NEW COURTS FOR NEW DEMOCRACIES: REINVENTING COURTS AND CONSTITUTIONS IN LATIN AMERICA SINCE 1975

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Abstract

Since the second wave of democratization, scholars have documented the expansion of judicial power and the consequent judicialization of politics. Despite scholarly attention to the appearance of new and reformed courts, we do not yet have a crucial first step in evaluating judicial empowerment: a comprehensive and systematic mapping of the judicial institutions that formally structure the way in which courts influence and are influenced by their political environments. Without a good understanding of the relevant dimensions of judicial institutional design we cannot understand the political forces that shape the design of particularly consequential (or inconsequential) courts; nor can we understand the ways in which these formal institutional features shape judicial behavior. We offer an original and comprehensive framework that includes three dimensions—*ex ante and ex post autonomy*, and *authority*. Using this conceptual framework, which can be applied to any court around the world, we offer a detailed and dynamic survey of judicial institutional arrangements in Latin America over the past 35 years. The framework's application yields important insights that suggest interesting judgments about the role of courts as political agents and constitutions as political agendas. We find that constitutional designers appear to defy the universal judicial empowerment narrative in important and systematic ways, as revealed in patterns of judicial structure that suggest a logic of tradeoffs among competing goals of ex ante and ex post autonomy, and authority, with potentially important implications for our understanding of judicial politics.

Introduction

Over the last quarter century, scholars have documented the expansion of judicial power and the consequent judicialization of politics (Tate 1997; Stone Sweet 1999; Tate and Vallinder 1995a). Country after country, especially among emerging democracies, has abandoned parliamentary supremacy, establishing a constitutional or supreme court equipped with the power to review acts of the legislature and executive. Countries that already had courts with the power of judicial review have reformed them, ostensibly with the goal of creating more independence, more rights protection, more rule of law, more democracy, or all of these combined. These courts, the literature suggests, are increasingly consequential: now, ever more powerful courts have begun to protect a broadening array of human rights (Gauri and Brinks 2008), promote political stability (Cross 1999), and contribute to social order and economic development (Weingast 2008). A review of the literature suggests a teleological, linear narrative in which courts are moving toward greater political relevance, although some may temporarily lag.

Accompanying this empirical trend, the labels used for judicial empowerment have proliferated, ranging from the relatively tame "judicialization of politics" (Tate and Vallinder 1995) to the more alarming "juristocracy" (Hirschl 2004). Add to this a dizzying array of definitions and measures for judicial power, and it is easy to understand Ginsburg's observation that today, despite a wealth of terminology and empirical examples, we do not yet have agreement on the concept or measurement of judicial power (Ginsburg 2008: 94). Power is a subtle and slippery concept to measure, but we do not yet have the crucial first step in evaluating *de jure* judicial empowerment: a conceptually sound, theoretically informed, comprehensive and systematic mapping of the extraordinary diversity of judicial institutional arrangements that

formally structure the way in which courts influence and are influenced by their political environments.

Without a good understanding of the relevant dimensions of judicial institutional design we cannot understand the political forces that shape the design of particularly consequential (or inconsequential) courts. Moreover, without a good measure of institutional design – one that is theoretically informed, conceptually precise and systematically carried out – we cannot understand the ways in which formal institutional features shape judicial behavior. We must have an adequate understanding of the relevant parameters of judicial structure before we attempt to predict their emergence or explain their effects. Our own attempt to offer such a measure has required us to rethink what we mean by judicial independence and judicial power, and it ended by upsetting conventional linear narratives of judicial empowerment, especially for Latin America. The result is a much more nuanced description of what has happened to constitutional courts over the last three or four decades, one that is strongly evocative of recognizable, but as yet understudied, trends in the political deployment of law and constitutions.

The framework we develop below advances our collective knowledge of the rules that structure judicial power by providing scholars with a conceptual map to better understand the full range of relevant parameters for judicial power and finer measures along three dimensions: two that are relevant to a court's impartiality and autonomy, and one that relates to the scope of its authority. In the last section of this paper, we demonstrate the utility of this enhanced analytic leverage to assess judicial design "under the hood" by showing how constitutional designers defy the universal judicial empowerment narrative in important and systematic ways. We find, for instance, that they often palliate the effect of increased judicial authority by maintaining political mechanisms of ex post control. We find patterns of design that suggest a logic of tradeoffs

among competing goals of ex ante autonomy, authority, and ex post autonomy with potentially important implications for our understanding of judicial behavior. Most importantly, we find that the three-dimensional approach can illuminate recognizable trends in the politicization and use of constitutional politics to advance particular agendas.

Our framework measures formal judicial power along three dimensions: judicial *ex ante autonomy*, *ex post autonomy*, and *scope of authority.* The first two dimensions highlight the potential institutional points of entry for political pressure to influence judicial behavior: mechanisms that make it easy to select and appoint ideological allies (ex ante autonomy) and mechanisms that facilitate the manipulation of incentives to induce strategic behavior by judges regardless of their sincere ideological orientation (ex post autonomy). We will address each of these in more detail below. First, however, we begin with a conceptual discussion of formal judicial power: what it is, and what it is not. We then distinguish our conceptual scheme from existing efforts to systematically characterize judicial institutional design, and outline our three dimensions of judicial power and their components. To illustrate the insights this framework offers, we apply it to formal changes to the design of high courts in twenty-one countries in Latin America from 1975 to the present. We conclude with a discussion of the implications of the framework for the study of judicial politics and institutional design generally.

Conceptualizing Judicial Power

First, a clarification. Our focus is on institutional design. The literature that addresses the sources of *de facto* judicial power (implicitly or explicitly) tends to emphasize one or more of three sets of variables, in addition to institutional ones. First, the distribution of political preferences and power in a court's environment is thought to influence the degree to which a court can (and is willing to) challenge powerful interests. The logic is that, as political

fragmentation increases, it becomes more difficult for other political actors to mount attacks on a court either by overturning its decisions or by punishing its members (Epstein and Knight 1998; Bill Chavez 2004a, 2004b; Epstein et al. 2001). Second, scholars point to societal variables, such as the importance of legal mobilization efforts by non-governmental actors like NGOs and legal organizations (Epp 2009, 1998; Gauri and Brinks 2008) and the lay public through mass public opinion (Staton 2010; Staton 2004; Vanberg 2001; Gibson et al. 1998) that can provide support for the exercise of judicial power and supplement the court's ability to strategically exploit its political environment. Third, many have argued that judges' policy preferences and ideological orientations toward the appropriate exercise of judicial power influence their willingness to take advantage of the tools they are equipped with and the strategic openings afforded by their political environments, particularly in cases where the law is indeterminate or conflicting (Segal and Spaeth 2002). Thus, the literature suggests that whether courts will actually exercise their institutional power is contingent upon at least three variables that are beyond the scope of the present analysis.

At the same time, close examination of those other explanations suggests that the influence of contextual variables is mediated in important respects by institutional ones. Judicial institutional design can minimize or magnify the ability of other political actors to punish defiant justices, for example. The extent to which social actors are granted standing to assert constitutional claims, and the nature of the claims that can be made informs the extent to which social groups will see the court as an ally and mobilize to protect it. And appointment mechanisms crucially condition the extent to which judicial preferences can be controlled by dominant political actors. Regardless of one's ultimate theoretical inclination, therefore, a more systematic analysis of judicial design is a valuable addition to our collective toolkit.

