Friends and Enemies inside the Chilean Constitutional Court[1]

Sergio Verdugo[2]

Diego Pardow[3]

> *"Private attitudes, in other words, become public law. More precisely, it is the private attitudes of the majority of the Court which become public law. As an inexact science, issues at law are settled by counting the noses of jurors and justices".*
>
> Herman Pritchett[4]

I will analyze the agreements and disagreements between several pairs of individual Justices of the Chilean Constitutional Court, by observing the correlation of them in their voting behavior. The purpose is to study if certain Justices are closer to others, and if the relation that they have are somehow related to the way the Justices were appointed by the political process and their profile prior to the appointment.

A study like this has been done before in the U.S. by Herman Pritchett,[5] who examined the U.S. Supreme Court. His work, like many others in the U.S., developed a different kind of study about judicial behavior, without using the traditional legalistic model. By using a legalistic model, a study assume that judges apply the law and follow the rules in a neutral way, without considering other alternatives, such as ideology, religion, power, etc.[6] By these different kinds of studies, the scholars assume an "attitudinal model", where judges are influenced by other reasons that are not

[1] All the translations from Spanish to English were made by the author. The data shown in this paper has not been reviewed yet, and probably the final version of this paper will have some minor numerical changes.

[2] Master of Laws, University of California, Berkeley. Magíster en Derecho Público, P. Universidad Católica de Chile. Abogado. Licenciado en Ciencias Jurídicas, Universidad del Desarrollo. Profesor-Investigador, Universidad del Desarrollo.

[3] Master of Laws, University of California, Berkeley. Abogado. Licenciado en Ciencias Jurídicas, Universidad de Chile. Profesor de Derecho, Universidad de Chile y Universidad Adolfo Ibáñez.

[4] PRITCHETT (1941) p. 890.

[5] PRITCHETT (1941)

[6] See, for instance, POSNER (1993)

"legalistic".[7] They can even assume a strategic perspective of the Courts and the judges, observing their behavior in a rational way considering their relation with other branches of the government, such as the Congress or the President.

This paper is not inside the traditional legalistic models, but in the kinds of studies that pursues to analyze and obtain objective conclusions about how things are (not about how things should be) by examining an objective behavior of the Justices: their votes. In this work, therefore, I am not interested in what is the correct way to interpret the meaning of the Constitution, or to develop a theory about a legal issue, but to obtain and explore the practice of the Justices of the Constitutional Court.[8]

This paper follows the following order: firstly (1), I will explain the main ideas that I am trying to demonstrate; secondly (2), I will briefly note the relevance of this kind of study in the Chilean Constitutional court; thirdly, (3) I will explain why I think the Pritchett study can help the legal academia in Chile; fourthly (4), I will enumerate some of the differences between the U.S. Supreme Court and the Chilean Constitutional Court that I should consider in this research; fifth (5), I will explain the methodology that I used and I will describe the sample; sixth (6), I will analyze the data and provide the main tables showing the results.

1. Main ideas

I am going to test the following hypothesis about the Chilean Constitutional Court:

1. The Justices of the Chilean Constitutional Court can be divided according to their past profile, and according to the way they were appointed.
2. Dissenting opinions are common in the Constitutional Court and, therefore, Justices are often divided in groups.
3. The way Justices agree or disagree with each other in controversial cases is somehow related to the division noted in point two, at least partially.

[7] See a general overview of the different kind of studies in SPILLER et al (2007).

[8] As we will see, I will base my analysis in examining votes, especially in controversial cases where dissenting opinions exist. For a model showing the reasons why judges dissent, see EPSTEIN et al (2010)

4. The disagreements are relatively connected to the appointment procedure of the Justices.

If the hypotheses are true, that would be consistent with the attitudinal approaches to judicial behavior, which suggests that the judges, in general, act in a political way according to their own ideology. However, further research should be made for demonstrating this.[9] This study can contribute to the debate about the nature (political or juridical) of the Court, but it is not intended to answer directly that question, and its results should not be interpreted in that way, even when it would be possible to construct a political theory to explain them.

It is important to note that, even when my work is not intended to demonstrate this point, this research was done in a context where a tension between judicial independence and democratic accountability has not been resolved completely by the institutional design of the Court, as I will show in section 4. If the Court acts politically, then the democratic and counter majoritarian difficulty (in the Alexander Bickel´s language[10]) gets stronger when we intend to have an independent and unaccountable Court. If the Court does not act politically, then a different democratic problem arises if we want to pursue democratic accountability.

Even though all these questions should be addressed in future research, characterizing the coalition factor inside the Court (that this paper is intended to) would help to build some ground for further discussion.

2. Relevance of the study in the Chilean Constitutional Court

The lack of empirical and quantitative studies about the Chilean Constitutional Court after the year 2005 is notorious.[11] Scholars have not developed a very sophisticated empirical academia

[9] See CARROLL et al (2010), who concludes that, in the Chilean Constitutional Court, the voting behavior of the justices is predictable and consistent with the political background and appointment of the judges.

[10] See BICKEL (1962) pp. 16-22. A more refined theory about the democratic problem of the Courts, applied to constitutional judicial review, can be found in WALDRON (2004) pp. 209-312.

