

Comments on Tsebelis'
« Bicameralism as a tool of
constitutional engineering »

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Introduction

- My comments focus on:
 1. Tsebelis' analysis of the consequences of CR on the judiciary, especially the ICC
 2. The introduction of the positive referendum (art 11c of dl 12/4/2016)

The CR and the judiciary

- Tsebelis correctly concludes that CR decreases number of VPs → “Role of courts in statutory interpretations shrinks, in constitutional interpretations expands”
- The higher the number of the legislative VPs (the wider their ideological distance) the higher the probability that the ICC overthrows the legislative *status quo*

Determinants of ICC independence - 1

- Tsebelis' conclusions are based on Santoni and Zucchini (2004) → possibly misleading
- Santoni and Zucchini (2004)
 - test only VP model on ICC independence (measured as % of decisions of constitutional illegitimacy per year)
 - Do not distinguish decisions in parte qua
- More fragmented government coalitions (BUT: not relatively to fragmentation of opposition) and more ideologically dispersed ones have higher probability to be confronted by decisions of constitutional illegitimacy by ICC

Determinants of ICC independence - 2

- Fiorino et al. (2007) show that ICC independence depends also on:
 - Type of nomination/election of ICC justice (Parliamentary vs. Presidential vs. Magistracy)
 - Personal characteristics of justice/future career concerns (e.g., age)
 - Durability of legislation (Landes and Posner, 1975)
- Point is that ICC takes decisions via colleges of justices whose composition varies in terms of professional backgrounds for each decision
- Fiorino et al. (2007) consider decisions of constitutional illegitimacy/legitimacy but also decisions *in parte qua* (i.e., of partial illegitimacy of the law)

