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Conflict and Courts: Civil War and Judicial Independence across Democracies

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Abstract

Many argue that during conflict, executive power expands at the expense of the judiciary and civil liberties. Although this is a common conjecture, no systematic study of conflict and judicial independence exists. We argue that conflict, rather than strictly inhibiting independence, is instead a critical juncture that increases the possibility of institutional change, either positive or negative. We assess this claim in three ways: cross-national analyses of (1) de facto and (2) de jure judicial independence after the onset of conflict, and (3) a case study of statutory and jurisdictional changes to the federal judiciary after the outbreak of the U.S. Civil War. Each illustrates that conflict onset is associated with a higher likelihood of changing levels—both decreases and increases—rather than unidirectional decreases in judicial independence. We then present preliminary hypotheses and analyses for three factors that, given conflict onset, should be associated with either improved or worsened conditions for the judiciary. This study has implications for research on conflict, courts, and the rule of law in both political science and legal studies.

Keywords

courts, conflict, judicial independence

"Inter arma silent leges"

During times of war law is silent. Or is it? Both scholarship and intuition since the time of Cicero suggest the arrival of conflict means laws binding the state, and specifically the executive, are silenced. In the modern era, this means the ability of judges to review government policies is diminished, either formally by law, informally by undue influence, or by the practice of judges themselves. Much has been written about the trade-off between rights and security in democracies during times of crisis, judicial deference and delegation of decision making, and the contraction of civil liberties during war. Yet, to date there exists no systematic study of the relationship between conflict and change in the formal powers of the judicial branch or its freedom from undue influence. Intuition and assumption have stood in place of analysis. As such, we know far less about how the onset of conflict affects the judicial branch's formal and informal power and autonomy than we might expect, and this lack of analysis has resulted in improper expectations about the relationship between conflict and the judiciary.

The importance of an independent judicial branch is difficult to overstate. It can provide stability to democracies, inhibiting backsliding (Gibler and Randazzo 2011); decrease the likelihood that leaders will be punished after leaving office, increasing regime stability (Epperly 2013); positively affect economic growth and protect property rights (Feld and Voigt 2003); influence treaty adoption and implementation (Powell and Staton 2009); decrease the likelihood of state repression and human rights violations (Keith 2002); and is a fundamental pillar of the rule of law and an essential part of the process of a rights revolution (Epp 1998). The importance of judicial independence is further conveyed by the fact that many indices of democracy—such as Polity and Freedom House—consider it a defining attribute of democracy. Consensus exists that it is imperative to understand how and why states empower judicial institutions to review the constitutionality of laws. Also necessary is understanding when and why we observe change in both formal and behavioral judicial independence, as these expansions or restrictions can have lasting effects on civil liberties and state development. By better understanding what precedes major changes in judicial independence, we can better predict when and how these changes are likely to occur.

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Our purpose is threefold. First, we develop an argument that runs counter to the "crisis jurisprudence" literature and intuition since Cicero. Rather than the intuition that war is universally bad for the business of judging, we argue that conflict onset serves as a shock and critical juncture, disrupting existing democratic institutions and increasing the likelihood of change in constitutional rules affecting courts, as well as the behavior of political actors toward the judiciary. Second, we examine this argument both qualitatively and quantitatively, assessing the degree to which it helps explain change in formal and informal judicial independence across democracies. While showing that conflict is associated with both positive and negative shifts in independence is an important contribution in its own right, we recognize the next step is to better understand under what conditions we should expect increases or decreases in independence after conflict's onset. Therefore, our third aim is to identify factors that might, when conflict onset occurs, predict the directionality of change in independence. We present three such factors, developing both preliminary hypotheses regarding their influences and analyses of their relationship with change.

We proceed along these lines: in the first section, we lay out our argument with reference to existing explanations, discussing the various aspects of independence. In the following, we assess the explanatory power of our theoretical account. First, across modern democracies by looking at the relationship between civil conflict—the form of conflict accounting for over 90% of conflicts in democracies in the past sixty years—and change in de facto and de jure independence. We then leverage a case study of the changing powers and scope of the federal judiciary after the outbreak of the U.S. Civil War to address limitations in our quantitative analyses. In the following section, we offer preliminary analysis of how three factors—federalism, democratic age, and whether the conflict is over control of territory or government—might help explain the directionality of change once conflict arises. We then conclude, offering suggestions for future research.

Conflict and Courts

Although there has been almost no attention to how conflict (civil or otherwise) is related to formal and behavioral judicial *independence* specifically, we would be remiss if we did not first address the primary way in which conflict's relationship to the judicial *branch* is examined. This is the crisis jurisprudence approach, in which judicial deference to democratic executives is amplified during war.[1] Here, overwhelming attention is paid to analyses of the U.S. Supreme Court, which Epstein et al. (2005) argue adopts a jurisprudential stance leading to curtailed rights and liberties at times of security threats. While the precise nature of rights restrictions are contested,[2] there exists agreement that "as a general matter in times of crisis we will overestimate our security needs and discount the value of liberty" (Cole 2002, 955).

In such research, the outcome of interest is almost always a question of contractions in civil liberties (typically considered the product of increased deference) or the latitude enjoyed by the executive regarding policy matters, not the independence of judiciary per se. While undoubtedly an important object of study, respect for individual rights is neither a synonym of nor proxy for judicial independence, and similarly an autonomous and powerful judiciary deferring on specific policy matters to an executive is not necessarily an indication of shrinking judicial independence.

Two results flow from the United States being the overwhelming focus of studies of courts and conflict. First, the stable formal institutional environment and long tradition of robust judicial independence means the main focus is—as noted—on how judges respond to conflict, with little attention paid to how other actors seek to affect the environment in which judges operate. In other words, judicial behavior is being examined as opposed to how other actors unduly influence courts and infringe on de facto independence.[3] Second, the extreme rigidity of the constitutional order in the U.S. case means that the potential for conflict to precipitate change in the formal constitutional rules of the game is ignored; in other words, there is little attention to how conflict affects de jure independence. That terms such as deference and crisis jurisprudence dominate is telling. While this work is of vital importance for understanding judicial behavior in the United States, a comparative focus coupled with attention to de jure and de facto independence can allow a broader understanding of how conflict affects the environment in which judicial behavior occurs.