[11] There are, however, exceptions that are partially quantitative. See, for instance, the work of CARROLL et al (2010), who studied the relation between the political factors and conflicts on the Constitutional Court. This paper also addresses the dissents inside the Court, but in a very different way as this. It did not used Pritchett´s methodology about agreements and disagreements. See also, VERDUGO (2010), who made an empirical research

related to this court. The period after 2005 is very relevant, because it incorporates a very important amendment[12] that modified substantially the importance of the Constitutional Court inside the Chilean political system,[13] but the academic work remains qualitative[14] and mostly descriptive[15]. Also, a lack of papers constructing theoretical models about the Court behavior is present in the Chilean legal academia.[16] Perhaps this is because the Chilean academia has not abandoned the legalistic model, since most of the works are about juridical doctrine and legal answers about some Law issues.

Despite of the facts stated above, the decisions of the Constitutional Court have been classified by the "memories" conducted by the own Court.[17] Those documents are very useful for scholars, but unfortunately, those studies do not have any analysis at all (it is only a data collection) and they do not provide information about the voting behavior of the Justices. The lack of a current study describing the behavior of the Justices in their votes (and the lack of public and available data about it) makes my research so relevant.

3. Why Pritchett´s study?

As I said above, Pritchett´s study belongs to the attitudinal model literature,[18] and tries to measure the divisions among the judges of a collegiate Court by collecting the data of voting behavior and related it to the agreements and disagreements among the individual Justices.

---

using a representative sample of the decisions made by the Constitutional Court in the mandatory preventive constitutional control of the bills, to prove that they are, in general and at as a practical matter, not motivated at all.

[12] Statute of Constitutional Amendment Nº 20.050, approved in august of 2005.

[13] For the Justice Marisol Peña, the whole amendment is the second more important in the history of the Constitution of 1980 (the first one is the one which returned the country into a democracy), and specifically, the modification of the "constitutional justice represents the most transcendental change inside the set of amendments made by the constitutional reform of 2005". PEÑA (2006) p. 207.

[14] See, for instance, one of the most famous works: ZAPATA (2008), who focused on the democratic legitimacy of the Constitutional Court, the tools of interpretation and the juridical doctrines raised inside the Court.

[15] See, for example, ZÚÑIGA (2010), maybe one of the most complete work in describing the new powers of the Constitutional Court. It is focused mostly in examples that explain how the Court understands its own powers as written in the Constitution.

[16] See a good exception in VARGAS et al (2001). Furthermore, there are some studies that focused on the other branches of government. See, for instance GARCÍA (2008)

[17] The Constitutional Court started to produce these annual memories since 2006, and all of them are available in http://www.tribunalconstitucional.cl/index.php/documentos/memorias_cuentas

[18] GIBSON (1978) p. 912.

Although Pritchett´s work is an old study,[19] it is considered a seminal work in the field,[20] and it is still valuable because of the following reasons: it uses a very objective data (voting behavior) to describe the groups that can appear inside the Court. If there are alliances inside the Court, then this way of studying it is very objective. It has a very simple methodology that treats all the cases as equals and it does not need to use a proxy to divide the groups inside the Court, because the groups will appear naturally from the data. Dissenting opinions are easy to measure objectively, and they can provide very relevant information about judge's behavior, that is why important studies about the judges consider this information.[21]

One of the weaknesses of Pritchett analysis is that it "does not provide a theory of Supreme Court decision making".[22] Answering this valid critique, I assume that the coalitions formed are related to the political appointment procedure of the Justices and to their past profile, as I will explain in section 4.

The ideas presented above are assumed despite the doctrine that former Chief Justice Cea has imported quoting Favoreu about the "duty of ingratitude" (*deber de ingratitud*) that Justices should follow.[23] That doctrine claims that the Justices have the obligation not to follow the preferences of the political actors that appointed them, and is somehow related to a formalist approach of the judge's behavior.[24] I am assuming a model incompatible with this idea, because in this paper I am not arguing how things should be, but how things have been and are. If the hypotheses are correct, the data will show that, in general, Justices vote using a coalition logic that is coherent to the appointment procedure and the past profile, suggesting that the "law in action" is coherent with a "gratitude duty", in opposition of former Chief Justice Cea´s doctrine. If the hypotheses are correct, then the "duty of ingratitude" is solely part of the "law in the books", and remains in the field of how things should be.

[19] This study can be viewed as a starting point in the positive literature of judicial decision making, which sees the judge as a politician. SPILLER et al (2007) pp. 2-3.

[20] Indeed, Pritchett is the "founder of the modern-day study of law and courts". KNIGHT et al (1996) p. 1019.

[21] See, for instance, SEGAL et al (1996) and EPSTEIN et al (2001).

[22] SEGAL et al (1989) p. 557.

[23] See CEA (2003)

[24] I use the word "formalism" in Schauer´s sense. See SCHAUER (1988).

4. Adapting the analysis to the Chilean context

Since Pritchett´s work focused solely on the U.S. Supreme Court, it is important to consider the Chilean case. Indeed, since the Chilean Constitutional Court is very different from the U.S. Supreme Court, Pritchett´s analysis needs to be adapted:[25]

(1) There are two main political coalitions in Chile with congressional representation: *Concertación* and *Alianza*. One of them (*Concertación*) has conservative and liberal political parties working together at the same time. The other political coalition (*Alianza*) is mostly conservative and libertarian. Both coalitions have participated in the appointment procedure of the Justices of the Constitutional Court.