Figure 1. Percentage of constitutional judges elected by the magistracy per year

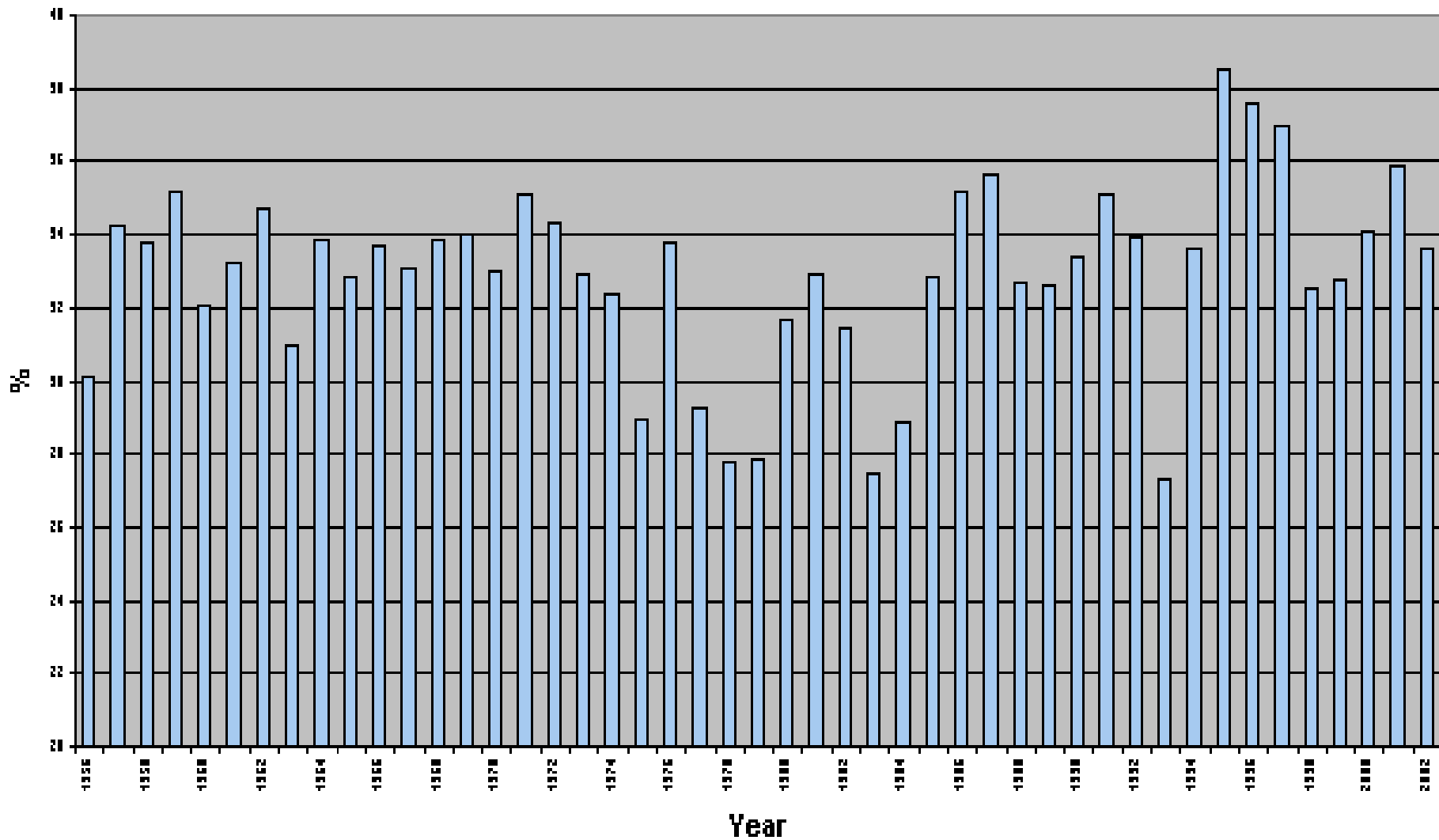


Figure 2. Percentage of constitutional judges elected by the magistracy per sentence