Conceptualizing Independence

Before presenting our argument about the relationship between conflict and judicial independence, a clearer clarification of the term is necessary. While some contend we have not, and possibly never can, coalesce around a shared definition (Kornhauser 2002), others point out there is general agreement empirically on the core characteristics of judicial independence (Linzer and Staton 2015). Within this core, two main conceptual categories emerge: de facto and de jure independence. At its foundation, both forms of independence are about judges being authors of their own opinions, and making decisions without undue influence from other governmental actors (that is, judicial autonomy), as well as the degree to which these decisions constrain other political actors (judicial

influence or power; Ríos-Figueroa and Staton 2014). Independence is, in effect, about freedom from inappropriate influences on the *process* of judicial decision making and the enforcement thereof, rather than on the *content* of judicial decisions. Judicial independence is, then, the umbrella term encompassing both de jure and de facto independence, and within each varying aspects speak to the formal and informal autonomy and power of the judiciary. We seek to show that judicial independence in its entirety—both the formal, de jure provisions and informal, de facto behavior—is affected by conflict, testing this empirically by utilizing measures that capture the distinct aspects of independence.

At its heart, de jure independence is the formal constitutional rules, statutory protections, and procedures designed to promote independent behavior by insulating judges from undue pressure. Examples include protections regarding arbitrary salary changes, lifetime tenure, multilateral appointment and dismissal procedures, budgetary autonomy, and docket control. Theoretically, these formal rules exist to protect judges and create space for independent behavior, that is, to foster autonomous decision making (formal provisions ensuring judicial influence/power are also often considered, for example, constitutional statements of judicial review powers or necessity of enforcement). Of course, states lacking various de jure protections are not necessarily lacking in de facto independence, and conversely states with formal protections may systematically violate them. Despite de jure independence being neither a necessary nor sufficient condition for behavioral independence (Hayo and Voigt 2007), the expectation remains that it is an important condition enabling such independence (Melton and Ginsburg 2014).

One of the clearest and most influential conceptualizations of de facto independence builds on Becker's (1970) formulation that judges are independent when decision making reflects their true preferences (i.e., they are autonomous). Building on Hamiltonian insights, de facto judges need not only be autonomous but critically their decisions must be enforced, and that such enforcement must occur even when political branches would prefer noncompliance (Cameron 2002).[4] Thus, actually existing behavioral independence is achieved when judges make decisions freely on their own, and other actors abide by and implement these decisions. That is, when judges possess both autonomy and power/influence. Often most identifiable in its absence (Ginsburg 2010), de facto independence is violated in myriad ways, from classic "telephone justice" to explicit (or implicit) refusals by executives to enforce decisions. These violations highlight the importance of both autonomy and power for understanding de facto independence.

We draw the distinction between autonomy and power/influence above because the two concepts are distinct, at least in theory. This distinction, however, primarily cuts across the de jure/de facto conceptualization: while aspects of autonomy and power are relevant to both, de jure independence relies far more heavily on the autonomy concept, de facto the power/influence concept. This becomes clear when we make reference to empirical comparative research on independence. Measures of de jure independence capture primarily—but not exclusively—aspects of governance ensuring autonomous judicial decision making. Of the six features used in our analysis below, only one captures judicial power/influence to some degree, and this pattern holds up in other indices of de jure protections (Keith 2002). The opposite is true for de facto independence, as popular individual measures primarily tackle the influence/power component of independence (Ríos-Figueroa and Staton 2014). Even here, however, aspects of autonomy are not ignored, as the Howard and Carey (2003, 286) de facto measure, which assesses "[t]he extent to which a court may adjudicate free from institutional controls, incentives, and impediments," makes clear.

Just because autonomy and power are distinct conceptually in theory does not, however, mean they are unrelated. There is general consensus among comparative law and courts scholars that they are inextricably linked, and empirical analyses of independence need to take both into account.[5] This is because while an autonomous judge need not be influential, such autonomy is meaningless if decisions go unenforced, and a judge can hardly be considered independent "if her decisions are routinely ignored or poorly implemented" (Ríos-Figueroa and Staton 2014, 107). Power/influence, on the contrary, requires autonomy: if autonomous judges are authors of their own opinions, then any causal relationship in which judicial preferences produce outcomes requires those decisions be enforced.

We recognize that distinctions between the autonomy and power components can be important for the study of judicial independence conceptually at both the de jure and de facto levels, even if clearly delineating between the two in empirical research is difficult (Linzer and Staton 2015). As such, in our analyses we attempt to tackle both the autonomy and power aspects of independence: we examine change in de jure independence, capturing primarily judicial autonomy, as well as de facto independence, capturing primarily judicial power/influence.

Conflict and Critical Junctures

Intuition and the literature on judicial deference in times of state crisis argue that the effects of conflict are unidirectional, leading to a weakened judiciary. This perspective is

also found in studies of how conflict affects the rule of law more broadly. In their empirical exploration of how conflict is related to change in various components of the rule of law (including judicial independence), Haggard and Tiede (2014) suggest that civil conflict inhibits the rule of law because it either centralizes power in the executive (via delegation or arrogation) or leads to breakdowns in state authority. Post-conflict settings, on the contrary, are the context in which "institutional gains" may occur. Despite reference to research on the nature of institutional change, the fundamental assumption is that the onset of conflict is only associated with negative change, and citing Call (2007, 11), the resolution of civil conflict is a "window of opportunity for institutional reforms," always conceived of as reforms enhancing the rule of law.

We are skeptical of a constant unidirectional relationship between conflict and the rule of law, and especially so when it comes to judicial independence. This is not to suggest that conflict cannot lead to attenuated levels of de jure or de facto judicial independence. Rather, we argue that it can *also* lead to increases in either. Put simply, instead of conflict being associated with decreases in independence, we contend that it should be associated with *change* in the phenomenon. We offer two broad arguments: first, that conflict should be associated with institutional change, and second, that such change is often in the direction of expanded judicial power.

First, the onset of civil conflict serves as a shock to a political system, potentially disrupting existing institutional arrangements. Research in both American and comparative politics highlights that there are various contexts where this change is more likely (Baumgartner and Jones 2010; Mahoney 2001). Civil conflict is just such a context, and is an important potential critical juncture in the trajectory of political and institutional development (Wantchekon and Garcia-Ponce 2015). A key insight from the critical junctures approach is that similar events can produce different outcomes depending on the political and historical contexts in which they occur. As noted above, we do not expect the effects of events with large magnitude such as civil conflict to be unidirectional. Recognizing this variation and addressing it explicitly, however, means that any general account of the *direction* of change needs to look beyond simply conflict and instead at the institutional environment when conflict occurs (Capoccia and Kelemen 2007). While fully developing such an account is beyond the scope of this article, focused as it is on the prerequisite claim that conflict can produce both positive and negative change in independence, the penultimate section offers preliminary analysis of how three factors condition the effects of conflict onset.

