The similar institutionalization of courts in South Korea and Taiwan, such as nomination processes and term limits placed on judges, offer potentially significant limitations on the ability for either country’s judiciary to establish independence. But, while the two countries share many historical experiences—such as having strong external influences, dynamic economies that helped shape democracy and shifting from authoritarian rule to democracy—South Korea’s constitutional courts have significantly more autonomy than those in Taiwan. By looking at the different political contexts surrounding the formation of each country’s constitution, similar institutionalization of the courts, and the propensity of courts to either refrain from or assertively exercise independence, it becomes clear that South Korea’s weak political parties were crucial in allowing for highly active courts at the beginning of their establishment, whereas Taiwan’s strong political parties curtailed the courts exercise of judicial review.

In assessing the different results of similar institutionalization of the courts, it is important to define what is being compared. By focusing on the constitutional courts in Taiwan and South Korea, there is more direct comparison in regards to the interpretive range of each respective court. Taiwan’s judicial branch, the Judicial
Yuan, is divided into three subcategories: the grand council, the Supreme Court and ordinary courts. As such, it would be difficult to look the independence exercised by courts when each of the assigned responsibilities and jurisdiction of individual courts may vary between the two countries. In addition, the focus will be placed on the most recent versions of the constitutions in each country. The South Korean constitution has seen five major revisions since 1948, each of which signified a new republic. While any relevant information will be included, it would make the most sense to limit the analysis mostly to the context of the most recent formation rather than the entire choppy history of constitutionalism.

**Historical Context**

Taiwan’s constitution began on the mainland, but the rise of Chinese communists in 1949 pushed Chiang Kai-shek’s nationalist KMT party into Formosa. The early years of the KMT regime on Taiwan were characterized by a state of national emergency; the government declared martial law with temporary provisions (Beer, 124). In establishing military dominion over the majority of the Taiwan-born population, the KMT could not have majority elections but it could not suspend the constitution entirely either. The KMT still had hopes to recapture the mainland and its legitimacy was based on distinguishing the regime from the communist PRC (Tsang, 8). Forming the council of the grand justices provided a convenient solution to the problem. This first council was hand-picked by Chiang, guaranteeing a positive response from the justices. It also provided legitimacy and a means of suspending elections while still reserving significant power for the elites. The KMT could exert strong influence over the courts though a top-down approach to democratization even while maintaining highly authoritarian characteristics.
South Korea’s constitution, on the other hand, was written in the aftermath of a series of failed regimes. Toppled, ousted, executed and incarcerated—leaders in South Korea have had a grim past. The Sixth Republic of 1988 came into power after the leadership of the Fifth Republic was forced to open its doors to democracy (Zhao, 155). In an attempt to save itself, the Fifth Republic had named itself a transitional government to quell the people’s complaints. This tactic may have bought the regime some time, but it increased the Korean people’s desire for democracy by fueling their hopes for one. Uprisings increased and led to severe crack-downs by the state, the largest of these being what is called the Gwangju Massacre in which over 200 civilians were killed at a student demonstration (Robinson, 110). Public outrage over the deaths generated nation-wide support for democratic reforms, eventually leading to the first democratic elections in 1987. Through a largely bottom-up approach to democratization, Korea did not have one consolidated political party or regime at the time that the Sixth Republic came into power.

**Similar Institutionalization of Courts**

The United States served as a reference society that influenced institutional and systematic changes during the long authoritarian periods in both Taiwan and South Korea (Beer, 327). Many of these influences created similarities in the two countries’ governments. The constitutional courts in both countries have developed similar duties and institutionalized regulations for courts. Term limits for constitutional judges are an example of similarities. In the Korean Constitution, the term of the office of the Chief Justice is six years and he cannot be reappointed (ROK Const., Art. 105). The term of office of the Justices of the Supreme Court is six years and they may be reappointed as prescribed by law. In Taiwan, the case is similar. Whereas judges hold terms for life, those in the
grand council are not considered "judges," therefore eight of the grand justices, including the vice-president and president of the Judicial Yuan, serve four-year terms, and the remaining grand justices serve eight-year terms without mentioned limitations on reappointment (ROC Const., Art. 81).