(2) In the Chilean Constitutional Court, the Justices do not have life tenure. They only have fixed nine years terms, although they can be nominated again for several times.[26]

(3) The Constitutional Court is not part of the Judiciary. Moreover, it is viewed as a separate special Court that does not belong to any other branches of government. It is an autonomous power, at least in a formal sense. This autonomy is expressed, among other arguments, in the lack of an impeachment process against the Justices. However, this autonomy is diminished by the appointment procedure and the fixed tenure of the Justices.

These institutional arrangements are very relevant, because if Courts and judges act politically expressing their own views, is because they are independent.[27] Judges that are not independent will not tend to vote freely and probably they will favor the purposes of other authority and would not necessarily defend their own views. Of course, a formalist role of the judges will

[25] In general, see Chapter VIII of the Chilean Constitution and art. 3 of the U.S. Constitution.

[26] In my point of view, this is a very important issue that has not been very studied in Chile. An academic discussion of the effects of the lack of life tenure and the existence of fixed terms can be seen in some U.S. literature. For example, see the discussion between CALABRESI et al (2005-2006) and STRAS et al (2006-2007).

[27] See COOTER (2002) pp. 195-196

argue that judges need to be independent, so they can obey the rule of law. But even if formalism is correct, and independence is a necessary condition for obeying the rule of law, it certainly can conduct to other alternative behaviors. A judge that is independent can act freely, and inside his freedom he has several choices: (1) to act ideologically; (2) to act in favor of the rule of law; (3) to act politically in hard cases and according to the rule of law in easy cases; (4) to act politically but to make arguments related to the rule of law, etc.

In the case of the Constitutional Court, the institutional arrangements described above do not improve judicial independence as the Supreme Court arrangements does, at least in theory. Justices are expected to be and to act, however, according to the rule of law. The veracity of this expectation will partially depend on the Court design and partially in the persons of the Justices. Through this study, we will be able to suggest a relation between the Justices voting behavior, the appointment procedure, and the Justices past profile. Unfortunately, I will not be able to answer the formalist question about what (and why) judges do.

(4) The Chilean Court has abstract preventive (*ex-ante*) powers of judicial review over the bills (statute projects that are being currently approved), like the French *Conseil Constitutionnel* model, and it also has repressive (ex-post) powers (after the statute finally becomes a binding law), similar to the German Constitutional Court. In this last power, the Court has a concrete and a separate abstract judicial review attribution, without precedential effects in their decisions, although in some of its powers the effects of the declaration of unconstitutionality are permanent.

(5) In the U.S., there are nine Justices in the Supreme Court, and they decide the cases with a simple majority rule. In Chile is different: there are ten Justices that decide the issues with different kinds of majority rules.[28]

[28] For granting an action of inapplicability, for instance, the Court needs a simple majority, but since the number of the Justices is even (there are ten Justices), in practice the Court needs to achieve 6 votes (more than 50%) to declare the inapplicability of the statutory provision that has been challenged. A tie election will favor the rejection of the action. In the procedure for declaring the unconstitutionality of a statutory provision with general effects, the Court needs to obtain a majority of 8 votes. In the preventive control, simple majority is needed for declaring the unconstitutionality, but if the Justices votes tied, then the President of the Court should remain.

(6) In the U.S. Supreme Court there is only one way to appoint a Justice: presidential nomination with Senate´s consent. Usually, this system leads to the appointment of a Justice that sympathizes with the President, although this general rule have experimented certain problems.[29] On the contrary, the Justices of the Chilean Constitutional Court are appointed in three different ways:

i.- Congress nominates four Justices. Two are appointed by the Senate and the other two are proposed by the House of Representatives (*Cámara de Diputados*) and approved by the Senate. In these cases, normally congressmen agree in nominating Justices that comes from one of the two political coalitions by exchanging votes. Therefore, most of the Justices appointed by the Congress can be related to a strong ideological and partisan position.[30]

ii.- The President appoints three Justices freely, without the check of any other institution. Normally, this Justices are sympathetic to the political positions of the Executive.[31]

[29] See, for instance, the problem occurred with the Bork nomination by the first President Bush, when the Senate forced him to choose a much more moderate candidate: Justice Kennedy. Although Kennedy is a republican (as President Bush was), his views are very liberal in some relevant cases. Sometimes he votes with the democrat Justices. For the opposite, Robert Bork, the first preference of Bush, was considered a very right-wing conservative that could be essential for overruling some liberal precedents from the Warren court.

[30] Let´s see the career of this Justices: (a) Justice M. Fernández, appointed by the Senate because of the proposal of the House of Representatives in 2006, belongs to one of the political parties of the *Concertación* (the only conservative party in that political coalition, the *Democracia Cristiana*). Before being a Justice, he has occupied several political positions for the *Concertación*, like being appointed as a secretary of state two times, and being an ambassador. (b) Justice Vodanovic, appointed by the Senate in 2006, is very close to the Socialist Party (another party member of the *Concertación*). He has occupied some clearly political positions, such as senator. (c) Justice Bertelsen, appointed by the Senate in 2006, has very clear and strong conservative preferences. Although he has never occupied a political position before being a Justice of the Constitutional Court, and that he is a very well-known scholar, he has being the President of *Universidad de Los Andes*, a very conservative catholic university, and he was a member of the commission that wrote the Constitution of 1980, under Pinochet´s government. (d) Justice Venegas, appointed by the Senate because of the proposition of the House of Representatives in 2006, is related to *Renovación Nacional*, a political right-wing party that is member of *Alianza*. He has occupied minor political positions under Pinochet´s government in the 80´s, and he has been an advisor for many conservative congressmen of the *Alianza*. Also, he used to work for *Instituto Libertad*, a think tank that advises congressmen of *Renovación Nacional*.