Civil war is, of course, only one of a number of shocks increasing the likelihood of widespread or significant institutional change: financial crises, serious environmental disasters, and war in general are all examples of systemic shocks.[6] We focus on civil war, however, for two reasons. First, given the postwar international context in which state boundaries are (almost) sacrosanct, civil conflict poses a unique threat to state institutions, win or lose. Even in winning, that losers largely remain within the confines of the state has far greater implications for institutional change, as they must be neutralized, dominated, or co-opted. Second, civil conflicts comprise the vast majority of wars in the modern world—over 90% of conflicts involving democracies are civil—and their share is increasing (Regan 2009).

Having laid out the first argument that conflict serves as a critical juncture for judicial independence, we turn to the second: that the directionality of change can also be positive.[7] As Haggard and Tiede (2014) illustrate, analysis typically treats rule of law institutions like independent judiciaries as means of stabilizing post-conflict polities (Chen, Loayza, and Reynal-Querol 2008), and judicial independence is often treated as a normative end in itself rather than an institutional means to produce desirable outcomes (Burbank and Friedman 2002). This tendency to treat judicial independence as normatively good helps obscure the fact that the judiciary remains a branch of the state, and as a quasi-political actor has significant interest in the state's continued existence as constituted. In other words, courts are not only tools of the state but also possess similar attachments and status quo biases of other state actors. And as Federalist No. 78 and Shapiro (1981) make clear, strong judiciaries can act as important components of state power. Therefore, if we expect that critical junctures such as conflict onset should be associated with institutional change, there is strong reason to expect that such change might take the place of expansions of judicial autonomy and power in the interests of expanding state power.

A potential objection is that instrumental expansions of judicial independence that serve the executive are not "real" expansions of judicial power, because they are by nature instrumental. Such an objection runs counter to current understandings of judicial independence, however, as there is consensus that almost every expansion of independence occurs only when it serves the interests of the political branches; otherwise expansion would not occur in the first place (Ginsburg 2003; Landes and Posner 1975). Even were this objection to hold, however, the most instrumental expansions of judicial independence are meaningful for two reasons. First, political actors never possess perfect information concerning either the policy preferences or corporate interests of judicial actors, and thus increasing the power of agents insulated from easy monitoring and sanctioning is always risky. Second, intertemporal change means a political

actor empowering a judiciary (for instrumental reasons) that shares its policy preferences has no guarantee that the preferences—let alone actors—remain the same at later time periods. Eisenhower's apocryphal "mistakes" of Justices Brennan and Warren illustrate both.

Recognizing that independent courts offer multiple ways of strengthening central state institutions and furthering state power (Landes and Posner 1975), however, does not answer the question of whether civil conflict might be associated with both decreases and increases in judicial independence. We now turn to analyses of de facto and de jure independence to provide an answer.

Examining Conflict and Independence

To thoroughly examine both the de jure and de facto aspects of judicial independence, we employ cross-national analyses of each, coupled with a case study of the U.S. Civil War. This approach offers three benefits. First, the quantitative analyses allow us to not only test our argument across decades of democracies but also test it explicitly against the conventional wisdom to see which better explains the data. Second, by doing so in models of de jure and de facto independence, we are able to examine how conflict affects the formal and behavioral aspects of independence, as well as both the judicial autonomy and power/influence components of independence. Third, augmenting these analyses with a brief case study allows us to assess how formal rules change in a way no cross-national analysis can: by assessing statutory and jurisdictional change not captured by constitution-level data.

The Argument across Democracies

In the previous section, we argue that rather than the conventional wisdom's account of pernicious effects of conflict on judicial independence, we should instead expect conflict to be associated with both increases and decreases. Here, we present empirical analyses of both de facto and de jure independence, showing there is no evidence to support a unidirectional negative effect of conflict onset, and in fact robust evidence that conflict produces both positive and negative change.

In their examination of how conflict affects the value of various rule of law indicators, Haggard and Tiede (2014) compare mean values of each component in pre- and post-conflict periods, assessing whether change is significant. If one's theoretical expectation is that conflict's effects on such components is solely unidirectional, this is a fine strategy. If, on the contrary, one expects, as do we, that conflict should be associated with change in either direction, not simply negative change, this approach should make observing a relationship difficult: if conflict in general has very large positive *and* negative effects, empirical examinations will suggest no relationship. Because we think civil conflict should increase positive and negative change rather than seeking to examine the change pre- and post-conflict, we examine absolute values of change.

Measuring Judicial Independence

As we are interested in the formal and behavioral implications of conflict, we assess change in both de jure and de facto independence. Given the nature of panel analyses and cross-national data, our measures for each are neither detailed nor granular. In the case of de facto, behavioral independence, this is to be expected: it is both latent, difficult to observe and measure, and multifaceted, containing aspects of autonomy, power, and influence. To address this, we employ Linzer and Staton's (2015) latent judicial independence measure (LJI), which provides estimates (ranging from 0–1) of de facto independence for 200 countries over the 1960–2012 period. The Bayesian IRT (item response theory) model Linzer and Staton use draws on eight commonly used measures of de facto independence (primarily but not exclusively capturing the judicial power/influence component), improving on them by using their agreement to more accurately capture the underlying, latent phenomenon while accounting for missingness in each component measure. In assessing *change* in de facto independence, we consider how a country's score for a given year is different than it was three years prior (for alternative temporal specifications, see the supplemental appendix). That is, we take the absolute value of the difference in a country's LJI score between times t and $t - 3$. Thus, a score of 0.45 in 2003 compared with 0.40 in 2000 means the change value for 2003 is coded as 0.05; the same value obtains if the score in 2000 is 0.50, due to our focus on absolute values (see the supplemental appendix for full descriptive statistics).