Specific checks on judges also exist through the nomination processes, as written in the constitution. In regards to the separation of courts, both have experienced struggles for jurisdiction between the top courts. The ability of the grand council in Taiwan to consolidate its power through a negotiation of relations within the different courts has led to favorable rulings, providing a check on legislative and executive powers. Grand justices are specifically responsible for interpreting the Constitution, are nominated and, upon confirmation by the Control Yuan, appointed by the President of the Republic (ROC Const., Art. 79). The judges of the Korea Constitutional Court are appointed by the president without the need for confirmation (ROK Const., Art. 104). However, the relations between the Korean Supreme Court and constitutional court are more confrontational. While grand justices in Taiwan were able to secure a position as the highest normative authority over the constitution, the Korean constitutional court’s struggle with the Supreme Court—which is the highest court—over issues of supremacy, is less conclusive. Yet, the constitutional court seems to enjoy supremacy for now (Ginsburg, 256). These limitations color the political scene, contributing to a need for caution by courts in ruling against other governmental branches, but do not singularly curtail judicial independence.
Court Authority in South Korea and Caution in Taiwan

While certain provisions in the constitution can potentially limit judicial independence, it does not predetermine the possibility for successful independence either. For example, an aftereffect of traditional leadership being kept within founding families of parties is that the constitutions of both Korea and Taiwan tend to empower the president, but the exercise of this power over the judiciary is more pronounced in Korea than Taiwan (Koo, 213). In fact, Korea’s courts are notably independent of the executive. The role of the president and the strength of political parties are determined by the historical political context, but even if these different contexts led to similar institutionalization of power, the actual product of those institutions is not necessarily the same. So, whereas Taiwan democratized under a dominant party associated with the old regime, Korean parties continue to be notoriously underdeveloped despite reserving strong powers under the president (Ginsburg, 244). This fragmentation of political parties is a very significant factor that lends strength to Korean courts.

In Korea, there was a need to establish some kind of leadership after the fragmented change in regime. With a political deadlock between parties of equal strength with very uncertain outcomes, it was strategic for all parties to demand a strong form of judicial review as a form of political insurance against high probability of electoral loss (Ginsburg, 247). In Taiwan, however, the constitution was drafted by a single dominant party with a single figure clearly at the center—Chiang Kai-shek (Zhao, 43). This is a matter of comparing fledgling judiciaries against respectively weak or solid executive and legislative branches of government. Thus, Korea started with, and remained, at high involvement in regards to judicial review, but Taiwan worked toward its current level of influence.
through a gradual process under the heavy hand of the dominant party. The fragmented party system in Korea allowed for stronger judicial institutions and the fragmented judicial branch in Taiwan was largely influenced by the party.

To understand how Korea’s courts could establish such an active role within the government, it is important to look at how weak parties enhance judicial review. First, weak parties lack organized mechanisms to influence court composition and structure (Diamond, 99). In Korea, the parties as formed under the Sixth Republic came in the aftermath of a failed authoritarian Fifth Republic. Under this party, there was little opportunity to develop one specific organized political party to oppose the regime. There were, instead, more widespread grass-roots movements (54). Second, weak parties that are unable to cooperate are unlikely to overrule a court through legislative action (Ginsburg, 245). Without consolidating power within another branch of the government, legislators and executives may not be able to rally help to punish the courts for actions that others may support. Finally, weak parties can provide opportunities for judicial power because they are less able to control the bureaucracy (ibid).

Political parties, such as in Korea, that gather into two or more groups of fairly equal strength enhances the courts power; the possibility of sporadic access to power becomes increasingly salient and alternating parties have a strong interest in safeguarding the court as an autonomous adjudicator. For, when a dominant party holds sway, it has little incentive to empower courts as the party can rely on direct control and enforcement to protect its preferred policies. This imposes in weak parties the need to compromise. Unable to establish direct control, parties of equal strength compromise in order to achieve joint purposes (Stone Sweet, 39). In the case of political parties
in Korea, such purposes included the potential to rule and to direct the polity. In establishing a parliamentary democracy, each political party knew that its ability to exercise power and influence would fluctuate, depending on its relative electoral success (Ginsburg, 215). In a highly uncertain political atmosphere, each party hoped to see its desired policies instated. Yet, the parties also knew that constructing stable rules for competition amongst themselves was necessary as a first step to governing. They had an equal desire and stake in the law being fair, lest one of their competitors gains a greater advantage over another.

