + \beta_3 (PS_j) + \beta_4 (PN_j) + \beta_5 (OS_j) + \beta_6 (MP_j) + \upsilon_j$$

for $i = 1, \ldots, m$ first-level groups (unconstitutionality claims) and $j = 1, \ldots, n$ second-level groups (referrals) that are nested within group i, where D_{ij} is the probability of the Court's binary decision on each of the unconstitutionality claims nested in the referral (Y, taking the value of 0 for rejection and 1 for acceptance of the claim) under the given condition b such that Prob $(Y = 1|b) = D$; S_{ij} and R_{ij} are dummy variables for referral reasons regarding secular-unitary state principles and individual or group rights, with a referral reason regarding horizontal accountability H_{ij} as the base for comparison; PS_j, PN_j, OS_j, and MP_j are dummy variables for a state-elite president, a non-state-elite president, a state-elite main opposition, and one-fifth of the parliamentarians, respectively, with a non-state-elite main opposition ON_j as the base for comparison; α is the intercept; β_k are k coefficients to be estimated; and υ_i is the error term at the second level such that υ_j is further divided into $\beta_7 (S_j) + \beta_8 (R_j)$.

Determinants of decisions of nullity

Before testing whether the type of referring authorities and referral reasons affect Court decisions, distributions of referrals by referring authorities and referral reasons are examined. Certain biases are found in the distributions, but they are shown to be more favorable for the HA hypothesis than for the HP hypothesis. The two-level logistic regressions estimate the probability of decisions of nullity. The results largely support the HA hypothesis.

Referral frequency by referring authorities and referral reasons

When the referring authorities are divided into the president and others, the frequency of referral by the president is smaller than that by other types of referring authorities. On average, presidents made 1.0 referral to the Court annually, whereas the main opposition party and the parliamentarians made 3.8 and 2.4 referrals, respectively. Referrals by the president constituted only 25 cases, or 14.3 percent of the total, whereas referrals by the main opposition party formed 92 cases, or 52.6 percent. The president's referrals therefore have a limited impact on the number of unconstitutionality decisions.

In terms of the state-elite and non-state-elite distinction, state-elite presidents or parties more frequently refer laws to the Court than do non-state-elite presidents or parties. The mean frequency of annual referral was greater for state-elite presidents (1.4) than for non-state-elite presidents (0.6) at a statistically significant level ($t = 2.00$, $p = 0.059$).[20] State-elite presidents challenged the incumbent more frequently than did non-state-elite presidents. In contrast, between state-elite (4.0) and non-state-elite (3.6) main opposition parties, the mean frequency of referrals per year was not significantly different ($t = 0.24$, $p = 0.812$), a striking result given that state-elite main opposition

parties were almost invariably faced with single-party governments (1984–1991; 2002–2007), but non-state-elite main opposition parties dealt with coalition governments (1991–2002). Single-party governments theoretically should have aroused more parliamentary opposition and thus more referrals to constitutional review than coalition governments because they offer fewer veto points. The lack of a significant difference between the two suggests that both state-elite and non-state-elite parties took advantage of constitutional review more actively than reactively while on the opposition side.

Table 5 presents the breakdown of referral reasons. Because referral reasons are coded for each specific unconstitutionality claim, more than one such reason exists for each referral. The total number of referral reasons reached 3153. Referral reasons based on secular-unitary state principles formed just over a quarter (27.1 percent) of the total, and horizontal accountability accounted for nearly half (48.6 percent). This means that even if there is not a significant difference in the probability of a decision of nullity between referrals based on secular-unitary state principles and those based on horizontal accountability, almost half of the unconstitutionality claims are to be accepted by the Court for reasons of horizontal accountability. This is a strong condition for supporting the HA hypothesis if the probability of a decision of nullity is higher for horizontal accountability than for secular-unitary state principles.