When it comes to formal provisions securing independence (which primarily capture the judicial autonomy component of independence), we suspect that significant change occurs at statutory and jurisdictional levels (like those concerning the federal judiciary during the U.S. Civil War, which we address in the next section). Unfortunately, the systematic collection of such data has not occurred even in data-rich environments such as the United States, let alone cross-nationally. Therefore, as is common in studies of de jure independence, we look to formal constitutional rules. We employ the measure of de jure independence constructed by Melton and Ginsburg (2014), which draws on their Comparative Constitutions Project data.[8] Building on work by Hayo and Voigt (2007) and Keith, Tate, and Poe (2009), Melton and Ginsburg aggregate six formal constitutional provisions safeguarding independence: (1)

statements of judicial independence, (2) life tenure for judges, (3) selection procedures requiring input from multiple institutional actors, (4) conditions for removal from office requiring either a supermajority or multiple actors, (5) clarified rules preventing removal for reasons other than crimes or serious misconduct, and (6) insulation from salary reduction.

We measure de jure change in the same manner as noted above for de facto: taking the absolute value of the difference between *t* and *t – 3*. This creates a measure capturing changed levels of de jure independence over the previous three years, ranging from 0 to 5. After doing so, we generate dichotomous measures capturing whether any change occurs, including rare instances of adding and subtracting the same number of provisions: here, the addition or removal of one procedure is treated the same as adding or removing two or more, the goal being to capture institutional change at the constitutional level per se.

Civil Conflict

Civil conflict onset is dichotomous, generated from the UCDP/PRIO Armed Conflict Database (Gleditsch et al. 2002). Because we are interested in how onset is associated with changed levels of formal and informal independence, which might not simply occur in the single subsequent year, we consider change over a three-year period. Thus, onset is coded as 1 if intrastate conflict began in the year examined or the two years prior. When comparing this with change in judicial independence, we assess change in both forms of independence between *t – 3* and *t*, and consider whether conflict onset happens in years *t, t – 1*, or *t – 2* (with alternative temporal specifications in the supplemental appendix).

In the supplemental appendix, we assess a further implication of our argument that conflict onset is important because it provides a shock to the system, including duration of conflict. Results show it is conflict's onset rather than length that is associated with change in independence.

Potential Confounders

There are a number of potential events that could plausibly affect both conflict onset and change the level of either de jure or de facto independence. Given our analysis is restricted to democracies, and we are interested in those states that were democratic at the beginning and end of our three-year windows of analysis, confounders are those factors potentially affecting the likelihood of change in independence and onset. The primary factors we identify are those relating to regime change, specifically autocratic transitions and coups, as we expect that such events often occur contemporaneously with conflict and affect change in judicial independence. For example, brief spells of autocratic rule bookended by democracy may be cause or consequence of conflict, and also likely to produce change in formal or informal judicial independence. From the Democracy–Dictatorship Revisited Data (Cheibub, Gandhi, and Vreeland 2010), we generate a dichotomous measure for autocratic interregnums when the three-year window witnessed a transition to autocracy.[9] For similar reasons, we control for the potential confounder of coups, using data from J. M. Powell and Thyne (2011).

Results

In conventional accounts, components of the rule of law—like judicial independence—are negatively affected by conflict, and empirical analyses employ a continuous measure of the phenomena; if conflict's actual impact is producing institutional change, such a procedure obscures any relationship between onset and change. To demonstrate this, we include models employing this conventional operationalization strategy as well as our own focus on absolute change in both de jure and de facto independence.

Table 1 presents four linear models of change in judicial independence (all models report robust errors clustered by country). Models 1 and 2 analyze change in de jure constitutional provisions, whereas models 3 and 4 look at de facto change (due to data availability differences, there are slightly more de facto observations). Models 1 and 3 present the conventional account, and the results support conflict affecting change in independence rather than in predicting its decrease. In each, conflict onset has no consistent relationship with change in independence between *t* and *t – 3*. The same is true for model 2, which assesses absolute change in the number of constitutional provisions concerning the judiciary. Here, the lack of results is likely due, in part, to the extremely small number of observations where the absolute change is greater than 1: less than 2% of observations, which falls to less than 1% for 3, 4, or 5 changes in constitutional rules combined.

Table 2 thus examines a different operationalization of the outcome of change in de jure (model 5) and de facto (model 6) independence. Here, rather than treating absolute change in independence linearly, it operationalizes change as *any* change in the outcome and uses logistic regression: Model 5 thus assesses any change in constitutional rules regarding the judiciary and model 6 change in latent independence greater than one standard deviation from its mean. In model 5, 6% of observations involve change in constitutional rules affecting the courts, which is large considering these are changes in constitutional

Table 1. Changes in Judicial Independence.

	De jure		De facto	
	Model 1 (Conventional)	Model 2 (Absolute)	Model 3 (Conventional)	Model 4 (Absolute)
(Intercept)	0.04***	0.08***	0.01***	0.02***
	(0.01)	(0.01)	(0.00)	(0.00)
Conflict onset	−0.02	0.03	−0.01	0.02***
	(0.04)	(0.04)	(0.01)	(0.00)
Autocratic interregnum	0.07	0.19	0.04	0.04*
	(0.16)	(0.15)	(0.02)	(0.02)
Coup	−0.15	−0.11	−0.00	0.01
	(0.09)	(0.08)	(0.01)	(0.01)
AIC	2,889.78	2,794.25	−9,867.20	−10,813.38
Observations	2,680	2,680	2,778	2,778

Four linear models of change in judicial independence. Models 1 and 2 are fit to change in de jure independence, while models 3 and 4 to de facto. Models 1 and 3 are fit to the conventional operationalization of change, while models 2 and 4 are fit to absolute change.
Note: *** $p < 0.001$; ** $p < 0.01$; * $p < 0.05$.

Table 2. Two Logistic Regressions of Change as a Categorical Measure.

	De jure	De facto
	Model 5	Model 6
(Intercept)	−2.74***	−1.37***
	(0.08)	(0.05)
Conflict onset	1.05***	0.93***
	(0.33)	(0.22)
Autocratic interregnum	2.17*	2.00*
	(1.08)	(0.88)
Coup	−1.53	−0.29
	(1.40)	(0.87)
AIC	1,268.50	2,841.40
Observations	2,680	2,778

Model 5 is fit to a dichotomous measure indicating those country-years observing any constitutional change affecting the judiciary, while model 6 to any change in latent judicial independence greater than one standard deviation from the mean.
Note: *** $p < 0.001$; ** $p < 0.01$; * $p < 0.05$.

not statutory rules. The results of model 6 in Table 2 are consistent with model 4 in Table 1: conflict onset is consistently related to change in de facto independence.