Most of this information can be obtained in the web page of the Chilean Constitutional Court.

[31] Let's review all the recent Justices appointed by Presidents: (1) Justice Aróstica was nominated in 2010 by President Piñera after being the chief of the juridical department of Piñera´s Vicepresident (*Ministro del Interior*). (2) Justice Viera Gallo was nominated by President Bachelet in 2010 after being one of her secretaries of State (*Ministro de Estado*). Before that, Justice Viera Gallo occupied some political positions (such as senator) representing the Socialist Party, a political party that belongs to the *Concertación* coalition. (3) Justice Carmona was nominated in 2009 by President Bachelet after being the chief of the juridical department of the Congressional office of the Executive (*Secretaría General de la Presidencia*). Before that, Justice Carmona occupied several positions inside the governments of the *Concertación* political coalition. (4) Justice Correa was nominated in 2006 by

iii.- The Supreme Court appoints three more Justices, but is very difficult to predict the way the Supreme Court is going to behavior in the appointment procedure. Indeed, since the Supreme Court has twenty one members, and not all of them can be related to a specific political coalition, not even a specific political ideology, it is usually very difficult to predict who is going to be appointed. However, Justices nominated by the Supreme Court can be seen as having a political preference, but it is certain that that preference is not a partisan one. Most of them tend to have an academic record or a prior judicial career and to have strong independent opinions.[32]

(7) In the period that I am analyzing, there are two Justices (Cea and Colombo) that were not appointed by the system that I am considering. They were appointed in the former period of the Constitutional Court (1980-2005), when political actors were not so interested in capturing the Court. In spite of the fact stated above, and since I cannot code these Justices according to the appointment procedure that my data-period consider, I will classify these Justices considering their past profile and their reputation.[33] As we will see, they are also part of the internal coalitions that can be observed in the Justices voting behavior.

The analysis of the data will consider these specific institutional arrangements and facts described above. In general, and according to the nomination procedure described above, and the

---

President Lagos after having an important political position in his Government (*Subsecretario del Interior*) and being a member of the Socialist Party, the same party of President Lagos. He was replaced by Justice Carmona.

All this information can be obtained in the web page of the Chilean Constitutional Court.

[32] Let´s see the current available examples: (1) Justice F. Fernández, appointed by the Supreme Court in 2006, was a former judge of a special Court (*Tribunal de Contratación Pública*). Although he can be related to the *Concertación*, his prior public positions were technical. (2) Justice Navarro, appointed by the Supreme Court in 2006, was a professor of two universities, and the chief of juridical research in one of them (*Universidad Finis Terrae*). Although he can be related to a more conservative way of thinking (close to the *Alianza*) he has never occupied a political position. (3) Justice Peña, appointed by the Supreme Court in two different opportunities (2006, for the transition period, and 2009), is a professor and the chief of the public law department of a catholic university. Although she is seen as a conservative Justice, her voting behavior has been very different from *Alianza´*s political party´s positions in several times (like in the constitutional position of the international treaties and in positive rights cases). She has never occupied a political position.

All this information can be obtained in the web page of the Chilean Constitutional Court.

[33] Both of them have an extensive academic record, having several scholarly positions. Both of them have being elected as Chief Justice of the Constitutional Court Former Chief Justice Cea is generally viewed as a conservative Justice, and comes from (and teaches in) a catholic university. As we will see, he usually votes in the same way as Justice Peña does. Former Chief Justice Colombo is generally viewed as a liberal Justice. He comes from a liberal public university.

facts stated above and on the details expressed on the former footnotes, I expect the Justices to vote in two big coalitions and test if these groups are constant over time. Of course, this is an extreme caricature of the big picture, and probably the reality is going to be far from this (as we will see in section 6) but still, if the theory of the political groups is correct without any shade, and the appointments and profiles of the Justices are conclusive, then we should expect to observe two different coalitions:

The first group, closer to *Alianza´*s political preferences, is integrated by the following Justices: Cea, Venegas, Bertelsen, Peña, Navarro and Aróstica.

The second group, closer to *Concertación´*s political preferences, is integrated by the following Justices: Colombo, Vodanovic, M. Fernández, F. Fernández, Correa, Carmona and Viera Gallo.