Court decisions

Table 6 presents the results of the two-level logistic regression analysis regarding the research questions of this study, that is to say whether the Constitutional Court favors: (1) the state-elite over the non-state elite, as referring authorities; and/or (2) the secular-unitary state principles over horizontal accountability, as referral reasons. Models 1 and 2 compared state-elite and non-state-elite *presidents*, while Models 3 and 4 compared state-elite and non-state-elite *main opposition parties* as referring authorities, with subsamples and full samples. The estimated coefficients for fixed effects are shown as odds ratios.

In the fixed effects section of the table, the odds ratios tell how many times larger the probability of annulment becomes for each one-unit increase in the value of the relevant independent variable. Accordingly, an odds ratio of 1 denotes no effect (of the relevant independent variable on the dependent variable), whereas an odds ratio larger or smaller than 1 denotes a positive or negative effect. All the variables in the table are dummy variables that take values of either 1 (for the said category) or 0 (for any other category). The number of dummy variables is one short of the number of categories (for referring authorities and referral reasons) because the basis of comparison (see

Table 5. Referral reasons ($N = 3153$)

	n	%
Secular-unitary state principles	854	27.1
Individual or group rights	768	24.4
Horizontal accountability[a]	1531	48.6
Total	3153	100.0

Note: [a] Horizontal accountability includes 1248 (39.6%) cases of 'authorities of state institutions' and 283 (9.0%) cases of 'fiscal and economic provisions'.
Source: Compiled by the author.

Table 6. Determinants of Court decisions ($N = 3153$)

Comparison	President		Main opposition party	
Sample	Sub	Total	Sub	Total
Model	(1)	(2)	(3)	(4)
Fixed effects				
Referring authorities[a]				
PS (state-elite president)	20.665 *	20.297 **		22.623 **
	1.63	*3.42*		*3.52*
PN (non-state-elite president)				1.318
				0.20
OS (state-elite main opposition)		0.343	1.100	1.109
		–0.64	*0.17*	*0.17*
ON (non-state-elite main opposition)		0.309		
		–0.76		
MP (one-fifth of MPs)		3.904	3.507	1.336
		0.87	*0.91*	*0.47*
Referral reason[b]				
State principles	0.534	0.354 **	0.458 **	0.353 **
	–1.57	*–4.47*	*–3.52*	*–4.49*
Individual or group rights	0.366	0.348 **	0.349 **	0.344 **
	–1.16	*–4.36*	*–4.46*	*–4.41*
Random effects				
Level-two: Referral				
State principles	0.001	1.276 †	0.001	1.274 †
Individual and group rights	1.655	0.877 †	0.001	0.875 †
Constant	3.135 †	2.580 †	2.312 †	2.589 †
Referrals(n)	25	175	97	175
No. of observations(N)	405	3153	1796	3153
Wald Chi^2	5.37	43.58	23.22	43.10
Prob > Chi^2	0.146	0.001	0.001	0.001

Notes: Entries are results of the two-level logistic regression. Estimated coefficients for fixed effects are shown as odds ratios. Italicized values are *Z*-values. Estimated parameters for random effects are standard deviations. * Fixed-effects estimates are statistically significant at the 0.10 level. ** Fixed-effects estimates are statistically significant at the 0.01 level. There were no estimates for which *p*-values were between 0.01 and 0.10. †Random-effects estimates are within the 95-percent confidence interval. [a] Second-level variables ($n = 175$). For models 1 and 2, the basis of comparison is a referral by a non-state-elite president, whereas for models 3 and 4, the basis of comparison is a referral by a non-state-elite main opposition party. [b] First-level variables ($mn = N = 3153$). The basis of comparison is a referral reason regarding horizontal accountability. The number of unconstitutionality claims (m) varies by referral.
Source: Compiled by the author from the dataset.

note *a* in the table) occupies one category. For instance, in Model 2, if the referring authority is a state-elite president, then the probability of an annulment (unconstitutionality) decision by the Court is 20.297 times greater ($p < 0.01$) than if the referring authority is a non-state-elite president. Additionally, if the referral reason is based on secular-unitary state principles, then the probability of annulment is one-third (0.354, $p < 0.01$) the probability of annulment than when the referral reason is related to horizontal accountability.