The substantive effect of onset is also significant. Figure 1 shows predicted probabilities of changing levels of judicial independence for the models in Table 2. Model 5, as noted, estimates any change in de jure independence, model 6 a greater than one standard deviation change in de facto. Black solid points show predicted probabilities for the respective models when conflict onset is present, and hollow gray points when no onset occurs (each estimate also shows 95% confidence intervals). As Figure 1 illustrates, conflict approximately triples the likelihood of de jure change and doubles that of de facto.

The U.S. Civil War and the Federal Judiciary

Four decisions—one negative and three positive—taken by the political branches regarding the federal judiciary in the first years of the U.S. Civil War highlight both how the relationship between civil conflict onset and change in the judiciary's power and autonomy can be multidirectional, and that expansion and contraction of judicial independence can be statutory rather than constitutional. This case study augments the cross-national analyses above in three key ways. First, it explicitly ties the outbreak of conflict to change, illustrating the causal linkages between the aggregate independent and dependent variables in the previous section. Second, it demonstrates that significant formal change can occur absent constitutional change, suggesting that the analyses above identify the floor of the effects of conflict's onset on de jure change. Third, it highlights the ways in which jurisdiction—not captured by the de jure constitutional measure and only partly captured by the de facto measure (Ríos-Figueroa and Staton 2014)—can also be affected by conflict in both positive and negative ways.

Likely, the most significant blow to judicial independence during the American Civil War was the suspension of habeas corpus, first unilaterally by President Lincoln and then by Congress. It serves as an example of conflict's problematic effects on civil liberties and judicial power, as the judicial check on unlawful imprisonment was suspended, explicitly rebuking the judiciary's power. An immediate response to Lincoln's suspension of habeas corpus in the weeks immediately following the outbreak of the conflict was a District Court judge's decision to issue a writ of habeas corpus. Recognition of the writ was rejected by the military commander, despite there not being the constitutional requirement of Congressional authorization for the writ's suspension. John Merryman's

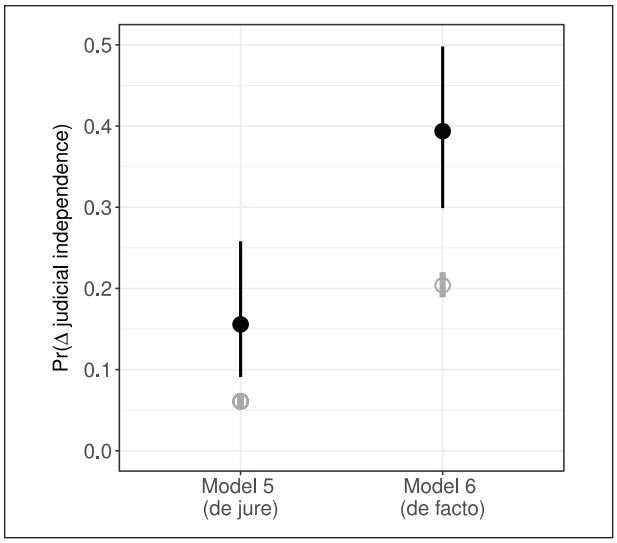

Figure 1. Conflict onset and predicted probability of change. The predicted probability of change in independence for each model in Table 2 when conflict is set to zero (gray) and one (solid black). All other covariates are held at mean values.

imprisonment weeks later was made famous by Chief Justice Taney's issuance of a writ, and his subsequent decision in *Ex parte Merryman* that Presidents lack authority to unilaterally suspend habeas corpus. The executive openly rejected the decision, and Lincoln continued suspending habeas corpus without Congressional authorization until granted such power in the Habeas Corpus Act of 1863, ignoring the contrary decision of the Chief Justice.

Although this story of restricting federal judicial power remains the dominant narrative, significant expansion of the court's independence also occurred as a result of conflict's onset.[10] First, only months after the outbreak of conflict, the Confiscation Act authorized the federal government to initiate proceedings against any property found, "to be used or employed, in aiding, abetting, or promoting such insurrection or resistance to the laws" (Confiscation Act of 1861). These proceedings were authorized to occur in any district court, aiming to limit the economic and military capabilities of those committing treason in defense of slavery. Notably, this act and the subsequent Confiscation Act of 1862 (increasing judicial venues for confiscations) greatly expanded the federal judiciary's jurisdiction, previously confined to cases crossing state lines or in admiralty.

Given one of the antebellum issues facing the federal judiciary was its small size and resulting docket overload (exacerbated by mandates of riding circuit), its expansion in size during the Civil War was critical in expanding the effective power of federal judges.[11] The year after war's outbreak, Lincoln and the Republican Congress took coordinated steps to grow the federal judiciary and weaken Southern power within it. The Judiciary Act of 1862 reorganized judicial circuits, from each of which one Supreme Court justice was appointed. The Southern and border states previously comprising five circuits—and thus five seats on the court—were condensed into three, and pro-Union areas subdivided. The following year Congress passed the Tenth Circuit Act, further expanding federal judicial reach and watering down any lingering pro-treason sympathies within the judiciary (Hall 1975).

One of the most significant expansions of judicial autonomy and power—the two components comparative courts scholars consider vital for independence—during the Civil War was the Court of Claims Act (1863). Prior to 1863, the Court of Claims maintained original jurisdiction over and decided all civil claims against the U.S. government. However, parties displeased with settlements issued by the Court of Claims could appeal decisions to Congress itself, thereby greatly diminishing judicial independence. The Act restricted review of decisions to the judiciary, removing any legislative oversight of this Court's decisions. Perhaps the starkest expansion of judicial independence during the war, the Act is an archetypical example of the legislature transferring power to the judiciary, induced directly by the increase in claims caused by the conflict.

The statutory examples discussed here illustrate that conflict can be associated with expansions of independence, not solely contractions. The reasons for these changes are clear: a stronger and larger federal judiciary, with greater jurisdiction, could be relied upon as an ally in the fight against the South; that it was done for instrumental reasons does not, however, mean it did not expand independence (even during the war courts ruled against federal power in critical cases). These changes were, after all, lasting expansions of judicial power, radically transforming the judiciary. And these expansions were not solely the result of instrumental needs brought on by conflict: there is significant evidence to suggest that many who had desired the reorganization of the federal judiciary and expansion of judicial power before the outbreak of conflict used the institutional shock of the Civil War to pursue their agenda (Hall 1975; Turner 1965). This highlights the fact that change in independence flowing from the outbreak of civil conflict can be endogenous to the development of conflict as well as reflect latent desires for change made possible by the critical juncture of war.