We will see that it would be very rare to see this coalitions acting, and that the group formulation represents a mistaken and exaggerative view. There are a lot of important cases where the logic of coalition showed changes. For instance, here are rare important and publicly known cases where Justices voted against their expected normal coalition background: the cases where Justices Cea and Peña voted against *Alianza´*s belief that international treaties are under the Constitution;[34] the case where Justice M. Fernández voted in a conservative way in a bioethical controversy against the liberal *Concertación´*s position (known as the "*Píldora del Día Después"* case)[35]; the case where Justices Correa and M. Fernández voted against *Concertación´*s position in financing the public transportation system in favor of the Executive branch (known as the "*Transantiago"* case);[36] and the cases where Justices Cea and Peña voted for upholding a constitutional positive right in matter of the health system, going against *Alianza´*s libertarian position (known as the "ISAPREs" case).[37]

[34] TC, rol Nº 1288, August 25, 2009.

[35] TC, rol Nº 740, April 18, 2008.

[36] TC, rol Nº 1153, September 30, 2008. It is important to notice that both, Justices Correa and M. Fernández, are no longer Justices of the Constitutional Court. Correa was not reappointed by President Bachelet after his period was over (and she is from the Concertación, also), and M. Fernández renounced.

[37] See, for instance, TC, rol Nº 976, June 26, 2008.

However, in spite of the fact stated above, the coalition parameter (even an exaggerated one) can help us to explain and to tell a story about why some Justices prefer to agree more with other specific Justice, and prefers to disagree more with another different Justice.

If all the things stated above are true, then hypothesis 1 is also, although partially, true: *the Justices of the Chilean Constitutional Court can be divided according to their past profile, and according to the way they were appointed.* In section 6 we will see if these possible divisions exist in the practice of the Constitutional Court.

5. Methodology and sample explanation

This paper requires an original data that was already created for this purpose, using the information of the Court web page.[38]

The data comprehend the voting behavior of the individual Justices in all the cases that happened between August of 2006 and March of 2011.[39] I am only considering the decisions made by the Constitutional Court as a whole, excluding the decisions of the separated "rooms" of the Court, because the separated "rooms", in general, only do formal procedural decisions and do not resolve the issues presented before the Court. Also, in general, in the "rooms" procedures only half of the Justices participate. For those reasons, I excluded 441 decisions that were achieved by the "rooms".

Then, I excluded three cases: one because of its complexity and difficulty for coding it,[40] and the next two because of the lack of essential information.[41] Excluding the decisions noted, I found 527 judgments on the web page in the relevant period. In the period considered, 13 Justices

[38] www.tribunalconstitucional.cl

[39] The first decisions considered are TC rol Nº 478 and 479, from August 8 of 2006. The last decisions considered are TC rol Nº 1798 and 1940, from March 29 of 2011.

[40] TC rol Nº 1288. This case is very complex, because several Justices joined the majority and also made different dissents to certain parts of the judgment. It is really difficult to code since, in practice, this judgment can be considered as having several opinions in one whole document.

[41] TC rol Nº 797 and 810. Those decisions do not express how the Justices actually voted, and this information is the whole purpose of this paper. I could not find this information, so I decided to exclude this two cases.

participated, although most of them were not present in the whole epoch. I considered them all, so we should take into account that (1) the Court design only permits the participation of 10 Justices at the same time; (2) not all of the Justices had the opportunity to agree or disagree with all the others, and (3) some Justices only participated in a very short term compared with the others (especially Justices Viera-Gallo and Aróstica), so not all the numbers that I will show will have the same accuracy. I will express the number in percentages, because counting individual voting behavior can be misleading if we consider the preventions mentioned above.

The sample taken in of the period selected is universal. That means that I took *all* the cases (except the ones that I am excluding expressly with objective reasons), no matter what subject they are. All of the cases have some constitutional feature, since all functions of the Constitutional Court are, of course, constitutional. However, a great range of different cases are comprehended in this sample, such as the following matters: property rights decisions; equal protection and discrimination cases; procedural struggles inside the legislative procedure among political actors; positive rights controversies; economic liberty decisions; due process criminal cases; due process administrative cases; bioethical struggles; slanderous accusations compensatory damages; tax jurisdictions issues; power controversies among public authorities; constitutional challenges against legislative bills; health care issues; among many others.

The analysis will center only in controversial decisions. That means that I am excluding those cases where the Court achieved the decision unanimously, as Pritchett did too. The idea is to examine how the groups and pairs are expressed, and unanimous cases do not show significant information about coalitions inside the Court.[42] Though, we should take into account that a lot of cases are decided in a unanimous way. Probably those non-controversial cases contain easy decisions, clear juridical answers and consolidated legal doctrines that explain why not solely one of the Justices made any dissenting opinion.

[42] The cases that contain concurrences, but no dissenting opinions are excluded too. Even when I agree with Justice´s Scalia´s characterization about the nature of the concurrences, for practical purposes I will focus this work only on outcomes, as I will explain. Let´s remember Justice´s Scalia´s words: there is little difference between dissents and concurring opinions "(…) insofar as the desirability of a separate opinion is concerned. Legal opinions are important, after all, for the reasons they give, not the results they announce; results can be announced in judgments orders without opinion. (…) to get the reasons wrong is to get it all wrong, and that is worth a dissent, even if the dissent is called a concurrence". SCALIA (1994) p. 33

Table 1

Total opinions examined	527	100%
Unanimous opinions	264	50,1%
Controversial opinions	263	49,9%

As shown in table 1, there are 264 unanimous decisions and 263 controversial cases. That means that 49,9% percent of the cases have at least one dissenting Justice. This demonstrates the veracity of hypothesis 2: *dissenting opinions are common in the Constitutional Court and, therefore, Justices are often divided in groups*.