In this bargaining process, conditions change and the interests in the parties to the agreement will evolve. Contracting and bargaining is not limited to parties, but is also a part of the establishment process for the responsibilities of each governmental branch. The establishment of constitutional review can be understood as an institutional response to the shifting contract, and the connected problems of uncertainty and enforcement (Stone Sweet 44). Review functions to clarify the contracts overtime, to monitor compliance and institutionalize the rules. As Korean courts continue to exercise power, they retain more of it; similarly, though starting slower, Taiwan’s courts established a step-by-step process to claiming independence (Ginsburg, 139). However, if a bargain wound up in unfavorable to one side, it is harder for that certain party or branch to establish clear jurisdiction or strong exercise of independence later on.

Of course, there are always issues of public support and the social context that also contribute to the political atmosphere of a country, which in turn can even strengthen courts. The speed of Korean democratization was much faster paced than the slow, gradual process in Taiwan due to these differences in the political scenes.
That speed, combined with a variety of other factors, made a difference. In Taiwan, the KMT established strict controls over the people; in fact, many native-born Taiwanese saw the KMT as a brutal oppressor. The reaction to this stronghold was limited by the force of the KMT. The constitutional reform was a gradual process in Taiwan, and the courts played a cooperative role more than a contentious one (Tsang, 52). Here, the court fears the very real possibility of constitutional override of any unpopular decisions and therefore will be more cautious. In Korea, republics were formed and destroyed every decade or so and the people clamored for change. While some demonstrations were brutally crushed, many times the people’s push for democracy is what gave court decisions the backing and force to be adhered to. Constitutional reform was accomplished quickly at the outset of the transition process, providing courts with a solid moment to invoke power under the constitution. The urgency to establish reforms, the rush to create a government acceptable to all parties, empowered the courts and supported strong judicial review (Diamond, 35).

Indicators of Judicial Independence

In comparing the powers of courts in Korea and Taiwan, indicators are necessary to assess the degree of independence exercised by the judiciary. One such indicator is the number of petitions to the court and interpretations rendered before development of the courts and after. In Taiwan, during authoritarian rule, the scope of the council for independent decisions suffered as expected. As liberalization increased, the council became more active, as evidenced by the number of petitions and interpretations rendered by the council by term (The Judicial Yuan, 2006). But there is a drop in the number of petitions due to the backlash the courts received on some of their decisions. The numbers rise again, slowly, and are projected to continue in the trend as the courts open up;
most petitions originally came from other government bodies, but over 90% came from individuals by the fifth term, illustrating the degree of public access to the council (Ginsburg, 126). In Korea, petitions have been the single largest source of cases for the constitutional court (223). At the outset of these courts, there were large numbers of petitions and actions by the court in successfully striking legislation and overturning prosecutorial decisions. This reflects court autonomy and active exercise of power (Jayasuriya, 266).

Furthermore, the sheer numbers of political parties that have held the presidency in Korea far outweigh that of Taiwan. Each of the major figures involved in the 1987 constitutional amendments has now served as president of the country, illustrating that perceptions of future electoral uncertainty were accurate at this time, particularly due to the violent confrontations between civil society and the state in the previous periods (Koo, 247). Yet, the courts have remained a stable player through this latest uncertainty. In contrast, the KMT in Taiwan retained control of the important institutions of the country from 1986 until the election of Democratic Progressive leader Chen Shiu-bian as president in 2000 (Tsang, 15). Taiwan had a dominant-party setting, whereas the courts generally worked more as part of the government structure rather than an institution that protects from another. This is changing, but only through a gradual process. The party system has continuously evolved in both countries, but in Korea it retains the fragmented character that led to the adoption of an open system of judicial review at the outset.

Conclusion

The different degree of judicial independence in each country illustrates the inexorable politicization of courts, regardless of similarity in institutionalization of court power. Yet, this politicization does not necessarily always
weaken judicial review. Instead, the most significant factor contributing to the autonomy of South Korean constitutional courts is weak political parties whereas Taiwan’s strong political parties limit the expansion of judicial independence.
Works Cited