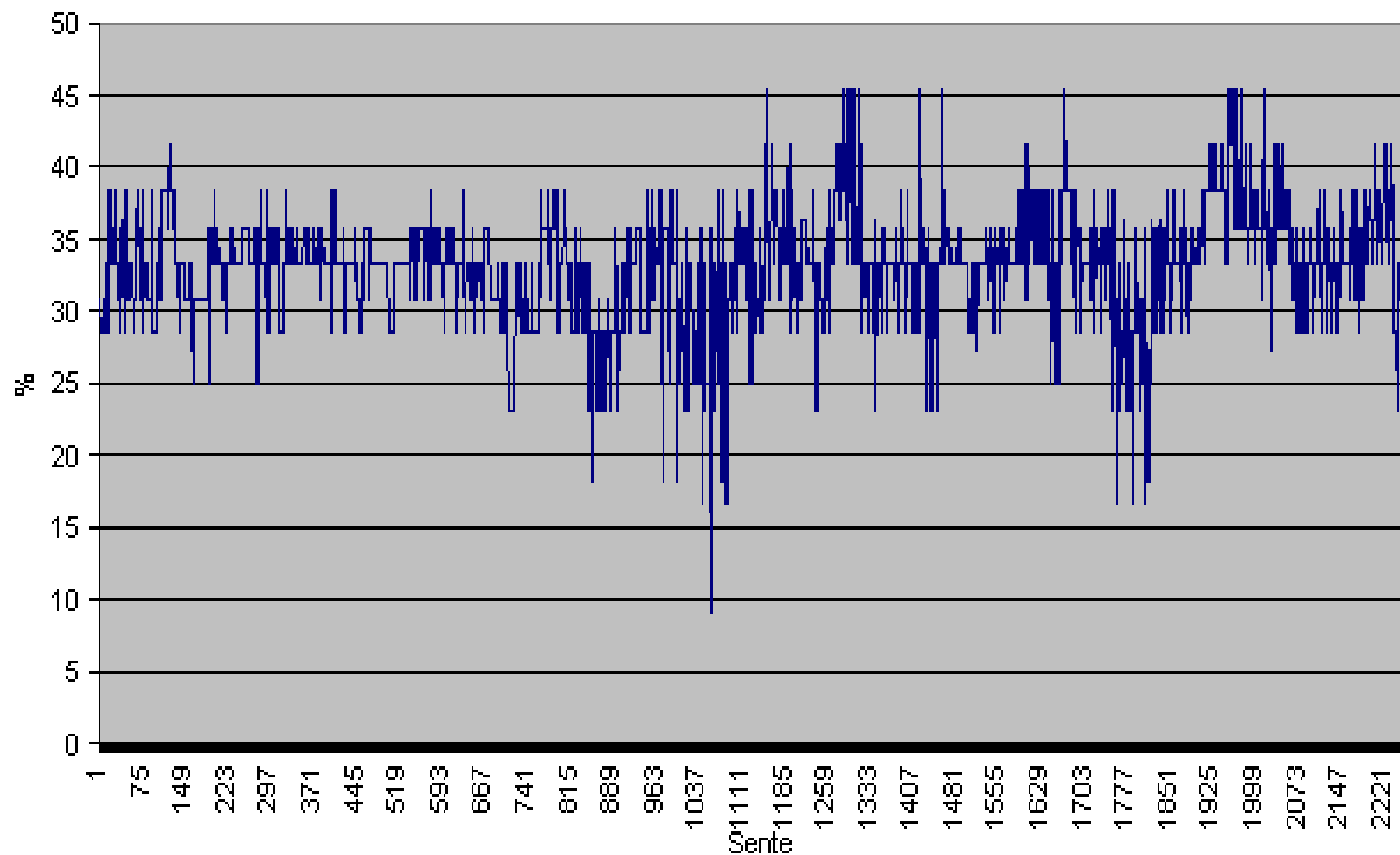
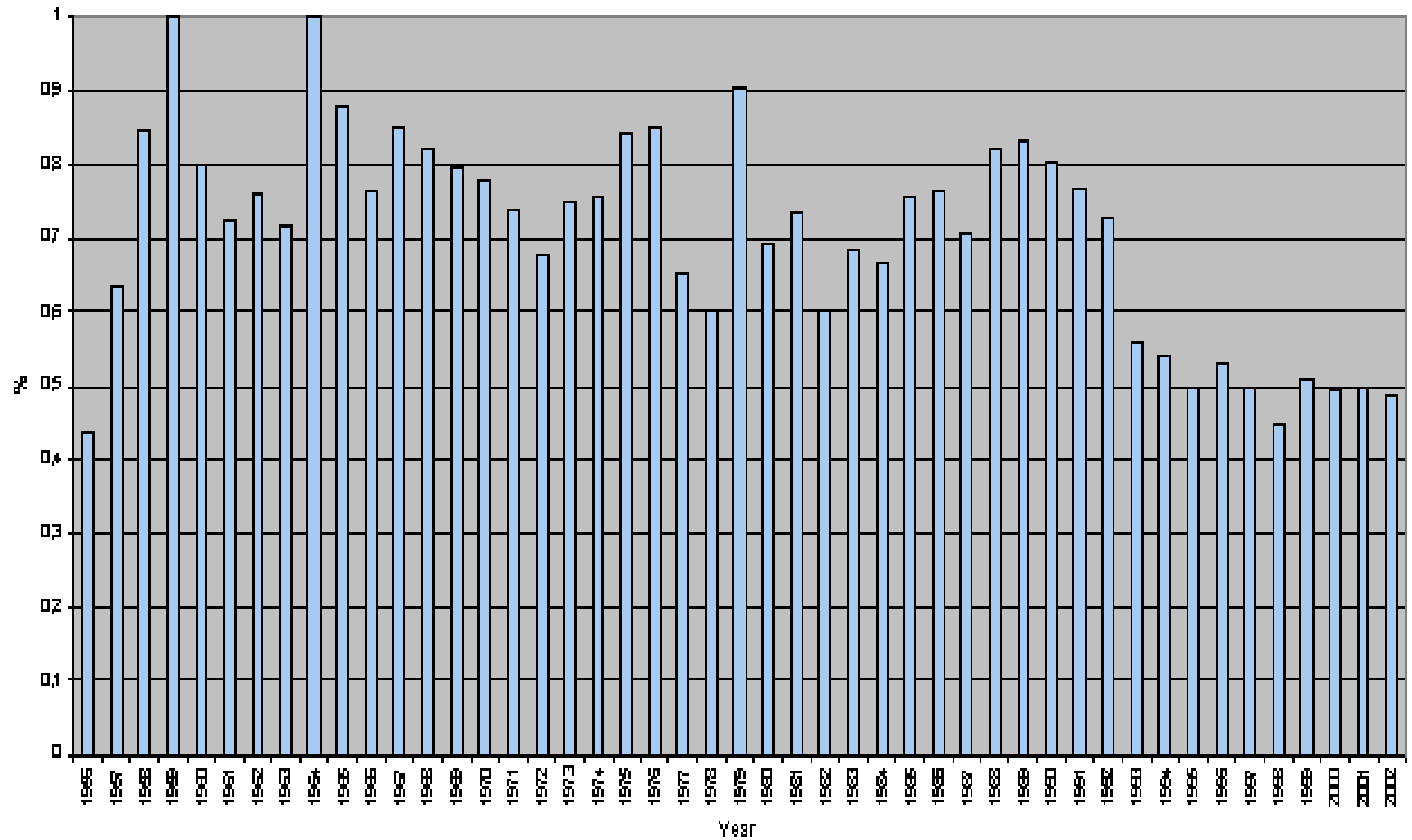