Directionality of Change

In the preceding theorizing and analysis, we constrain ourselves to whether conflict onset is related to absolute change in independence, as we think establishing a

relationship between two phenomena need precede attempts to explore any potential conditional effects of other phenomena. That is, establishing that conflict's effects are multidirectional should precede establishing how institutional and political factors drive directionality when conflict occurs. In this section, we offer preliminary analyses of three factors we think might help explain this directionality, explicitly recognizing each individually warrants article-length treatment.

Our approach in analyzing these factors aims at better predictive understanding of why conflict might hurt judicial independence one place while improving it elsewhere. As such, to ascertain whether any factors help predict directionality, we restrict analyses to where onset has occurred, that is, observations three years after onset. There exists no theoretical accounts in the existing literature to suggest these variables confound the relationship between onset and independence; indeed, all three show minimal association (see the supplemental appendix) with onset or changing levels of independence when analyzing the full data.

Federalism

First, there are reasons to think that if civil conflict occurs, federal and centralized systems might respond differently due to how each are differently organized. Federal states may, for example, be more likely to change the formal powers of their courts as a result of conflict, either shifting general jurisdiction and powers to those courts still under the control of the state regardless of the localization of conflict, or stripping the powers of lower level courts in specific regions under rebel control and shifting them to the national level.[12] Similar patterns are possible at the de facto level as well. We might expect more negative shifts in federal states because in centralized states, as long as a government retains control of central state powers it has greater incentives to maintain or expand the powers of centrally controlled courts.

Figure 2 uses federalism data from the Institutions and Elections Project (Regan, Frank, and Clark 2009) to examine the three years following civil conflict onset in our data. Plot (a) shows distributions of change in de facto independence in federal (gray) and centralized (dashed black) systems, and a Kolmogorov–Smirnov test rejects the null hypothesis that change in federal and nonfederal systems are drawn from the same distribution ($p = .04$). It illustrates the relationship between federalism and de facto change: the split of observations showing a decrease/increase is 38% and 28%, respectively (35% showing no change > 0.01), and with larger negative than positive change. In nonfederal systems, this split is reversed, with 32% decreases and 50% increases. In addition, maximum observed increases are more than 3 times greater than federal states. This divergence suggests federal states more often than not curtail independence after the outbreak of civil conflict, with while the reverse is true in centralized systems, highlighting the mechanisms proposed above. Plot (b) contains histograms of change in de jure independence in federal and centralized systems, showing little difference between federal and centralized systems when it comes to formal, constitutional changes in independence.

One interpretation of Figure 2 is that federal states are far more likely to decrease de facto independence, potentially because of the fact that lower levels of government have far more control over judiciaries in federal systems; in centralized systems, governments likely retain control over the centralized procedures of appointment to and conduct within the judicial branch post-onset, and might therefore expand independence. The key insight from these data, however, is that while preliminary support exists, sustained analysis regarding the relationship between state organization and response to conflict is necessary.

Age of Democracy

While democratic longevity is predictive of neither onset nor changing levels of independence in the full data, given onset's occurrence there are reasons to think it may help explain the directionality of change. First, new democracies, having less time to create stable expectations among political actors regarding institutions supportive of the rule of law, or to consolidate these institutions themselves, might be associated with greater attacks on independence than long-standing democracies. Conversely, one might expect that when civil conflict breaks out in established democracies it creates greater incentives for those in office to weaken judicial independence. In new democracies, individuals in power were often directly involved in the creation of the formal institutional order (Ginsburg 2003), and thus might have less desire to undermine de jure independence. Similarly, if it is the case that behavioral expectations regarding independence stabilize over time, conflict onset might enable political actors to engage in de facto attacks difficult in more in stable contexts.[13]

Although we recognize that both approaches deserve thoroughly developed theoretical and empirical attention, here we offer a preliminary look at what the data suggest regarding the directionality of change in new versus established democracies. Figure 3 contains two scatterplots of the relationship between age of democracy (logged, as the salience of each additional year should decrease in long-standing democracies) and change in independence: plots (a) de facto change and (b) de jure, with points slightly jittered (<0.1) for clarity. In each, a

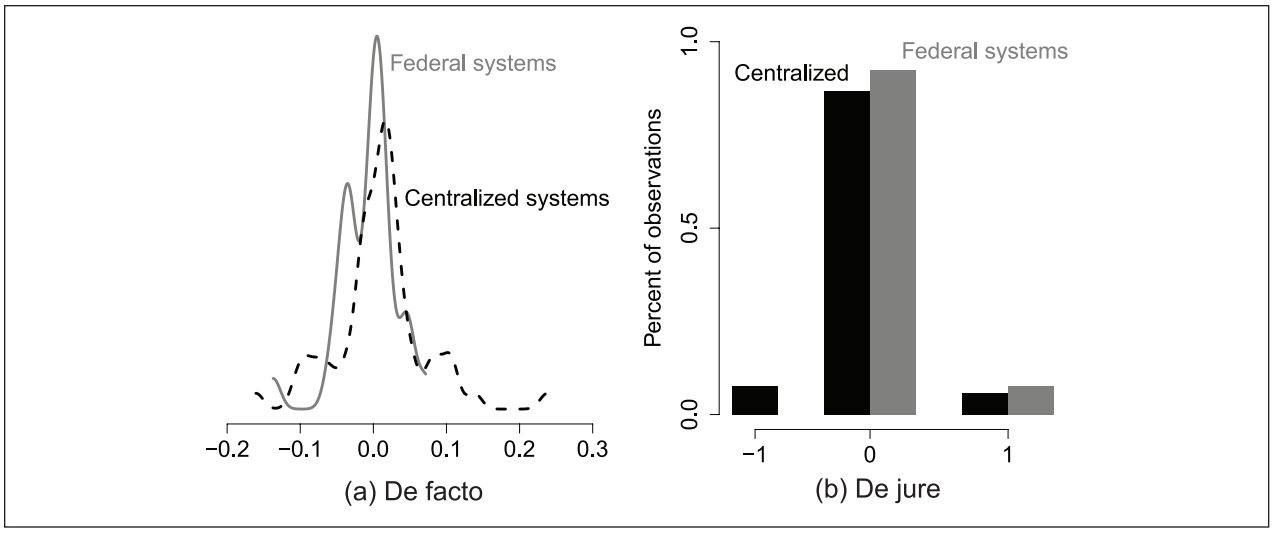

Figure 2. Federalism.
Two plots showing the relationship between federalism and change in judicial independence. Plot (a) is the distribution of change in de facto independence for both federal (gray lines) and centralized (dashed black) systems, and plot (b) is a histogram showing change in de jure constitutional provisions in federal and centralized systems.