This study will focus only on an outcome basis, in spite of the fact that some scholars have criticized this way of testing judicial preferences.[43] I will assume that the Justices have the same opinion when they agree with the result of a decision, even when their reasoning can be different. Therefore, Justices dissenting separately will be coded as being in the same group; and Justices that concur with a majority opinion will be coded as forming a group with the majority. Maybe those Justices would not want to be coded in this way, because they are showing a difference with the other group, but they are expressing the same preference in the result of the decision (granting or denying the legal action, declaring the unconstitutionality or not, etc.). Having the same preference about the outcome means a significant coincidence that should not be diminished. That is why, even when someone can argue that coding the votes in this way is not necessarily accurate, arguing that the rule of the decisions is in the reasoning (and not in the outcome), it is not wrong to do it. Indeed (1) usually the rule is immerse in the outcome of the case and the,[44] (2) the outcomes express a practical preference (one that produces results in the case) and finally (3), in professor´s Spaeth words arguing against another scholar "I find the key to judicial behavior in what justices do, Professor Mendelson in what they say. I focus upon their votes, he upon their opinions".[45] [46]

[43] See some criticisms in FRIEDMAN (2006) p. 266 and in TILLER et al (2006) pp. 522-527

[44] See a different opinion in FRIEDMAN (2006) p. 267

[45] FRIEDMAN (2006) p. 266, quoting Harold Spaeth´s words.

[46] Here is an issue that I found coding the cases, and the solution that I gave: if a Justice has, in the same judgment, has concurring and a dissenting vote, I counted it as a dissenting vote.

As I said above, this study considered the presence of 13 Justices. Considering the total of cases (controversial and unanimous ones) table 2 provides a list of the Justices and the number of cases that they dissented, organized starting by the most *controversial* Justice and finalizing by the one that agreed more with the majority:

Table 2

Name	Opinions participated in	Number of dissents	Per cent dissents
Jorge Correa	308	109	35%
Mario Fernández	456	127	28%
Francisco Fernández	478	73	15%
Carlos Carmona	207	31	15%
Raúl Bertelsen	491	57	12%
Hernán Vodanovic	443	55	12%
Marcelo Venegas	478	52	11%
José Antonio Viera-Gallo	107	10	9%
Iván Aróstica	78	7	9%
Juan Colombo	334	27	8%
Marisol Peña	483	36	7%
Enrique Navarro	481	28	6%
Cea	316	14	4%

There is a very relevant difference among the Justices. The most controversial one is former Justice Jorge Correa, whom dissented in 35% of the cases. The one that most of the time agreed with the majority is former Justice José Luis Cea, whom dissented in only 4% of the majority opinions. The numbers go down if we analyze the current conformation of the Court (at 2011). Indeed, the current most controversial Justices (Francisco Fernández and Carlos Carmona) have only dissented in 15% of the cases. In general, Carroll and Tiede´s findings are partially right,[47]

[47] CARROLL et al (2010)

since Justices appointed by Presidents tend to dissent more than the others, but this rule is not absolute. The case of Justices Correa and Carmona demonstrates Carroll and Tiede´s conclusion, but we should take into account that Justices appointed by the Congress also tend to dissent, like Justice Mario Fernández, for instance.

6. Data analysis

Table 3, below, shows how Justices behave between each other in a pair comparative agreement basis. I only considered controversial cases where both of the Justices voted. I will assume that, in general, a Justice tends to agree with another when he has more than 50% of controversial decisions where they vote in the same way. For the opposite, I will assume that, in general, a Justice tends to disagree with another when he has less than 50% of agreements. I will assume that when a Justice agrees more than 70% of the time with another colleague (or disagrees less than 30% with him), it is a strong agreement; and when he agrees less than 30% of the time with his colleague (or disagrees more than 70% with him), it is a weak disagreement.

This means that, for instance, that Justice Colombo agrees with Justice Cea in the 76.9% of the cases where they both participated, either in the majority or in the minority.[48] In this case, we can observe a strong agreement trend.

[48] All the numbers are presented in percentages. I eliminated the second and following decimals. N/A means that both Justices had never participated in one controversial decision at the same time, so it is imposible to measure that correlation

Table 3[49]

	Colombo	Cea	Venegas	Bertelsen	Vodanovic	Navarro	F. Fernández	Correa	Carmona	Viera-Gallo	Aróstica
Colombo	-	76.9	77.9	81.5	73.8	87.1	64.7	29.0	46.8	N/A	N/A
Cea	76.9	-	77.3	74.2	79.8	82.2	72.9	34.4	54.9	63.6	N/A
Venegas	77.9	77.3	-	73.4	65.4	78.1	59.8	26.1	49.4	64.8	87.5
Bertelsen	81.5	74.2	73.4	-	74.1	78.0	54.2	35.3	35.2	45.9	80.0
Vodanovic	73.8	79.8	65.4	74.1	-	73.2	63.7	41.1	56.6	69.7	57.1
Navarro	87.1	82.2	78.1	78.0	73.2	-	63.8	31.1	57.5	55.2	79.1
F.Fernández	64.7	72.9	59.8	54.2	63.7	63.8	-	50.3	81.3	60.9	53.5
Correa	29.0	34.4	26.1	35.3	41.1	31.1	50.3	-	N/A	N/A	N/A
Carmona	46.8	54.9	49.4	35.2	56.6	57.5	81.3	N/A	-	79.0	51.7
Viera-Gallo	N/A	63.6	64.8	45.9	69.7	55.2	60.9	N/A	79.0	-	25.9
Aróstica	N/A	N/A	87.5	80.0	57.1	79.1	53.5	N/A	51.7	25.9	-