What do we mean, then, by (de jure) judicial power? Since our concern is with institutional design, our conception of power refers to the capacity for action conferred by formal institutional design, as opposed to a conception of power that refers to *observed influence*, or the result of power *exercised*.[1] Our framework mirrors a behavioral definition of judicial power. Ginsburg (2003: 252) says judicial power is the "*independent* input of a court in producing politically *significant* outcomes." In purely institutional terms, then, *de jure* judicial power is the institutional capacity of a court to have relatively autonomous input on a broad range of politically significant issues, on behalf of a broad range of actors.[2]

This definition needs to be unpacked, however. In order to function as consequential actors in a dynamic political environment, courts (or, more precisely, the judges who sit on them) must be capable of (a) developing and (b) expressing preferences that are substantially autonomous from those of a single dominant outside actor; and (c) must have a broad scope of authority, authorized to rule on claims regarding the most important issues of the day, on behalf of anyone affected by a public decision. Highly efficient courts with a broad scope of authority may be powerful instruments of repression, as Stalin's courts probably were, but without substantial autonomy they are fairly transparent instruments of other interests. Similarly, highly autonomous courts may remain completely irrelevant if their authority is limited to the mundane and inconsequential, if they are paralyzed by supermajority decision rules, or if they can be

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[1] See Rios-Figueroa and Staton (2008) for a discussion of the distinction between de jure versus de facto measures of judicial independence and power and the dangers of conflating the two rather than testing their relationship empirically. Note, however, that in their discussion, judicial independence refers to what we label "autonomy" and judicial power refers to "de facto power" or "influence". See also Feld and Voigt (2003). See also Kapiszewski and Taylor (2008: 750) for a discussion of a similar distinction: "potential" versus "active" power.

[2] Ginsburg's formulation includes a third prong with a compliance component, a consideration that we consider essential to any measure of de facto power, but outside the scope of a de jure analysis. While designers can seek to incorporate measures to promote compliance – contempt powers, or blanket provisions requiring compliance by political actors – the more important of these are captured in our scope of authority measure (e.g., provisions making high court decisions binding on all political actors), and we have not found much variation on these issues in constitutional provisions addressing high court design.

activated only by, say, a representative of the executive. A court with great autonomy but little authority is unlikely to contribute consequentially to the political process (it may be distinct but not influential), just as a court with high authority but little autonomy is unlikely to contribute as a consequential political force (it may be influential but not distinct). Our analysis of judicial design, therefore, tallies the mechanisms that might affect each of these three requirements for truly consequential courts.

Again, merely having the institutional capacity does not guarantee the outcome; and informal institutions may sometimes be crucial in filling out the institutional analysis. Behavioral outcomes are a conditional function of their social and political contexts; similar institutions can produce different outcomes and different institutional solutions can lead to the same outcome (Brinks 2008: 256-59; Locke and Thelen 1995). Our coding and aggregation only capture the primary formal institutional mechanisms that might affect judicial power. At the same time, they offer a unified framework to describe courts over time and across countries, provide an essential input for analyses of the origins of judicial design, and constitute an important starting point to uncover exactly how and when and which institutions matter to the ultimate behavioral outcome.

Re-thinking judicial independence: The traditional, indeed obligatory, independent variable to describe judiciaries is something labeled "independence," a concept that has led to interminable debates and endless variations on the definition. We have opted instead for the less baggage-laden label "autonomy" and adopted a conceptualization that ties it to the ultimate value that judicial independence is meant to secure: impartiality. Moreover, we have split our autonomy variable into two dimensions, each with deep theoretical roots. These two dimensions address the two basic concerns of principals who decide to empower an agent: ex ante controls

seek to minimize the risk of adverse selection, while ex post controls seek to address moral hazard, once the agent is appointed. Not coincidentally, the same two dimensions capture the two dominant strands in the classic judicial behavior literature: ex ante controls offer ways to select judges with particular attitudes and preferences (cf., Dahl 1957; Graber 1993), while ex post controls seek to induce strategic behavior on the part of judges, to reduce the agency costs of courts (cf., Epstein and Knight 1998).

Ex ante and ex post autonomy are conceptually related: we define ex ante autonomy as the extent to which a particular court is free from control by an identifiable faction or interest outside the court in the process of *appointment*, and we define ex post autonomy as the extent to which a particular court is free from pressures by an identifiable faction or interest outside the court *after* the judges have been seated. These definitions speak to the notion that courts exist to serve as neutral, impartial third parties to resolve disputes (Shapiro 1981; Stone Sweet 1999) – the more judges are free from dependence on or control by any single individual, institution or interest, the more likely they are to be impartial, especially in disputes involving that interest. They approximate the intuition that independence refers to a situation in which judges can rule based on their own notion of what the law requires. In contrast to many definitions of independence, however, this definition captures the idea that courts should act "without fear or favor," but does not unrealistically require courts to be completely unmoored from their political and social surroundings.[3]

We make a conscious decision to require not the absence of control but the absence of *unilateral* control. Our approach is consistent with classic views of judicial impartiality but does not depend on some extra-political standard of impartiality. As Holmes notes, in real politics "the

[3] See also Brinks (2005) for a discussion of independence that ties the concept to impartiality.

balance of many partialities is the closest we can come to impartiality" (Holmes 2003: 50). This is the same logic to which Madison appeals, in Federalist 51 (Hamilton et al. 1961: 323-24), as a safeguard against the tyranny of the majority. He calls not for the creation of "an interest independent of the majority" but rather for a government that is responsive to "so many parts, interests and classes of citizens" that oppression of any one part becomes unlikely. In the same way, courts subject to multiple overlapping influences are less likely to be biased in favor of (or against) any one partisan faction; they are less likely to be subject to fear of punishment by any one faction; they are, in short, more likely to judge "without fear or favor." They may not be entirely free to "reflect their preferences in their decisions without facing retaliation measures" (Iaryczower, Spiller, and Tommasi 2002: 699), but at least retaliation will have to be based on a broad-based consensus that they have exceeded the proper bounds of conduct for a judge, and the cooperation of multiple actors.

Judicial authority: Still, the most autonomous and unaccountable court in the world will not be an influential political force if it is difficult to access or lacks the tools to act decisively on a wide range of issues. The scope of authority dimension—which refers to the nature and scope of the court's potential sphere of action—captures this component of institutional power. In contrast to some other approaches, we have kept the authority dimension (conceptually related to what Ríos Figueroa and Staton (2012) call "influence") separate from the autonomy dimension. We define authority as a function of those elements in a court's design that determine its ability to intervene decisively in a broad range of politically significant disputes on behalf of a broad range of actors. Institutional provisions that shape a court's jurisdiction and its ancillary powers beyond deciding cases, and that regulate the nature, timing and efficiency of its interaction with

other political actors, all contribute to the scope of a court's formal authority. We will describe all three dimensions in more detail in the section on operationalization, which follows.

Data and Methods

To apply this conceptual framework, we developed specific indicators and applied our coding scheme to all constitutional events (all new constitutions and all constitutional amendments) in force in Latin America from 1975 to 2009.[4] We employed research assistants to code, and then checked their coding ourselves against the text of the constitutions in question. As a separate test of the validity of our coding, where the variables overlapped we compared our data to data provided by the Comparative Constitutions Project, and resolved any discrepancies by rechecking the relevant constitutional text.

Indicators of Ex Ante and Ex Post Autonomy. Given our conceptual model, we must develop indicators of both the *ex ante* mechanism(s) by which the preferences on the court are chosen and the *ex post* mechanism(s) by which the sincere expression of preferences on the court are constrained (Table A1, found in the appendix, summarizes these indicators). We do not aggregate these dimensions, in effect remaining agnostic about whether they are jointly necessary or individually sufficient, whether sincere preferences or strategic calculations dominate judicial behavior, and we give them different labels for clarity.

The key logic of both our indicators for autonomy is that more veto players in the process of appointment or discipline increase autonomy. Conversely, the greater the influence of any single interest on the *ex ante* and *ex post* mechanisms of control of the court, the lower the court's potential institutional autonomy from outside actors – either in its preferences, or in its

[4] Wherever possible we used the same variables developed by the Comparative Constitutions Project, led by Tom Ginsburg and Zach Elkins, but supplemented those as needed for our coding. For more details on this project, please see www.comparativeconstitutionsproject.org.

operation once in place. As a result, we score mechanisms of selection and removal that increase and diversify participation and representation in the process as positive for autonomy, on the theory that they produce more impartial justices who are less tied to the preferences of any single powerful actor, and more free to follow their preferences.[5] We also increase the score if the decision rule for appointments and removals specifies a super-majority requirement.