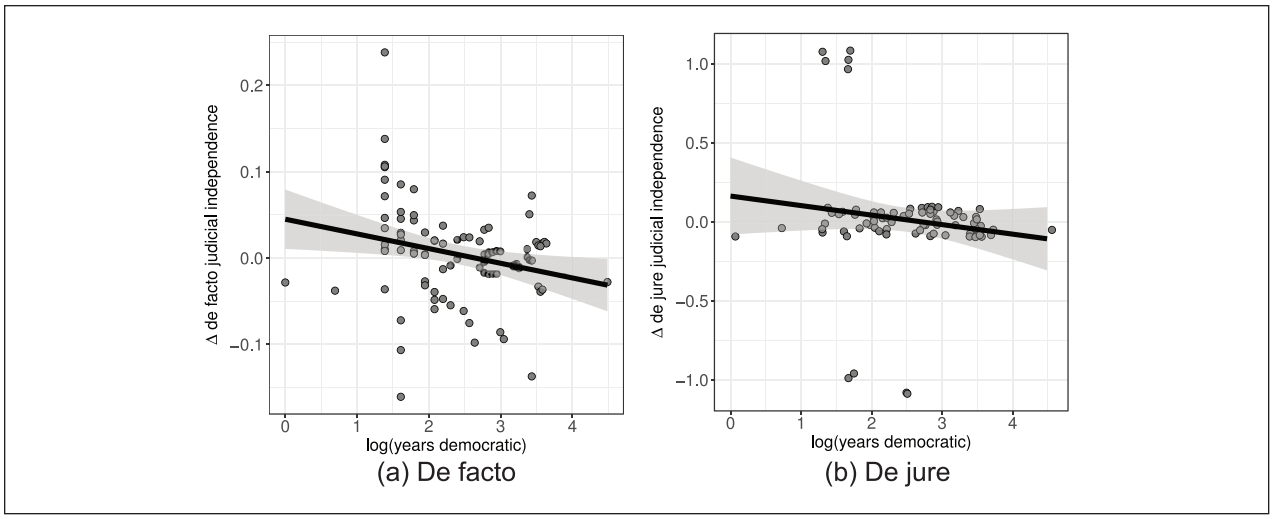

Figure 3. Age of democracy.
Two plots showing the relationship between age of democracy and change in judicial independence. Plot (a) is a scatterplot of change in de facto independence, and plot (b) de jure (jittered). Each shows a line of best fit (linear) and 95% confidence intervals.

line of best fit (linear) is plotted, along with its 95% confidence intervals.

Both plots in Figure 3 support the conjecture that civil conflict is less likely to produce positive outcomes in long-standing democracies. In plot (a), with the exception of one observation, all positive shifts > 0.05 occur in new democracies (log age < 2), while almost three-quarters of *negative* shifts < -0.05 occur in old. Plot (b) is similar: while both young and old democracies show the same number of negative shifts, *all* positive shifts in de jure protections occur in new democracies. Taken together, the evidence in Figure 3 suggests that a thorough treatment of the relationship between age of democracy and how conflict affects independence is warranted, with the preliminary—and perhaps surprising—conclusion that in new democracies civil conflict is less inimical to judicial independence.

Dispute Type

A third potential factor is the nature or type of dispute producing the conflict. Dispute types in civil wars fall

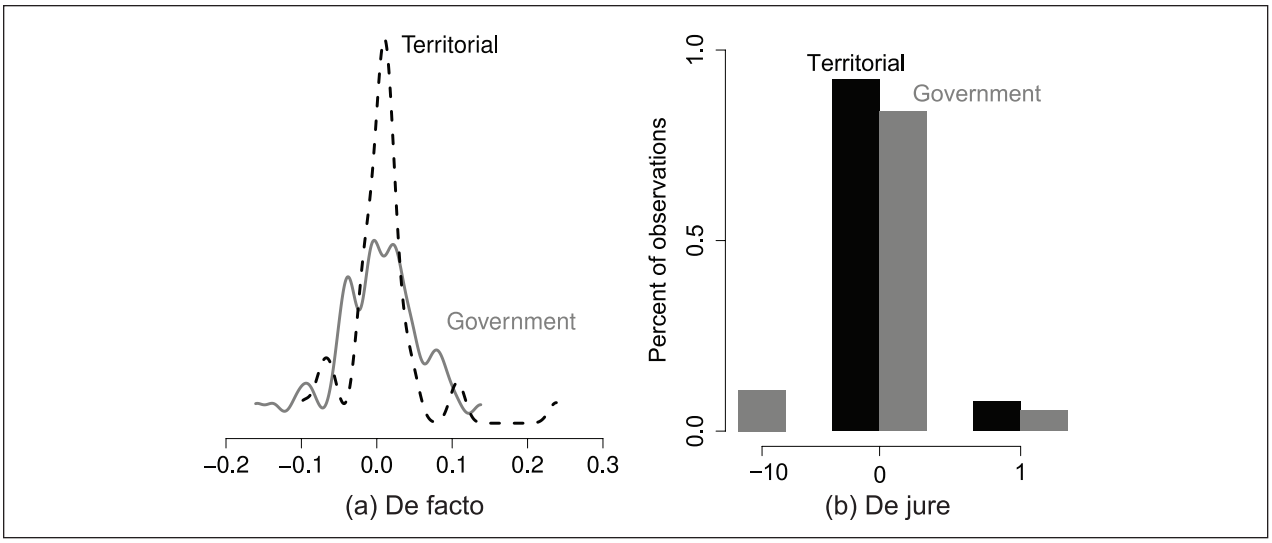

Figure 4. Dispute type.
Two plots showing the relationship between dispute type and change in judicial independence. Plot (a) is the distribution of change in de facto independence for both government (gray lines) and territorial (dashed black) disputes, and plot (b) is a histogram showing change in de jure constitutional provisions for government and territorial disputes.

into two broad categories: over control of territory or government. The nature of what parties fight over has implications for conflict's severity and length (Fearon 2004); this factor might also have implications for the directionality of change in judicial independence. Territorial disputes are typically considered indivisible issues, making compromise between combatants difficult and grievances unlikely satisfiable via policy concessions. Disputes over the government, on the contrary, can often be resolved via policy concessions or other institutional (including constitutional) reform.