The random-effects parameters show whether the coefficients and the intercept for the unconstitutionality claim level vary significantly at the referral level or whether it is appropriate to assume different coefficients and intercept for each referral. All of the standard deviations for the variables and intercepts for Models 2 and 4, which use the full sample, are larger than zero ($p < 0.05$),

and they give supportive evidence of statistically significant variation at the referral level, thereby justifying the use of the two-level model instead of a one-level model.

Regarding referring authorities, the results presented in Table 6 show that the Court is more likely to accept unconstitutionality claims made by a state-elite president than by a non-state-elite president (Models 1 and 2). However, the Court does not respond differently to unconstitutionality claims by state-elite and non-state-elite main opposition parties, as Models 3 and 4 show. With respect to the referral reasons, the results indicate that the Court accepts unconstitutionality claims based on horizontal accountability more frequently than those based on secular-unitary state principles (and individual or group rights).[21] In Models 2 to 4, the probability of the Court accepting an unconstitutionality claim based on secular-unitary state principles was calculated to be approximately 40 percent (0.354, 0.458, and 0.353, respectively) of the probability that such a claim would be accepted for reasons of horizontal accountability. In Model 1, the odds ratio is not statistically significant, likely because of the small size of the subsample ($n = 25$), but the sign of the Z value is negative and thus consistent with findings in the other models.

These results largely support the HA hypothesis and reject the HP hypothesis. There is no significant effect of an opposition party's state-elite versus non-state-elite status on the probability of a decision of nullity; and the Court is more likely to accept referral reasons based on horizontal accountability than those based on secular-unitary state principles and individual or group rights. Nevertheless, the fact that unconstitutionality claims by state-elite presidents were more likely to be accepted by the Court than those by non-state-elite presidents at very high odds ratios (above 20, Models 1, 2 and 4), is congruent with the HP hypothesis. As stated earlier, however, the president rarely makes referrals to the Court.[22] More importantly, among the 18 laws referred by state-elite presidents and entirely or partly annulled by the Court, only 2 were annulled for the violation of secularism or unitary-nation secular-unitary state principles: Referral Number 1989/1 (regarding the law that lifted the headscarf ban in universities) and Referral Number 2005/32 (regarding the law that expanded the authorities of local governments). Most of the remaining 16 laws had been struck down for transgressions of executive authority and procedural defects. Although there are a few cases in which the interests of public servants were upheld, these cases seem to protect the legitimate rights of public servants more than to preserve the hegemony of the state elite.[23]

Unconstitutionality decisions regarding the violation of horizontal accountability resulted in the correction of the transgressions of the executive authorities. Out of the 42 laws that were entirely or partly annulled for violation of horizontal accountability, the major reasons for annulment included: legislative delegation (an unconstitutional expansion of the executive power, $n = 15$); concealed legislation (the infusion of permanent law provisions into temporary legislation such as budget law, $n = 10$); and nullified laws (the reintroduction of a law once nullified by the Court, $n = 4$). Although the impact of some of these decisions may be less substantive or consequential than decisions regarding secular-unitary state principles, the sheer number of annulments due to the infringement of horizontal accountability, which is an executive branch advantage, attests to the general neglect of horizontal accountability in the state institutions of an emerging democracy such as Turkey and to the necessity of correcting such political behavior by way of the Court's enforcement of constitutional rules.

Conclusions

Recent arguments have stated that constitutional review favors the hegemony of the elite in societies that are divided by center–periphery cleavages. If this hegemonic preservation thesis applies to emerging democracies, then constitutional review would hinder rather than promote democratic

consolidation. Yet, even in a center–periphery society, active constitutional review seems to contribute to democratic consolidation if constitutional review is endowed with a strong mission for securing democratic principles such as horizontal accountability. Constitutional review that was introduced after a democratic revolution in response to majoritarian abuse and is exercised by the Constitutional Court that stands separate from the Supreme Court may well prefer to preserve its (diminishing) political capital by remaining committed to its initial institutional mission of securing horizontal accountability.