This is perhaps most intuitive in the case of *ex post* control. The presence of more veto players who must coordinate in order to punish or reward judges makes it harder to coordinate in order to affect a judge's incentive structure, leaving the judge more free to express his or her sincere preferences. But a similar logic in the appointment process should also lead to greater impartiality in the ex ante preferences of the judges. The presence of multiple veto players in the appointment process should tend to narrow and center the range of possible outcomes, eliminating unqualified, out-of-the-mainstream or transparently biased candidates, and leaving only those who fit broadly shared definitions of what it means to be an acceptable justice with acceptable preferences. In short, increasing the number of veto players and the level of consensus required for appointment should produce centrist, technically qualified justices, in the case of *ex ante* mechanisms, and should require consensually aberrant behavior before punishing justices, in the *ex post* case.[6]

We also add points to the score if some part of the appointment or disciplinary process is entrusted to actors outside the elected branches, such as a judicial commission with participation by the bench and bar and civil society. Again, the theory is that this will give the process some

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[5] See also Ginsburg (2002) for a brief discussion of this logic.

[6] It is possible that multiple veto players will develop a log-rolling strategy, trading appointments of equally but opposing partisan justices. The median justice theorem would nevertheless predict a moderate court under those conditions (cites to Mueller on Moderation Hypothesis). Thus, whether through mutual checks in the appointment process or through checks in negotiating decisions on the court, including more actors in the appointment process should produce a more impartial court.

distance from dominant political forces. In summary, a count of the number of actors involved in the nomination and confirmation process, plus an additional bump for the participation of extra-political actors in that process produces the score for ex ante autonomy.

Thoroughly evaluating how insulated sitting judges are from outside actors, however, requires us to consider several factors in addition to the formal disciplinary process. The first, of course, is the length of judicial tenure. On this point, we have two competing theoretical expectations to consider. Judicial life terms are frequently considered necessary for judicial autonomy because they free judges from the need to curry favor with outside actors. Appointment for life conditional only on good behavior, Hamilton famously wrote, "is the best expedient that can be devised in any government to secure a steady, upright and impartial administration of the laws" (Federalist No.78). Nevertheless, there is some evidence (from India or Colombia, for example) that shorter terms can also generate autonomous behavior by motivating justices to maximize their limited time on the bench, either to enshrine their preferences in law, or to prepare for a public position after their term expires. Similarly, Helmke and Staton (2011) show that shorter terms may free judges to act sincerely even in the face of a threatened job loss, by reducing the value of the future benefits associated with staying in one's seat. In addition, the possibility of reappointment radically changes the impact of short terms, motivating justices to please those who determine whether or not they keep their job.

Since we are coding institutional features according to the expectations of judicial designers, and since the conventional wisdom appears to be that longer terms are conducive to autonomy, we code term length as positive for ex post autonomy. Life terms with no retirement age score highest, while short terms with reappointment are coded as most substantially *decreasing* ex post autonomy. Short non-renewable terms moderately decrease ex post autonomy

scores (because they create incentives to please powerful people in order to secure post-term jobs). By the same logic, we code a young mandatory retirement age as negative for ex post autonomy, as judges looking forward to a second career are more likely to curry favor with powerful outside actors who might be future employers. Finally, we code courts as less autonomous depending on the general ease of removal, including the legal conditions under which a judge may be removed, the nature and number of actors involved in the process, and the level of consensus required to remove a judge.

Finally, we consider a number of ways – legal and extralegal – in which political actors have historically sought to pressure judges into rendering favorable decisions. Court packing, jurisdiction stripping and monetary pressures on the court and the judges are common schemes, but some constitutions make it more difficult to generate these pressures – a constitutional provision fixing the number of judges reduces the threat of court-packing schemes, fixed jurisdictional boundaries defuse the threat of taking away the court's decision-making power over certain issues, salary protection shields judges from monetary pressures, and budgetary autonomy frees the court from the need to curry favor with executives and legislatures every time a new budget is being debated. Where these controls are left to ordinary law or the discretion of other actors, they are open to manipulation. We increase the score for ex post autonomy for each one of these parameters that is constitutionally protected. Table A1, in the Appendix, summarizes all these indicators and their effect on the final score.

Scope of Authority indicators. Four basic elements go into our score on scope of authority. First, we examine provisions that shape a court's jurisdictional reach – either by giving the court broad jurisdictional prerogatives, by establishing substantive, judicially enforceable rights, or by giving the court control over non-traditional issues like elections and impeachments.

Second, we examine the rules that define those actors with standing to bring claims before the court – in essence, whether standing is (a) limited to majoritarian actors like the executive or leaders of the legislature, as was common in early centralized constitutional courts, or (b) extended also to minoritarian but still elite actors, like a minority of the Parliament, or (c) extended to all inhabitants, as is common with systems of concrete judicial review and some more recent abstract systems. The broader the standing, the easier it will be for the court to act on behalf of a broad range of actors. Third, we gauge whether the constitution gives a court's decisions narrow, *inter partes*, effects or broadly decisive, broadly effective decisions – decisions with *erga omnes* effects, or with binding precedential authority. A court with the latter can more efficiently affect public policy, thus gaining in authority. Finally, we look at the internal decision rules of the court. Courts that can invalidate laws by a simple majority vote can more easily render decisions than courts that must act by a vote of two thirds or all of their members. We collect all these elements into a measure of a court's scope of authority (Table 2, found in the appendix, summarizes these indicators).

If a court has no judicial review, we multiply its total score by 0.5 since its capacity to control the constitutionality of the actions of the other two branches is not constitutionally protected. A greater reduction is not justified, since most courts (like that of the United States or Argentina) have managed to exercise constitutional control even without an explicit provision to that effect. Moreover, especially in Latin America, much of the control over government activity that would be classified as constitutional in the US is often done through administrative law in specialized courts (the *contencioso administrativo* jurisdictions) that typically are subject to a final appeal to the apex court. But a lesser reduction is also not justified, since the absence of such a provision reflects at least ambivalence over judicial review, as exemplified in the debates

leading up to the drafting and adoption of the US constitution, and what we are primarily concerned with is the intent of the designers, not the ultimate performance of the court.

Although the particular structures that constitute each dimension may vary, our measures and operationalization are applicable and fairly exhaustive across all the designs we have seen thus far. The scope of authority variable has a slightly greater range, a higher mean and greater variance, but is still roughly comparable to the other two.

Table 1: Descriptive statistics for key variables

Variable	N	Mean	Std. Dev.	Min	Max
Ex ante	735	4.01	1.94	0	10
Ex post	735	4.83	2.14	0	10
Authority	735	6.22	3.01	0	12

Notably, the three dimensions do not run together. As we will see below, the measures tracking the autonomy of the appointment process and scope of authority both increase over nearly the entire range of thirty-five years and follow each other relatively closely, while the measure of autonomy on the bench appears independent of either trend and reflects nearly a flat slope over the course of the period. As a result, the measures of authority and ex ante autonomy are positively (but very moderately) correlated while ex post autonomy is negatively correlated with both authority and ex ante autonomy.

Table 2: Correlation among key variables (significance level)

	exante	expost	authority
exante	1		
expost	-0.22 (0.0009)	1	
authority	0.19 (0.0037)	-0.22 (0.0010)	1

Existing Accounts of Formal Judicial Power

Despite an increasing awareness of the importance of judiciaries, particularly in new and developing democracies, most analyses of judicial institutional design tend to be either relatively isolated (i.e. single-case studies) or under-inclusive (i.e. they include only a single dimension—usually independence—at the expense of one or the other autonomy and authority dimensions,[7] or tend to focus on one or two highly visible features rather than analyzing the whole package of institutional arrangements). Some studies underappreciate altogether the contribution of formal judicial institutions to the predominant theories of judicial behavior. It is in part institutional design that allows judges to follow their own political preferences; it is only toward the end of their book that Segal and Spaeth acknowledge, without any formal institutional analysis, that "the federal judiciary was designed to be independent, so we should not be surprised that it in fact is" (2002: 349). And the strategic theories, of course, explicitly incorporate the institutional context into their accounts; it is in part the design of the particular institution that determines whose preferences judges have to take into consideration (Epstein and Knight 1998). This suggests that institutional accounts are always at least part of the story behind the increase in observed judicial power.

