


BOOK REVIEW

***Judicial Vetoes: Decision-making on Mixed Selection Constitutional Courts.* By Lydia Brashear Tiede. New York: Cambridge University Press 2022. Hardback, ISBN 978-1-316-51231-9**

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Underlying Lydia Brashear Tiede's *Judicial Vetoes* is the idea that *constitutionality* is not an intrinsic attribute of the legislation a country eventually implements but the result of the decisions of institutions and individuals acting within the constraints of internal rules and under the pressures of political contexts, personal trajectories and professional aspirations. Tiede looks at under-researched dimensions of an old question: what affects higher court judges' likelihood of striking down legislation passed by elected powers? She studies constitutional courts as overtly political and policymaking bodies but does so taking the spotlight away from traditional explanations, like those linking judges' voting behavior with party allegiance, political climate or fear of retaliation from elected branches. The focus is here on the *use* of review powers, specifically on the nature of the relationship between selecting institutions and decision-making where higher court justices are appointed by different selectors.

These empirical questions are explored through two case studies, the Colombian and Chilean constitutional courts, chosen “[t]o fully understand the role of constitutional courts in dynamic democratization and constitution building contexts as well as their ability to check the elected branches” (p. 58). These relatively young mixed-selection South American tribunals share similar legal and political histories but are commonly understood to be on opposite sides of the judicial activism spectrum, with the Colombian *Corte Constitucional* holding a reputation for more readily standing up to elected powers. The analysis relies on “legislative histories” of both courts, interviews with judges and other court personnel, and data on individual voting and court decisions (limited to abstract reviews of constitutionality decided when the legislatures who enacted the legislation were still in power).

The first five chapters set out the background, hypotheses, selection of cases, and legal and political history of the courts studied. Chapters 6 and 7 mark the bulk of the book's original contributions as they establish the “determinants of legal invalidation” by individual judges and constitutional courts as collective bodies, respectively. At individual level, Tiede confirms the main hypothesis that selecting institution predicts

voting behavior, and it does so more strongly than political affiliation – the correlation being stronger in the Chilean *Tribunal Constitucional*. Tiede claims that more straightforward political motivations are mitigated by a complex mix of factors, including limited tenure (another shared characteristic of both courts) and the fact that judges' terms only partially overlap with those of their selectors in the executive or legislative branches. Chapter 7 confirms that behavior observed at individual level “is substantively significant enough to shift the majority opinion of the two exemplar courts” (p. 203). The changes in percentage of judges selected by different branches correlate with the direction of decisions, and so does court composition – which varies depending on the justices' terms and quorum rules. The way the review is triggered (i.e. automatic or required by part of the legislature), the process for the passing of legislation (in particular the degree of cross-party consensus required) and the type of law and subject matter are all significant as well. Party politics is again not a strong predictor, even in the unusual case of courts with majorities clearly identified with a particular political orientation. A sole exception is the Colombian court, when composed of a majority of Liberal judges, and only during Uribe's increasingly authoritarian presidency.

Tiede concludes that constitutional court justices in these courts are thus better described as “representatives of each selection branch's ideal of a constitutional adjudicator” than as “direct representatives of their political preferences” (p. 136). Strategic and often temporary alliances resulting from shifting compositions are also important. Increases in number and proportion of one “type” of adjudicator (as defined by selecting branch) influence individual voting behavior of other types. This is the main bridge between individual voting predictors and collective outcomes (the micro-to-macro component in Tiede's theory): panel effects are significant enough to drive group results, as “the two courts' overall decisions ultimately depend on whether a case has a critical mass of certain similar types of judges” (p. 172). This mitigates concerns about judges' impartiality or potential co-optation by selecting branches and provides some support to the idea that mixed selection courts provide a space for richer decision-making that reflects “different institutional viewpoints” (p. 165).

Most lively and nuanced are Tiede's discussions of specific cases. Chapter 7 closes with detailed examples of decisions that confirm or would not have been well predicted by the “critical mass theory.” Chapter 8 deals with the question of “weak vetoes,” not in terms of public or government compliance but as determined by the levels of dissent in the decisions. Through detailed discussions of specific cases, the author warns against the potentially harmful effects on courts' long-term legitimacy of overly divided decisions where judges vote along clear lines of political affiliation – a traditional criticism of mixed-selection courts and something Tiede observes as an emerging trend in Chile's *Tribunal Constitucional*. Whether or not one agrees with the warning against higher courts being divided on essentially divisive political and social matters, this is compellingly argued and shows Tiede's theory coming to life in relation to real judges making decisions in real political contexts. More extensive use of interview materials might have had a similar effect. Readers interested in the micro-level dynamics of decision-making will lament the missed opportunity of further foregrounding the voices of these very hard to reach judges. They are seldom referred to and never substantially quoted, either as part of the construction of hypotheses or of the findings.

The voices of actors could have helped Tiede fill some of the gaps in thought provoking ideas that the book leaves (purposefully) open: when and how do individual and collective reputation play a role? How important is deliberation in constructing “strong” vetoes? What is the real nature of the “panel effect” in practice?

Judicial Vetoes will be of interest to scholars and students of constitutional courts and their decision-making but also more generally to anyone exploring the many socio-legal dimensions of the complex relationship between judges and politics.