This paper examines the above claim using the case of Turkey, where the center–periphery cleavage persists and where constitutional review has been institutionalized for the last half-century. The results of the quantitative analysis of Constitutional Court decisions during the 1984–2007 period show that: (1) for referrals from main opposition parties, the Court did not favor state-elite parties over non-state-elite parties; and that (2) the Court was more likely to accept referral reasons that alleged executive transgressions than those that alleged the violation of secular-unitary state principles. Among referrals from presidents, those from state-elite presidents did frequently result in unconstitutionality decisions. Yet, those referrals were much fewer than referrals from main opposition parties. Moreover, state-elite presidents' unconstitutionality claims were accepted by the Court not so much for reasons of secular-unitary state principles as for horizontal accountability. In sum, the evidence points to Court preference for horizontal accountability over hegemonic preservation.

These findings have three important implications for emerging democracies, each of which deserves further study. First, although constitutional review may tempt the declining elite to preserve its status quo against the emerging elite, a persistent practice of hegemonic preservation would seriously undermine court legitimacy. Courts are likely to avoid such consequences, particularly when the stakes are high and when their behavior is transparent to the public. Constitutional review that was born out of a democratic revolution and that is exercised by a specialized (constitutional) court raises the stakes and transparency. Second, widespread attempts to transgress by executive authority exist that would allow arbitrary rule and breed corruption. Most of these attempts are more subtle than blatant and thus difficult to subject to public oversight. The evidence corroborates O'Donnell's claim that the deficit of horizontal accountability poses a serious challenge to emerging democracies (1994, 1996, 1999). Third, a neglected consequence of the elite's insurance policy (Ginsburg, 2003) is that the minority (hegemonic) elite in government does not escape the rules of their own making. The minority elite, while they may have wanted constitutional review as insurance against their loss of power, very likely retreat from horizontal accountability once they achieve power (Volcansek, 2010). However, Turkey's established Constitutional Court did not overlook executive transgressions by the minority elite. Any allegation of the Court's collusion with the government via its constitutionality decisions would have damaged the Court's reputation more than would allegations of collusion with the opposition via decisions of unconstitutionality.

The results of this research do not categorically reject the claim that juristocracy persists in Turkey. Despite their rare occurrence, the Constitutional Court showed a strong tendency to accept unconstitutionality claims by state-elite presidents who were mostly in conflict with the incumbent party. State-elite presidents may thus have blocked a few critically important laws from being enforced. A systematic test of the hegemonic preservation thesis would require further analysis of concrete constitutional review, administrative review and party dissolution. Nonetheless, abstract constitutional review forms the core of the mechanism of hegemonic preservation because it is through abstract constitutional review that the constitutionality of the incumbent government's policies can be directly challenged. This study's findings point to a need for further systematic examination of the role of the judiciary in democratic consolidation.