Several insightful single-country case studies trace the origins of conservative or deferential judicial behavior to one or more institutional mechanisms—such as insular mechanisms of appointment, promotion, replacement, or removal—that entrench a durable ideological bias in favor of the hegemonic ruling party, maintain a conservative ideological orientation, or allow relatively efficient executive control of the judiciary (e.g. Law 2009,

[7] For evidence on this point, see Pérez-Liñán and Castagnola (2009) or Kapiszewski and Taylor (2008). For examples of single-country studies of the effect of institutional design on judicial behavior, see Law (2009) on Japan, Hilbink (2007) on Chile, or Chavez (2004) on Argentina.

Hilbink 2003, Pérez-Liñán and Castagnola 2009). Others identify institutional features that make all the difference in a particular case, either because they fail to insulate a court from political pressure—e.g. insecurity of tenure (Helmke 2000)—or because they equip the court to broadly influence law and policy—e.g. ease of access (Wilson 2009)—or for any of a dozen relatively idiosyncratic reasons—(Law 2011 and 2009, Hilbink 2007, Ríos-Figueroa and Taylor 2006, Brinks 2005, Couso 2005, Wilson 2005, Ferreres Comella 2004).

Those studies that do offer a comparative analysis of institutional design tend to emphasize ex ante autonomy (and sometimes ex post autonomy) at the expense of authority.[8] Pérez-Liñán and Castagnola (2009), for example, present a comparative institutional measure of the relative ease of executive court packing via appointment and replacement without developing a complementary authority measure that might reflect the relative costs and benefits of packing courts with more or less authority. Their sole concession to the authority dimension is to posit that constitutional courts will be subject to greater pressures that non-constitutional ones. In contrast, Epstein et al (2002) explicitly, despite the title of their article, choose only variables that affect what we call ex post autonomy, since they consider tenure insecurity the true indicator of a court's potential agency costs. A comprehensive measure of a court's scope of authority, akin perhaps, to analyses of presidential powers (e.g., Shugart and Carey 1992), is long overdue.

Few studies offer a systematic and comprehensive effort to characterize judicial institutional design, for a single case or comparatively, along two or three dimensions (but see Brinks 2011, who applies an early version of the conceptual framework developed below, to understand the work of the Brazilian Supremo Tribunal Federal).[9] Many analyses of courts

[8] A notable exception to this is Ginsburg and Elkins' (2009) analysis of the ancillary powers of courts.

[9] See also Ríos Figueroa (2011) for similar attention to the autonomy/authority distinction and an entirely institutional framework to assess levels of independence and power (akin to our autonomy and authority) over time,

conflate de jure measures of "independence" with de facto measures of "influence," making it difficult to evaluate the contribution of formal features relative to other factors,[10] and even those that do measure them separately tend to collapse them in their analyses or fail to consider how different elements of judicial design might affect each other (e.g. Navia and Ríos Figueroa 2005). In sum, what is missing from the literature is a comprehensive and comparative account, valid across counties and over time, of all the institutional features that might affect the ex ante autonomy, ex post autonomy, and authority of courts around the world. There are, however, some existing quantitative measures of judicial independence, which we compare to ours in the following section.

The relationship between our measure of institutional strength and existing quantitative measures of judicial independence.

All the measures discussed in this section have been advanced as quantitative, cross-national measures of judicial independence. We are grateful to Jeffrey Staton, who has made the data available on his website (http://userwww.service.emory.edu/~jkstato/page3/index.html) and to his collaborators, Julio Ríos Figueroa and Drew Linzer for sharing their data. The excellent review of these indicators by Ríos-Figueroa and Staton (forthcoming, 2014) demonstrates that many are meant to measure very different things.[11] Some are de facto, while others are de jure; for some, the definition of independence is tied to a notion of autonomy, while for others the definition has more to do with influence (possibly closer to what we have called authority,

but whose findings are largely consistent with the "near-universal empowerment" narrative despite country-specific variation.

[10] See for example Ríos Figueroa and Taylor (2006) who develop a framework that includes both de jure and de facto indicators to explain variation in policy outcomes in Brazil and Mexico.

[11] Given how exhaustive their analysis is, we will not repeat it here, but refer the reader to their paper for fuller descriptions of these variables. Here, we give only as much information as is required to evaluate their relationship to our measure. Full references and sources for these variables is found in Appendix B.

although it is meant to include actual compliance). Finally, some are based on expert surveys (whether in the field or performed by staff), while others are based on observed behavior.

As Ríos Figueroa and Staton point out, none of the variables directly measure the behavioral independence of judges. The de jure measures, like ours, measure institutional arrangements that are expected (by the researchers) to produce independent courts. The expert surveys, of course, measure outsider's perceptions of the behavior of judges. The ones that are based on State Department reports measure observations about legal outcomes – the extent to which the population of a particular country experiences rights violations, for example – that are understood to depend at least in part on judicial independence. CIM, a measure of "contract intensive money," seeks to infer judicial independence from the confidence in the security of legal agreements denoted by the use of non-cash forms of money. LJI, the measure developed by Linzer and Staton, is meant to uncover the latent variable that underlies all these other measures, and so it meant to measure the actual judicial behavior that produces all these different perceptions and behaviors.

Our variables bear some relationship to all these other variables but are not identical to any. They are closest in spirit, of course, to the de jure variables, but since our primary interest at this point is in exploring the politics of judicial design, ours are actually meant to measure the institutional arrangements that would have been expected *by constitution-makers* (implicitly or explicitly) to produce impartial/autonomous courts with a broad scope of authority. We are officially agnostic, at this point, as to whether they actually do produce such courts; unofficially, of course, we expect that institutional arrangements do bear some relationship to judicial behavior, but we are not here advancing any particular theory regarding the shape of that relationship. Still, our variables and the de jure variables are meant to measure the same thing –

institutional arrangements – and so any correspondence between the two is a function of whether we are taking into account the same institutional elements, weighting them similarly, and using a similar aggregation rule. A correspondence between our variable and the de facto variables suggests something else – a correlation at least, if not a causal relationship, between institutional arrangements and actual behavior, or reputations for behavior. In Table 3, therefore, we separate out (A) the de jure measures from (B) the de facto ones, and among the latter, (B.1) the ones that aim at autonomy from (B.2) the ones, more numerous, that look for "influence." Finally, among the "influence" variables, we distinguish among those (B.2.a) meant to capture perceptions of judicial behavior directly and (B.2.b) those that capture perceptions of (or actual) societal outcomes that are thought to depend on judicial independence.

Ríos Figueroa and Staton find that the existing de jure measures bear virtually no relationship to each other or to existing behavioral measures. Using simple correlations with our disaggregated measure of judicial design, we do find some relationship between our (de jure) measures and the other de jure ones, as well as some interesting correspondence between some of the elements of our measure and one or another of the behavioral measures. The first of these findings suggests convergent validation of our disaggregated measure, while the latter findings offer support for its construct validity.

Table 3: Comparing existing quantitative measures of judicial independence to our measures of ex ante and ex post autonomy, and authority

	exante	expost	authority	Overlapping observations
A. Institutional/**de jure** measures				
Feld & Voigt de jure	0.14	-0.10	0.37	18
Keith	0.28*	-0.10*	0.20*	397
La Porta, et al.	0.21	-0.10	0.26	12
B. Behavioral measures				
1) Measure aimed at **autonomy**				
Howard & Carey (SD)	-0.03	0.01	0.13	168

2) Measures aimed at **influence**				
(a) Reputation-based measures (expert survey or staff coding):				
Bertelsman T Index	-0.004	0.18	-0.03	38
Feld & Voigt de facto	-0.04	0.37	0.09	15
Fraser (GCR)	-0.10	0.18	-0.06	114
Law & order (PRS)	-0.06	0.06	0.18*	523
Polity (xconst2)	0.22*	-0.07	0.37*	662
Henisz	-0.11*	0.04	0.13*	523
(b) Behavior-based measures & latent measure				
Tate and Keith[12] (SD)	-0.09	0.20*	0.06	315
CIRI (SD)	-0.05	0.13*	-0.06	609
CIM	0.24*	-0.02	0.44*	518
LJI	0.12*	0.05	0.34*	735

* p<.05.
SD indicates the measure is based on US State Department reports.