Figure 4 shows how de facto and de jure independence change after the onset of those conflicts where disputes are governmental or territorial in nature (dispute data from Gleditsch et al. 2002). Plot (a) shows distributions of change in de facto independence in government (solid gray) and territorial (dashed black) disputes. While disputes over government are more likely to see positive change (46% vs. 28% for territorial), and less likely to see no change (17% vs. 30%), they are about as likely to see negative change (38% vs. 42%). Kolmogorov–Smirnov tests, furthermore, fail to reject the null that the two distributions are different ($p = .2$). Plot (b) shows histograms of change in de jure independence for both governmental and territorial disputes. Like with plot (a), here we see very similar patterns, with the only exception being governmental disputes showing a small number of negative changes.

The preliminary evidence offered in Figure 4 suggests, perhaps surprisingly, that the nature of the dispute has little bearing on the directionality of change. While governmental challenges appear to produce more variation in de facto change, tests are inconclusive regarding the difference in these distributions. Similarly, de jure change is highly similar across dispute type.

Implications

Our goal is modest yet important: to show conflict onset is not *necessarily* bad for the business of judging, but can serve as a critical juncture resulting in either positive or negative developments for de jure and de facto judicial independence in democracies. In doing so, we aim to correct the common intuition and claim that conflict negatively affects courts, demonstrating such a claim lacks support in empirical analyses of how conflict onset affects either formal or behavioral independence.

Our argument has implications not only for the study of conflict and courts, but judicial independence more broadly. For example, our findings suggest that existing studies finding no relationship between conflict and independence (Epperly 2017; Randazzo, Gibler, and Reid 2016) rest on the shaky assumption that conflict has only a negative effect on independence. Similarly, research about how conflict affects other components of the rule of law approaches the issue from the perspective that conflict's onset undermines the rule of law (Call 2007). We hope this study serves as an alternative, reminding that conflict is a disequilibrating shock to democratic institutions, and that judiciaries are state actors so strengthening them can serve the interests of the state. Like other rule of law institutions, they can be used in the service of political ends (Maravall 2003). While unable in the confines of an article to offer more than a brief, preliminary analysis

of what might explain when onset supports as opposed to hinders judicial independence, we nonetheless present three potentially important factors. We offer reasons why federalism, democratic age, and the nature of the dispute might explain the directionality of change, analyzing the distribution of change across each. Our preliminary results show how each factor is associated with change, but primarily suggest far more attention to these factors is needed.

Finally, our results highlight the complexity of the relationship between conflict and independence. While conventional wisdom for centuries has held that war has universally negative effects on civil rights and liberties specifically, and rule of law more broadly, we find this traditional explanation wanting empirically. By constraining our theorizing by assuming conflict onset leads to shifts in judicial independence that are universally negative, we hinder the development of accounts better able to explain the data. Integrating this insight should thus have significant implications for how we understand institutional change broadly, and specifically how and when courts are affected by civil war.

Authors' Note

The views expressed by Jacqueline Sievert are her own and are not endorsed by M&T Bank or its affiliates.

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Notes

1. We restrict focus to democracies for two reasons. First, for comparability, as the scope condition of democracy is implicit in the existing literature on how courts respond to conflict. Second, because many scholars contend that the relationship between autocrats and judiciaries is fundamentally different (Ginsburg and Moustafa 2008).
2. Posner and Vermeule (2007) offer normative and legal arguments for the benefits of neutering courts in times of crisis. Epstein et al. (2005) offer an empirical analysis, finding war affects judicial power only for nonwar issues, and Clark (2006) finds judges more deferential to the executive during times of war only with respect to criminal matters. Howell and Ahmed (2012) find Supreme Court Justices more likely to decide for the government only in statutory cases involving the President during times of war, and Tushnet (2003) contends that restrictions during times of crises are loosened afterward.
3. Although judicial behavior is certainly not exogenous to institutional constraints such as independence, it cannot be treated as indicative of independence, as Ríos-Figueroa and Staton (2014) and our case study illustrate.
4. It is from here that the fundamental puzzle of judicial independence—explanations for which are the main focus of the comparative law and courts literature (Vanberg 2015)—derives: why do powerful political actors tolerate independent judiciaries, lacking the powers of purse or sword, checking their prerogatives?
5. For recent overviews of the comparative literature dealing with this, see Vanberg (2015) and Epperly and Lineberger (2017).
6. Coups and regime change as shocks to judiciaries is examined in polities as diverse as Turkey (Belge 2006) and Burma (Cheesman 2011).
7. As arguments that conflict inhibits independence are conventional wisdom and discussed above, we focus here on the novel argument that conflict can also empower courts.
8. http://comparativeconstitutionsproject.org/download-data/
9. There are approximately a dozen interregnums. Results are robust to their exclusion, as well as including observations where autocratic transition occurs but without any subsequent return to democracy.
10. As we note above, expansion is likely the result of political actors viewing expansion in instrumental terms, either providing benefits to those in power during conflict or the realization of preferences regarding the judiciary that political instability allows them to realize. This, of course, is in line with conventional approaches to independence, which is considered a puzzle precisely because it should only be expected when political actors benefit from independence (Vanberg 2015).
11. While the exact relationship between judicial size and independence is unclear (Ginsburg 2003), in the American case increasing the size of the judiciary was critical in increasing both its power and autonomy. Power, because its increased size allowed it to speak to far more issues. Autonomy, because of classical principal-agent issues: the proliferation of agents lessened attention to agent particularities before appointment and expanded agent discretion after.
12. Of course, change may occur at statutory and jurisdictional levels, and thus be missed by existing national and cross-national data.
13. This potentially relates to the argument of Vanberg (2001) and others concerning public backlash against such attacks.

Supplemental Materials

Replication data and code available at: bradepperly.com/research. Supplemental materials for this article are available with the manuscript on the *Political Research Quarterly* (*PRQ*) website.

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