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Notes

1. By horizontal accountability, O'Donnell (1996: 44) means 'the controls that state agencies are supposed to exercise over other state agencies', which have yet to take root in most emerging democracies because the executive branch of government strives to restrain the legislature and judiciary, which it regards 'as hindrances placed in the way of the proper discharge of the tasks that the voters have delegated to the executive'.
2. In Poland and Hungary, court decisions curbed the expansion of the authority of the executive branch of government, whereas in Bulgaria and Slovakia the courts defied political pressure from the repressive governments that temporarily existed during democratic transitions (Schwartz, 1999: 195–214; Schwartz, 2000).
3. Hirschl calls the minority elite the 'hegemonic elite' (2004: 44). By this, he means the current (or traditional) elite, such as urban intellectuals, lawyers and managers who hold political and economic dominance but whose hegemonic position is being threatened by the emergence of the cultural majority.
4. 'Culturally divided societies', as originally described in Hirschl (2004), directly correspond to societies with a strong center–periphery cleavage (Lipset and Rokkan, 1967), in which the minority elite represents the center. In the four countries (Israel, Canada, South Africa and New Zealand) that became models of hegemonic preservation, the center–periphery cleavage divides Israel into the secular and the religious, Canada into English and French cultural regions, South Africa into whites and blacks, and New Zealand into European and indigenous and/or Asian descendants (Hirschl, 2004).
5. A few studies on Israel, such as Barak-Erez (2002) and Woods (2008), contrast with Hirschl's juristocracy argument.
6. This paper defines a democratic revolution as a transition to democracy initiated by mass protests against undemocratic rule.
7. Hirschl (2004: 73–74) argued that, given the introduction of constitutional review to Israel in 1992, the growing practice of judicial activism by the Supreme Court led to the decline of its legitimacy in public opinion.
8. O'Donnell (2005: 296) argued that recent judicial activism in Latin America contributed to the enhancement of horizontal accountability.
9. The essential features of Turkish constitutional review prescribed by the 1961 constitution remained basically the same under the 1982 constitution, but access to review was curtailed. In Article 149, the 1961 constitution had granted the referral power to the president, parliamentary groups in either house, political parties that had parliamentary groups in the lower house, political parties that had obtained 10 percent of the valid votes in the most recent general election, one-sixth of the members of either house, and, when it concerned their existence or duties, the Supreme Council of Judges and Public Prosecutors, the Supreme Court, the Council of State, the Supreme Military Court and universities.
10. Veto points in legislative processes denote the number of opportunities to amend or reject bills (Immergut, 1990; Kaiser, 1997). Fewer veto points raise the possibility of the government passing confrontational bills and thus increase the probability of the opposition resorting to abstract constitutional review (Sweet, 2002: 191–192, 549).
11. The 1961 constitution did introduce a bill of rights (Özbudun, 2006), but the arguments regarding hegemonic preservation in Turkey, which are shown below, do not assert that the constitutionalization of a bill of rights protects elite interests.

12. In 1980, the military took over the government because it could not contain the left–right violence. Drafted almost entirely by the military, the 1982 constitution restricted individual and group rights and conferred more power upon the executive authorities (Özbudun, 1993b; Yazıcı, 2009), although it retained the basic structure of the 1961 constitution and constitutional review.
13. Needless to say, both the law and the constitutional amendment were sponsored by a non-state-elite party.
14. Belge (2006) includes a comprehensive analysis of constitutional review during the pre-1980 period.
15. This definition applies regardless of whether the party is in government or in opposition. In fact, state-elite parties were in government for 9 out of 23 years during the 1984–2007 period. The fair application of insurance against majoritarian abuse must be scrutinized regardless of which party holds the government or the opposition.
16. Özbudun (2007) claims that judicial activism in Turkey seeks the protection of the fundamental values and interests of the state rather than that of fundamental rights.
17. One-fifth of the parliamentarians necessarily includes members of both state-elite and non-state-elite parties to secure the number of signatories.
18. If the parliament enacts the same law by a simple majority vote without amendment, then the veto is overridden, and the president must promulgate it.
19. In only a few exceptional instances, such as during emergencies or for fiscal or economic measures, did it directly confer authority upon the executive branch (Özbudun, 1993b: 154–158).
20. Two-sided *t*-test.
21. The same analysis was also performed for data in which horizontal accountability was divided into authorities of state institutions and fiscal and economic provisions, but the results were very similar to the ones shown. Unconstitutionality claims based on authorities of state institutions were significantly more likely to be accepted by the Court than those based on secular-unitary state principles or individual or group rights, but not more likely to be accepted than those based on fiscal and economic provisions.
22. Also, state-elite presidents, discordant with the incumbent parties, may have more intensively scrutinized laws for referral than did concordant, non-state-elite presidents.
23. For the complete lists of the laws and the reasons for annulment discussed in this and the next paragraphs, see Hazama (2010).

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