The results for the comparison of de jure measures support the decision to disaggregate judicial design into the three dimensions we identify. The de jure measures are all negatively correlated with our measure of ex post autonomy, and positively correlated with our measures of ex ante autonomy and authority. And in the one case in which there is a sufficiently great number of cases, the relationships in both directions are significant beyond the .05 level. In other words, courts that score higher on the existing measures of independence systematically contain elements that we consider to be detrimental to the autonomy of judges on the bench (although the relationship is substantively not very important). Indeed, this is something we expect, for theoretical reasons, as noted earlier. Designers may seek to temper the agency risk of judiciaries either by reducing adverse selection risk (limiting ex ante autonomy) or by limiting moral hazard (by reducing ex post autonomy).

Meanwhile, behavioral measures that use different sources and evaluate different behavior are associated with distinct elements in our measure. CIRI and Tate and Keith's

[12] Tate and Keith classify judiciaries into "non-independent," "somewhat independent," and "independent." For this analysis we converted that classification into a 1-3 scale, in that order.

measures, which rely on codings of State Department human rights reports, are positively and significantly associated with ex post autonomy. But the Polity measure, which looks at constraints on the executive, and CIM, which gauges how much faith society places in property rights protections, are, in simple bivariate correlations, more positively and significantly associated with ex ante autonomy and authority.[13] The relationship between our variables and Linzer and Staton's LJI is similar to the one with CIM, though somewhat attenuated. Finally, the Law and Order measure from PRS, which is meant to evaluate compliance with the law by citizens and political elites alike, is, in turn, significantly associated only with our authority measure.[14] If our coding is right, the results indicate that different combinations of judicial attributes may be associated with very different outcomes – more protection of economic rights, more protection of human rights, greater constraints on the executive, and so on.

A more qualitative historical overview of the evolution of law and politics in Latin America, to which we now turn, further supports the validity and usefulness of our disaggregated, three-dimensional measure. It offers distinct advantages over a one-dimensional measure, in that it distinguishes between very different cases that would otherwise be lumped together; and it seems to discriminate among cases in ways that align well with what we know from more qualitative analyses of those cases.

The general pattern of constitutional changes in Latin America

While American scholars might expect constitutional features to be relatively invariant over time, Latin American countries have clearly been engaged in constant constitutional

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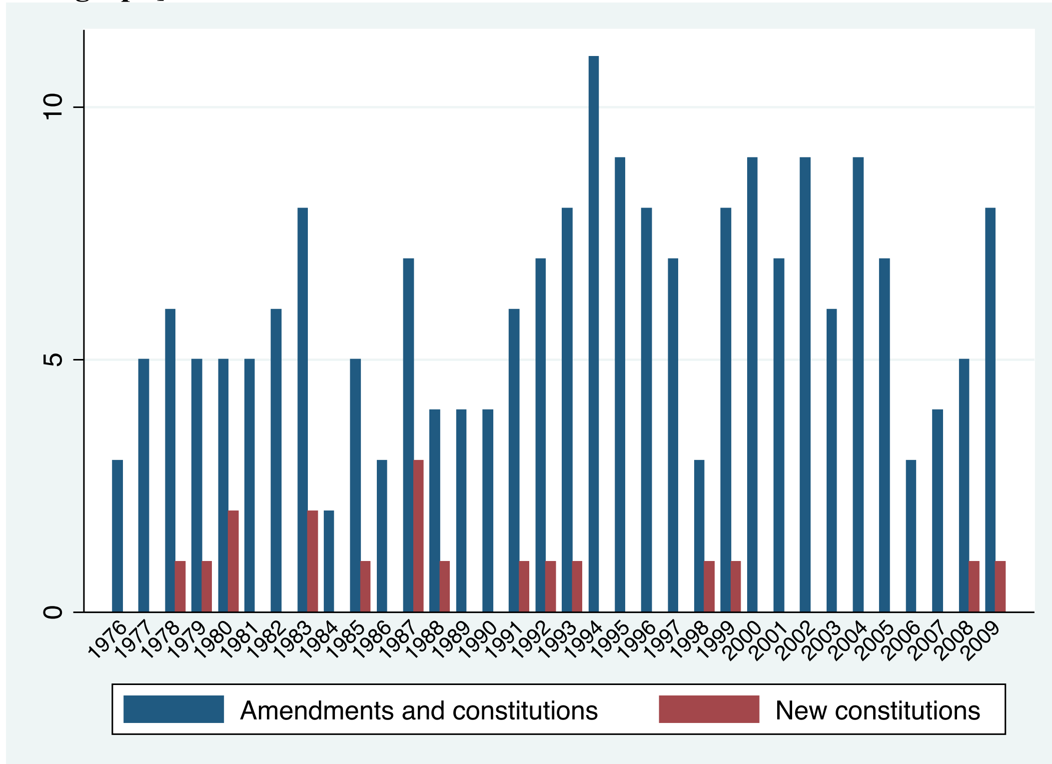
[13] Interestingly, a regression analysis (with heteroskedastic, panel corrected standard errors) using our three variables to predict CIM shows a positive and significant ($p<.01$ for all three) relationship between all three dimensions and CIM, explaining about 34% of the total variance in CIM.

[14] For Comparison, Table B1 in Appendix B shows the pairwise correlations among all the variables discussed here, for our sample.

changes over the last thirty years. Figure 1 presents the number of countries making constitutional changes, whether by amendment or by writing a new constitution, by year in all the countries of Latin America. The number of changes peaks in the mid-90s but is otherwise relatively constant, affecting about one quarter of the roughly twenty countries every year.

Figure 1: Constitutional Change by year in Latin America, 1975-2009 [replace with stacked bars graph]



As a result, on average, each Latin American country has enacted approximately ten constitutional reforms (each of which might amend dozens of articles in the constitution) in the thirty-five years we covered, or about one every three years. Brazil and Mexico top the list, with twenty-eight and thirty, respectively. Haiti has made no amendments, but has had three different constitutions in that period, as has Ecuador. Not all these changes affect judicial design, of course, but as we will see in the analysis below, these changes had a significant impact on the design of judicial institutions in the region, as well as implications for formal judicial ex ante

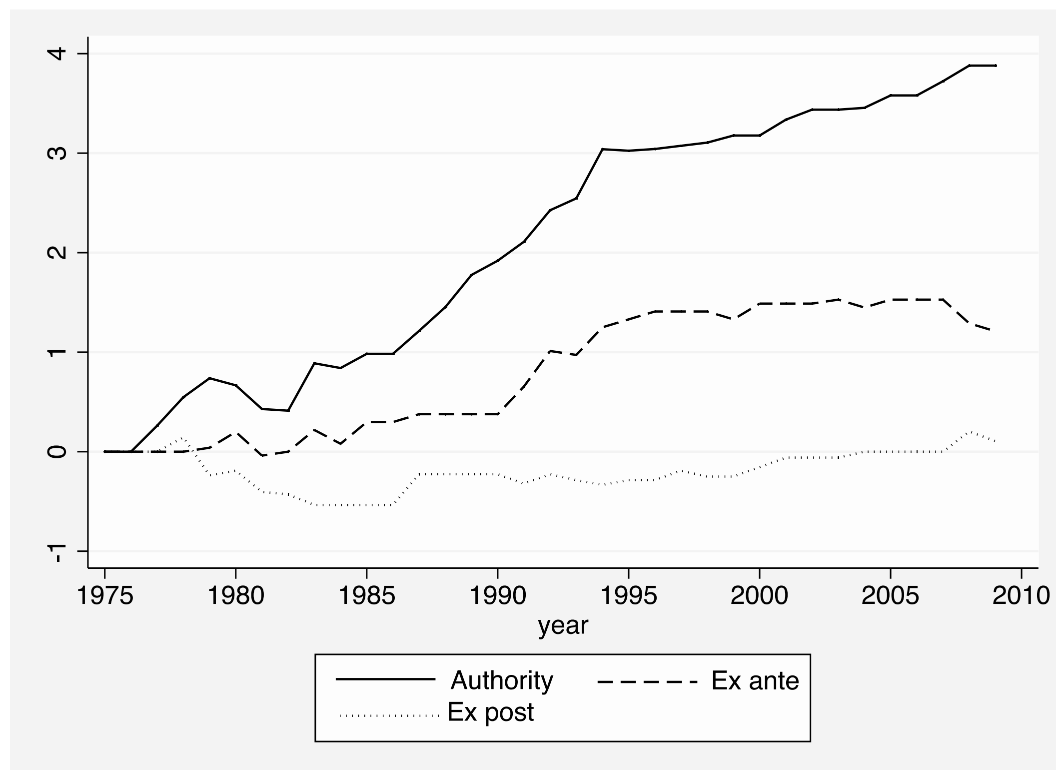
autonomy, ex post autonomy, and authority. The question is, does the general trajectory match the conventional view of linear, if uneven, empowerment and gradual convergence?