The appointees made by former President Bachelet are Justices Carmona and Viera-Gallo. They both use to work in the government of President Bachelet, and they are both members of the *Concertación*, so we should expect to see them working together. Indeed, they strongly agree with each other in the 79% of the cases. Another interesting Justice is Correa, whom is supposed to agree with Carmona and Viera-Gallo, since he was appointed by President Lagos (also from the Concertación), and he is a member of the same political party as Justice Viera-Gallo (the socialist Party). However, they before his retirement they did not share cases among each other. Another Justice that it is possible to relate to this group is Justice Vodanovic, who was appointed by the senate because of a political arrangement in 2006. He is also a member of the *Concertación*, and has occupied several public positions, such as senator. His agreements with Justices Carmona and Viera-Gallo are, however, not that strong (56.6% and 69.7%, respectively), but a positive number exists. He is different from the others because of the appointment procedure and also the longer judicial experience that he has. Maybe those are sufficient reasons for explaining why he do not strongly agree with other Justices related to the *Concertación*.

[49] The data about the voting behavior of justices M. Fernández and Peña has been deleted temporarily, since it has some inconsistencies that need to be reviewed again.

Justice Aróstica, for the contrary, was appointed by President Piñera (from the *Alianza*, the opposite coalition of *Concertación*). He has a very weak agreement rate with the Justices related to the *Concertación*. He only agrees with Justice Carmona in the 51.7% of the controversial cases, and he disagrees with Justice Viera-Gallo in the 74.1% of these cases (or agrees only in the 24.9%). He weakly agrees with Justice Vodanovic in the 57.1% of the cases. In this sense, it is possible to say that Justice Vodanovic is more moderate (remember that he only dissent in the 12% of the controversial cases).

Other Justices that are, in general, related to the *Alianza*, are Justices Venegas and Bertelsen. They both were appointed by the senate in the political arrangement of 2006 and, as I already said in section 4, they both have some conservative background. Indeed, they agree with each other in the 73.4% of the controversial cases. Both of them tend to strongly agree with Justice Aróstica (87.5% and 80%, respectively). Also, Justice Venegas tend to strongly disagree with liberal Justices Correa (only 26.1% of agreement) and Carmona (he agrees with him in only the 49.4% of the cases). He weakly agrees with Viera-Gallo in the 64.8% of the cases, perhaps showing a moderate feature in this combination. The situation of Justice Bertelsen is not very different, since, in general he usually disagrees with all the Justices appointed by Presidents of the *Concertación*, Correa (only agrees in 35.3%), Carmona (only agrees in 35.2), and Viera-Gallo (only agrees in 45.9%).

As we can see, among the Justices examined, it is possible to conclude that (1) Justices appointed by Presidents of the same coalition, or the same President, tend to agree among each other; (2) Justices appointed by the senate also tend to agree with the Justices appointed by the same coalition, but not as strongly as among the Justices appointed in the presidential way.

Let´s examine what happens with the Justices appointed by the Supreme Court. As I said in section 4, it is very difficult to describe a political profile of these Justices, since their appointment procedure is not very influenced by political parties (that dominates the congressional appointees and influence the presidential ones). In general, Justice Navarro is usually more related to conservative non-partisans positions (*Alianza*), and Justice F. Fernández is usually more related to liberal non-partisan positions (*Concertación*). If these assumptions are

true, then Justice Navarro would tend to agree more with Justices Aróstica, Venegas and Bertelsen, and to disagree more with Justices Carmona, Viera-Gallo, Vodanovic and Correa. The opposite would happen with Justice F. Fernández´s voting behavior. Let´s test these assumptions.

Justice Navarro strongly agrees with Justices Aróstica (79.1%), Venegas (78.1%) and Bertelsen (78%), but different results are achieved if we compare his approaches with the other group. He strongly agrees with Justice Vodanovic (73.2%), and that is not a surprise, because, as we have seen, this Justice is very moderate. Justice Navarro weakly agrees with Justices Carmona (57.5%) and Viera-Gallo (55.2%), and his strongly disagrees with Justice Correa (31.1% of agreement).

Maybe this is related to the fact that Justice Navarro usually is with the majority of the Court and rarely formulates a dissenting opinion (only in the 6% of the controversial cases, as I already said above). His disagreement with Justice Correa is not surprise, since Justice Correa is the Justice that has more dissenting opinions among all the others. We can infer from this data, then, that, in general, Justice Navarro is a moderate Justice.

Let´s see what happens with Justice F. Fernández: he weakly agrees with Venegas (59.8%), Bertelsen (54.2%) and Aróstica (53.5%), showing a moderate behavior; and he weakly agrees with Justices Correa (50.3%), Viera-Gallo (60.9%) and Vodanovic (63.7)%, and he strongly agrees solely with Justice Carmona (81.3%). With Justice Navarro, he weakly agrees (63.8%). In my opinion, this demonstrate that, in general, Justice F. Fernández does not take extreme positions and he can be considered a moderate Justice.