Figure 3. Percentage of sentences of constitutional illegitimacy per year



Covariates and expected signs

| Regressor | Theory | Sign |
|------------------|---------------|-------------|
| ILLSENT(-1) | Continuity | + |
| TIMELP | Landes&Posner | + |
| HGOV | Tsebelis | + |
| SHAREMAG | PSF | + |
| SHAREPRES | PSF | NS |
| SHAREPARL | PSF | NS |
| AGE | PSF | + |
| SECREP | Data | +/- |

Multinomial logit estimates

TABLE II. Multinomial logit estimates of equation (1)

Dependent variable: S_{jt}

| Variable | Model 1 | | Model 2 | | Model 3 | | Model 1 | | Model 2 | | Model 3 | |
|----------------|-----------------------|-----------------------|-----------------------|-----------------|-----------------------|-----------------------|-----------------------|-----------------|-----------------------|-----------------------|-----------------------|-----------------|
| | Coefficient | <i>p</i> -value | Coefficient | <i>p</i> -value | Coefficient | <i>p</i> -value | Coefficient | <i>p</i> -value | Coefficient | <i>p</i> -value | Coefficient | <i>p</i> -value |
| TIMELP | -2.18 ⁻⁰⁰⁶ | 0.00 | -7.47 ⁻⁰⁰⁷ | 0.02 | -2.19 ⁻⁰⁰⁶ | 0.00 | -7.50 ⁻⁰⁰⁷ | 0.02 | -2.18 ⁻⁰⁰⁶ | 0.00 | -7.21 ⁻⁰⁰⁷ | 0.02 |
| SHAREMAG | 0.002 | 0.87 | 0.02 | 0.05 | | | | | | | | |
| SHAREPRES | | | | | -0.02 | 1.17 | 0.01 | 0.28 | | | | |
| SHAREPARL | | | | | | | | | 0.02 | 0.12 | 0.008 | 0.47 |
| HGOV | 0.69 | 0.07 | 0.36 | 0.33 | 0.90 | 0.02 | 0.45 | 0.23 | 0.80 | 0.03 | 0.70 | 0.04 |
| AGE | 0.003 | 0.67 | 0.02 | 0.00 | 0.01 | 0.08 | 0.02 | 0.00 | 0.003 | 0.39 | 0.03 | 0.00 |
| SECREP | 2.25 | 0.00 | -1.41 | 0.00 | 2.28 | 0.00 | -1.39 | 0.00 | 2.25 | 0.00 | -1.40 | 0.00 |
| Log likelihood | | -1663.2 | | | | -1661.1 | | | | -1665.3 | | |
| χ^2 | | 1654.7 ^{***} | | | | 1658.8 ^{***} | | | | 1650.5 ^{***} | | |

Note: *** stands for 1% level of significance, while ** indicate a 5% significance level.

Fiorino et al. (2007) results

- Elements of structural independence increase the independence of the Court, in particular:
 - presence of justices elected by the magistracy
 - age of justices (as a proxy for future career concerns)
- → Independence of ICC must not be considered as a constant characteristic, but as feature conditional on the above determinants

Application to CR

- 5 justices elected from parliamentary will be divided in 2 sets of VPs
 - 3 from elected Chamber of Deputies
 - 2 from Senate (responsive to regional councils and municipalities)
- What will be the structural independence of the two Senate justices?
 - Possibly more independent than current justices from entire Parliament → ICC's structural independence should increase

The positive referendum - 1

- Art 11c of the dl 12/4/2016 (aka ddl Boschi) states:
- «In order to enhance the participation of citizens to the decision of public policies, the constitutional law determines the conditions and effects of positive and consultative popular referenda, as well as of other methods of consultation, also of social groups. The means of implementation are decided by a law to be approved by both Chambers»
- → scope of direct democracy increases

The positive referendum - 2

- Little discussed, but with potentially quite important consequences
- Positive referendum is, first and foremost, a sign of trust into voters
- It increases the number of legislative VPs.
Predictions:
 - should increase policy stability (?)
 - should decrease the agenda setting power of each VP
- Constraint on the discretionary power of agents of representative democracy

Effects on accountability (among other effects)

- Based on Eichenberger et al. (2013) and Matsusaka (2014), as well as Padovano and Portman (forthcoming)
- Under sufficient diffusion of info, combination of positive referendum and deputies' voting choices provides a tool for verifying their accountability
- Eichenberger et al. (2013) show that smaller districts increase the probability that representatives vote according to local MV's preferences as expressed in referendum, and not according to lobbies' demands
- Using a Swiss dataset, Padovano and Portmann (forthcoming) show that alignment actually increase representatives chances of re-election → disciplining device