To produce Figure 2 we mean-centered the values of the three variables by subtracting the 1975 regional average for each one. This sets the 1975 regional mean as the status quo; any movement up or down simply reflects changes from that level. It should not be taken to suggest that a change of, say 2 points in authority is somehow equivalent to a change of 2 points on ex ante autonomy, except in the sense that they both reflect a positive change of similar magnitude relative to each dimension's (regional) empirical scale. The various dimensions are, in a sense, incommensurable; more importantly perhaps, at least until we can test them on a reliable measure of judicial behavior, we have no way to know whether a change of one unit on each dimension has a similar effect on a court's actual behavior and its capacity to influence its political and social context. Indeed, we don't even know whether changing the appointment mechanisms, for example, matters at all. What we do know, however, is that – assuming institutional design has something to do with institutional performance – the combination of attributes reflected in the 1975 mean for Latin America produced courts that were, by most accounts and with very limited exceptions, weak and dependent on the executive, while the combination of attributes present by 2009 produced at least a half dozen courts that are much more active and influential. Our graph describes that change.

If we look at regional averages the picture that emerges is mixed. In Figure 2 we see (a) an expansion of judicial authority, coupled with (b) increased ex ante autonomy (that is, a depoliticization of the nomination and approval process), but with (c) no noticeable increase in the insulation of judges once on the bench. Indeed the only real change in the annual average level of ex post autonomy in the region is a significant decrease in the early 1980s. In other

words, compared to thirty-five years ago, courts in Latin America on average have a broader mandate, and judges are the product of more inclusive, less partisan appointments, but are no less subject to political control once seated. Depending on the particular mix achieved in any given country, this could be a welcome model, in which widely respected judges exercise broad authority within a context of (ex post) accountability. On the other hand, given that the comparison point is the pre-1975 status quo of subordinated judges in weak courts, the lack of change in what is sometimes called (formal) independence "on the bench" suggests a somewhat mixed prognosis for the long-term future of judicial autonomy in the region.

Figure 2: Levels of ex ante autonomy, ex post autonomy, and authority, Latin America, 1975-2009



What does this mean for the dominant logic of judicial design in Latin America? It is clear that courts in Latin America have on average acquired much more authority. But if the autonomy dimensions describe who controls that authority, we need to go further. Once we

consider who it is that typically exercises ex post and ex ante control, the picture suggests an interesting shift in the political locus of judicial control. The more the number of actors in the *appointment* process is restricted, the more the process usually becomes dominated by the executive. Low ex ante autonomy, therefore, indicates a court controlled by the executive. Ex post control, on the other hand, is usually exercised by the legislature, through impeachments and reappointment powers, court packing schemes, etc. – low ex post autonomy thus indicates a court accountable to a legislature, acting by simple majority. The overall pattern, thus, indicates that constitution-makers were unwilling to give more power to judges who were likely to be cronies of the executive, so if they increased a court's authority they depoliticized its appointments (recall that authority and ex ante autonomy are positively correlated). On the other hand, they were equally unwilling to entrust this much power to judges who remained unaccountable once they were seated (hence the weak but significant negative correlation between ex post autonomy and the other two measures). Depending on how that ex post control is exercised, and especially in view of the fact that any replacements would be subject to the new, more multilateral appointment process, that could be a positive model, of strong but democratically accountable courts, or a negative one, of covert pressures on sitting judges.

Interestingly, this divergence suggests constitutional designers are (implicitly or explicitly) distinguishing between the effects of the strategic and attitudinal models: the changes appear to express a preference for depoliticizing the mechanism of choosing who sits on the bench (and therefore, what judicial preferences are present) while simultaneously maintaining, at least formally, a fairly pro-majoritarian ability to discipline or remove judges once they are seated.

Given the billions spent on judicial reform by international donors (Domingo and Sieder 2001; Rodriguez Garavito 2010), it should not surprise us to find that some changes have taken place. Indeed, we might expect a convergence around some preferred international model of independent courts. But our data show that, once we go beyond a focus on the large signature issues (on which there has been convergence, see our companion paper (Brinks and Blass forthcoming)), courts have in fact become more divergent across the region. The annual standard deviation in the three scores shows an increase over time in the dispersion of ex ante autonomy and authority scores, suggesting that courts have become more—not less—different in this regard over the last 35 years. Ex post autonomy scores have converged, but not increased. This strongly suggests a large role for domestic politics in shaping the final features of a court, in spite of international pressures. It is worth looking at some representative courts, therefore, to see what different models are emerging, and what this might portend for the constitutional and judicial politics of the region.

A brief look at courts in action

After all this, one might reasonably ask whether these results connect to real world events, for real courts in real countries. In this section, we examine whether our new measures at all reflect our intuitions about changes in the relationship between law and politics in Latin America over the last thirty-five years. As it turns out, we can use our three-dimensional measure of judicial authority and autonomy to watch this movement play out over the thirty-five years since 1975. Putting authority on one axis and autonomy on the other renders a classic 2x2 table for classifying models of state legality, as depicted in Table 4. Each of the cells represents a different approach to law and politics, giving constitutional legality a greater or lesser role in

structuring social disputes and public policymaking, and allowing the judiciary greater or lesser autonomy in interpreting and applying whatever level of legality a country has chosen.[15]

Table 4: Legal characteristics of states, depending on levels of authority and autonomy granted to their judiciaries

	Low autonomy	High autonomy
Broad authority	Politicized legalism; *estado de derecho político*	Thick (social) rule of law; *estado social de derecho*
Narrow authority	Extra-legal policy making and implementation; *estado político*	Thin (liberal) rule of law; *estado liberal de derecho*