However, even when Justices appointed by the Supreme Court (Navarro and F. Fernández) are moderate, they both tend to agree more with different group of Justices: Navarro tend to agree more with Venegas, Bertelsen and Aróstica; and F. Fernández tend to agree more with Carmona and Viera-Gallo.

These results makes sense with the assumption that Justices appointed by the Supreme Court are usually moderate, non-partisan, but that they tend to agree more with a clear group of Justices.

References

BICKEL, Alexander (1962, edition of 1986) *The Least Dangerous Branch* (New York, Yale University Press).

CALABRESI, Stephen and LINDGREN, James (2005-2006) "Term Limits for the Supreme Court: Life Tenure Reconsidered", *Harvard Journal of Law and Public Policy*. 30: 769-877.

CARROLL, Royce and TIEDE, Lydia (2010) "Conflict on Chile's Constitutional Tribunal", 5th Annual Conference on Empirical Legal Studies Paper. Working paper available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1630986&http://www.google.com/

CEA, José Luis (2003) "Perfil Axiológico, Independencia y Responsabilidad del Juez Constitucional", *Ius et Praxis*, Talca. V. 9, n. 2.

COOTER, Robert (2002) *The Strategic Constitution* (Princeton University Press)

EPSTEIN, Lee, LANDES, William M. and POSNER, Richard A. (2010) "Why (and When) Judges Dissent: A Theoretical and Empirical Analysis", *U of Chicago Law & Economics*, Olin Working Paper No. 510. Available at SSRN: http://ssrn.com/abstract=1542834

EPSTEIN, Lee, SEGAL, Jeffrey A., SPAETH, Harold J. (2001) "The Norm of Consensus on the U.S. Supreme Court", *American Journal of Political Science*. 45: 362-377.

FRIEDMAN, Barry (2006) "Taking Law Seriously", *Perspectives on Politics*, vol. 4, Nº 2: pp. 261-276.

GARCÍA, José Francisco (2008): "El proceso legislativo sin romance: implicancias para el diseño constitucional chileno", *Ius et Praxis* (U. Talca). 14, Nº 2: pp. 489-522.

GIBSON, James L. (1978) “Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model", *The American Political Science Review*. 72: 911-924.

KNIGHT, Jack, EPSTEIN, Lee (1996) “The Norm of Stare Decisis", *American Journal of Political Science*. 40: 1018-1035.

PEÑA, Marisol (2007) “Desafíos para la justicia constitucional chilena a partir de la reforma de 2005”, *Revista Iberoamericana de Derecho Procesal,* Nº 7: pp. 199-212. http://www.iidpc.org/revistas/7/pdf/215_228.pdf

POSNER, Richard (1993) “What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)", *Supreme Court Economic Review*. 3: 1-41.

PRITCHETT, C. Herman (1941) “Divisions of Opinion Among Justices of the US Supreme Court, 1939-1941", *The American Political Science Review*. 35: pp. 890-898.

SCALIA, Antonin (1994) “The Dissenting Opinion", *Journal of Supreme Court History*: pp 33-44.

SCHAUER, Frederick (1988) “Formalism", *Yale Law Journal*. 97: 509-548.

SEGAL, Jeffrey A. and COVER, Albert D. (1989) “Ideological Values and the Votes of US Supreme Court Justices", *The American Political Science Review*. 83: 557-565.

SEGAL, Jeffrey A., SPAETH, Harold J. (1996) “The Influence of Stare Decisis on the Votes of United States Supreme Court Justices", *American Journal of Political Science*. 40: 971-1003.

SPILLER, Pablo T. and GELY, Rafael (2007) “Strategic Judicial Decision Making", *NBER Working Paper* 13321. Available at: http://ssrn.com/abstract=1008815.

STRAS, David and SCOTT, Ryan (2006-2007) "An Empirical Analysis of Life Tenure: A Response to Professors Calabresi and Lindgren", *Harvard Journal of Law and Public Policy*. 30:791-830.

TILLER, Emerson H. and CROSS, Frank B. (2006) "What is Legal Doctrine?", *Northwestern University School of Law*, vol. 100, Nº 1: pp. 517-533.

VARGAS, Enrique, PEÑA, Carlos and CORREA, Jorge (2001) *El Rol del Estado y el Mercado en la Justicia* (Santiago, Ediciones Universidad Diego Portales)

VERDUGO, Sergio (2010) "Control Preventivo Obligatorio: Auge y Caída de la Toma de Razón al Legislador", *Centro de Estudios Constitucionales*. Año 8, Nº1: pp. 201-248. http://www.cecoch.cl/docs/pdf/revista_ano8_1_2010/articulo_7.pdf

WALDRON, Jeremy (2004) *Law and Disagreement* (New York, Oxford University Press)

ZAPATA, Patricio (2008) *Justicia Constitucional* (Santiago de Chile, Editorial Jurídica de Chile).

ZÚÑIGA, Francisco (2010) *Acciones de Inaplicabilidad e Inconstitucionalidad: Doctrina y Jurisprudencia del Tribunal Constitucional sobre Temas Procesales* (Santiago de Chile, Editorial Abeledo Perrot).