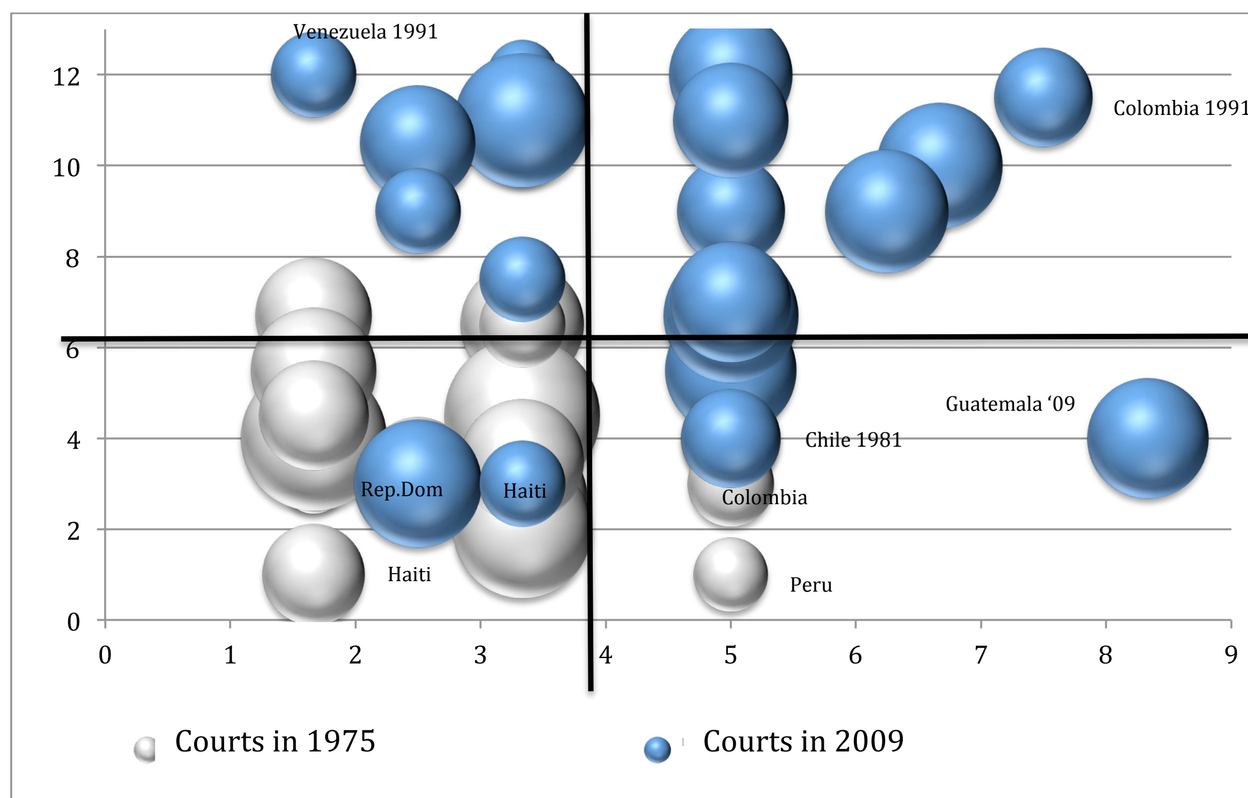
Figure 3, below, is arranged to match Table 4, using the means for authority and ex ante autonomy (indicated by the black lines) to divide a scatterplot of all the courts in the region into four quadrants that correspond to the categories in Table 4. Each bubble in Figure 3 represents the court contained in a separate constitutional document, although for clarity and with a couple of exceptions the documents are restricted to those that were in force in either 1975 or 2009. Because these are the variables that change the most over this period, we depict scope of authority and *ex ante* autonomy on the y and x axes, respectively. Ex post autonomy (insulation of judges on the bench) is represented by the size of the bubble – evoking how much protection is built around judges once they are seated.

There are, roughly speaking, four distinct constitutional moments in Latin America over this period whose courts, in ideal typical terms, correspond to each of these four quadrants. At the end of the 1970s, the first moment for our purposes, courts were largely irrelevant to the politics of the day. While they could serve to resolve private disputes, and were an important presence in arbitrating between employers and employees in the formal sector, the great

[15] Note that we have made a subtle but important shift here, from courts to constitutional legality. While the shift seems justified, in light of the empirical discussion that follows, it is perhaps most precise to understand our measures as a proxy for the model of state legality chosen, rather than as direct measures of it.

distributive and political conflicts that shook the region took place outside the purview of law and courts. The right called in the military to protect its property rights, while the left took to the jungles and the mountains to fight for its goals. Repression was largely extra-legal, with some variation (Pereira 2005), and executives routinely violated constitutional strictures. The literature reflects this reality, suggesting, for example, that courts had not only long been ineffective as checks on power, but were likely to continue that way for strong cultural and traditional reasons (Rosenn 1987; Merryman 1985). The initial constitutional moment is clearly reflected in Figure 3, showing that, as of 1975, all but two of the courts in the region scored below the mean on authority and ex ante autonomy. Note the size of the bubbles, however: often patterned after the US Supreme Court, many of these courts enjoyed substantial ex post autonomy, at least on paper.

Figure 3: Changes in Judicial Authority and Autonomy in Latin America 1975-2009



By the early to mid-1980s, however, the Washington consensus had suggested that an important part of neoliberal reforms should include strengthening the courts in order to protect property rights and stimulate economic growth. Vast amounts of money poured into the region, seeking to create a particular model of courts – courts insulated from the rough and tumble of democratic politics (including by adopting something like a merit selection process for many judges) but largely limited to protecting property rights and commercial predictability, along with some classic liberal negative freedoms (Domingo and Sieder 2001; Salas 2001; Sarles 2001). Chile 1981 and Guatemala 1985 are both courts and constitutions conceived in the midst of the cold war struggle, under the tutelage of neoliberal reformers with the nearly complete exclusion of the left. These models epitomize the second generation constitutions – they are solidly in the lower right quadrant of Figure 3, showing high levels of ex ante autonomy but very narrow judicial-constitutional agendas. These courts are designed to protect propertied interests and civil liberties, but have little role in broader social and economic conflicts, at best creating the space for the market and extra-constitutional politics to do that work.

This second moment overlapped somewhat with another generation of constitutions that had a broader agenda. Third generation constitutions were motivated often by disillusionment with the results of neoliberal reform and a quest to democratize societies by promoting social and economic inclusion. These new constitutions still relied on strong independent courts, but they gave them a much broader agenda, which included a long list of social and economic rights and more generous provisions for access. If second generation constitutions were neoliberal, these social constitutions constitutionalized many erstwhile private interactions and much social and economic state policy, without, however, withdrawing their concern for classic liberal rights (Brinks and Forbath forthcoming, 2014). Brazil's 1988 and Colombia's 1991 documents are

typical third generation constitutions, defining courts that sit in the upper right hand quadrant of Figure 3. These constitutions define a more social democratic agenda, with strong courts that can protect and push forward the progressive goals defined in their extensive bills of economic social, and cultural rights.

By the late 1990s, however, the pendulum had swung further from the classic liberal model. Beginning in Venezuela, but continuing in Ecuador and Bolivia (and with a very recent quasi-successful attempt in the same direction in Argentina), constitutions embodying "Bolivarian socialism" were appearing in the region. These movements made no secret of their disdain for old-fashioned representative democracy, and expressly advocate for law and courts as an instrument of social transformation in line with the demands of the new model (Couso 2013; Brinks 2012). Courts that would meet these requirements must have a broad agenda, somewhat like third generation courts, of course. But if they are to advance the correct agenda, and not impose too many constraints on these quasi-revolutionary governments, they must also be closely tied to the preferences of the executive and dominant party. Venezuela's 1991 judicial design reflects these choices, standing at the very top of judicial authority, and as near the bottom of ex ante autonomy as any court in the entire period. The small bubble indicates the double weakness of this court – not only are appointments closely controlled by the executive, but, once seated, judges must suffer strong political pressures and easy removal. Given its broad powers and low autonomy, this court has become a powerful tool of repression and social and political control (Inter-American Commission on Human Rights 2009; Pérez Perdomo 2003).

In summary, with the help of the new three-dimensional measures, we can draw some very general conclusions about the evolution of law and politics in Latin America. Some countries – those with a more social democratic agenda, and a more pluralistic and programmatic

party system – are building a more robust “estado social de derecho,” while others, with a stronger market orientation, opted for a leaner “estado liberal de derecho.” Meanwhile, some of the countries in the region are building powerful judiciaries that are vehicles for a partial, executive-dominated style of legalized political decision making – an “estado de derecho político.” More and more, it seems, countries are abandoning the old model, in which courts and law were relatively tangential to the exercise of political power. This should be qualified good news, even with the important caveat that law is, and always has been, a friend of the powerful. A state based on law, with autonomous courts, can reduce arbitrary action, impose a certain discipline and predictability, and create openings even for the least powerful in a society. Even a state that drapes a veneer of legality over essentially political repression is bound to be more constrained than the extra-legally repressive regimes of the 1970s, and opposition actors might find useful spaces within the law even if the courts respond quite closely to the executive. At the same time, of course, the law is a powerful instrument of social control and legitimation, so we should not underestimate its potential for oppression.

This brief historical exercise highlights the utility of our new, three-dimensional measures. It is unrealistic, of course, to expect a perfect congruence between the dominant political project and formal constitutional provisions. The politics of constitution making and constitutional change necessarily produce some slippage between the preferences of dominant actors and the constitutional outcome – this and related issues are explored in a companion paper looking at the determinants of judicial design. But the remarkable coincidence between our measures of constitutional legality and the evocative descriptions of the regimes in question suggests our new variables capture important aspects of judicial and constitutional reality. Moreover, none of the one-dimensional measures that have dominated the literature so far can

capture the full range of movement and the interesting variation exhibited by the actual courts of Latin America over the last thirty-five years. More can be done to exploit the difference between ex ante and ex post autonomy, but it is clear already that conceptualizing autonomy as pluralism in appointment and tenure-related processes, and splitting judicial power into its component dimensions, has a significant payoff in our understanding of the evolution of law and politics in Latin America since redemocratization in the late 1970s.

Conclusions and Future Research

The data already demonstrate clear variation in levels of authority and autonomy among the newly reformed courts of Latin America. There is simply too much variation in the final outcome to present this as a clear-cut, region-wide (if still incomplete) movement toward a constitutionalist, rights-based model of democratic politics achieved through the creation of powerful and autonomous courts, as some have presented it. In matters of institutional design at least, self-interested politicians were often able to slip in some measures meant to ease the task of reining in their newly empowered judges. It is equally incorrect, for that matter, to insist that Latin America is a lawless region, with weak courts and irrelevant constitutions.

The framework developed above and its application to judiciaries in Latin America over 35 years have several important implications for our understanding of judicial empowerment, judicial behavior, and institutional design more generally. In particular, our analysis of judicial autonomy and authority yields three primary insights for our study of courts and their interaction with other political actors. First, our analysis suggests that the narrative of near-universal judicial empowerment and attendant claims of "juristocracy" might be overdrawn. Judicial power is not a simple or a unidimensional concept: it is comprised of many institutional features—including some that past measures have overlooked—and it contains at least two, and possibly three,

distinct dimensions that cannot be accurately represented by a collapsed, additive index of institutional features.

These related points might account for our finding that while overall levels of judicial power have increased, qualitatively different models of legality have emerged in different places at different times, a fact that we believe has important implications for existing accounts of the emergence and behavior of powerful courts. Specifically, we find that from an institutional perspective, courts in Latin America are not untethered, countermajoritarian, or "deviant" institutions (Bickel 1956); in important respects they appear to be more accountable than previously suggested. A nuanced analysis that pushes beyond highly-visible institutional attributes reveals that courts have been designed to be subject to political incentives and constraints. Moreover, this trend appears rather constant over the more than three decades we cover in the analysis above.

Second, our analysis provides evidence that judicial design should not be understood in isolation from other political branches: institutional engineers face similar challenges when they design executives, legislatures, and courts. Those who design courts must resolve the classic principal-agent puzzle: how to delegate authority to another actor but retain the ability to shape that actor's behavior. Our comparison among measures of judicial independence, and the application of our framework to Latin American courts both suggest that institutional designers in the region understood the tradeoff between judicial autonomy and accountability. In the Latin American case, designers appear to have opted to resolve the tension by emphasizing ex ante autonomy and ex post accountability. At least formally, this resolution, compared to historic patterns, shifts influence over the judiciary from the executive to the legislature.

As anticipated above, we think that the particular resolution to this tradeoff speaks to a classic debate in the literature that continues unabated today regarding the forces that shape judicial behavior: judges' political preferences and constraints in their political environment. Our analysis suggests that while political actors have, on average, depoliticized the appointment process and provided greater tenure protections, they are not entirely willing to give up their ability to constrain judges post-appointment, a finding that seems consistent with the strategic model of decisionmaking. It is not hard to understand this choice: judges change, issues change, and no one knows what the court will be faced with, some years down the road. Ex ante mechanisms of political influence assume a predictable future and relatively unchanging judicial preferences (assumptions that have been disproven; see for example Epstein, Martin, Quinn, and Segal 2007). The ability to remove particular justices after they have been appointed can help reduce the uncertainty associated with crafting more powerful courts.

Finally, our framework suggests fruitful avenues for future research into the determinants of judicial design and the effect of institutional design on judicial behavior. In particular, our framework could quite fruitfully be employed as a dependent variable in order to explore which set of factors better explains, for example, ex ante autonomy versus authority, or symbolic versus operative features. We suspect, for example, that convergence on highly visible institutional features (e.g., life tenure or separate constitutional courts), but not on subtler, 'under the hood' attributes (e.g. supermajority requirements for judicial decisions, short renewable terms) can be attributed to a diffusion of support (whether foreign or domestic) for the value of such traditionally-salient judicial institutional features, but that interested and rational actors design

their courts by tailoring the constellation of court attributes, particularly the subtle engines of court operation, to suit their political needs.[16]

Second, using the framework as an independent variable to explore the differential effect of autonomy and authority on judicial behavior would almost certainly yield new insights into judicial decision making. The disaggregation of ex ante and ex post autonomy and authority, for example, begs the question: how do the dimensions interact, and to what (if any) effect on judicial behavior? That is, how do courts with unmatched values on either dimension behave (for example, high autonomy but low authority, or vice versa), and is that behavior systematically different than courts with matching values? Our hunch is that each dimension might contribute a distinct influence, such that courts with similar 'overall' levels of judicial power but different levels on each dimension (e.g. high autonomy but low authority) do behave differently even than their mismatched counterparts (e.g. low autonomy but high authority). Lastly, are courts with low levels of both autonomy and authority institutionally 'crippled' and relegated to stand on the political sidelines? Is the opposite true of courts with high levels on both dimensions?

In short, our new institutional measure of judicial power suggests that constitutional changes in Latin America over the last 35 years have a complex but potentially powerful and predictable relationship with the observed behavior of courts in the region. More importantly, this institutional analysis raises a number of important research questions regarding the impulses that lead constitution-makers to design courts with varying degrees of authority and autonomy, and what courts do with those attributes once they have them.

[16] See Brinks Blass (2011) for a discussion and test of these issues/hypotheses.

Appendix A:

Table A1: Components of and indicators for autonomy and ex post autonomy

<table>
<tr><th colspan="3">Autonomy</th></tr>
<tr><td>ex ante</td><td>Appointment</td><td>Nature (inside political system v outside) and number of actors involved in nomination and approval of judges (more actors=more autonomy), and level of consensus required (supermajority requirement=more autonomy), judicial council involvement (=more autonomy)</td></tr>
<tr><th colspan="3">Ex post autonomy</th></tr>
<tr><td rowspan="4">ex post</td><td>Protected Tenure</td><td>Length of term (and limits, if applicable)
Renewable appointment (if applicable)
Mandatory retirement age (if applicable)</td></tr>
<tr><td>Difficulty of Removal</td><td>Conditions of removal (not “at will”)
Number of actors involved in removal, and level of consensus required</td></tr>
<tr><td>Fixed Number</td><td>Number of judges fixed in constitution</td></tr>
<tr><td>Jurisdiction, Salary, Budget</td><td>Specified in constitution
Controlled by court or by external actor(s)
Protected from political discretion</td></tr>
</table>

Table A2: Components and indicators for scope of authority

Scope of Authority	
Agenda setting	Internal docket control mechanism (e.g., the US *cert* device) Primarily appellate rather than original jurisdiction Ease of ruling (maj or supermajority to strike law)
Open Access	Standing (open vs. restricted) and efficiency through special expedited procedures (e.g. amparo) (categorical scale of inclusivity: 1 if only insider access in abstract cases, no concrete review; 2 if concrete review regardless of level of openness, or if abstract review; 3 if both concrete and abstract review and outsider access to abstract)
Text	Proportion of 31 coded negative and positive justiciable rights in constitution
Judicial Review	Court empowered to interpret C and invalidate legislative or executive acts Centralized v diffuse Concrete v abstract review Pre v post promulgation review
Ancillary Powers	Presence of multiple (important) functions besides adjudicating disputes
Effect of decision	Force of precedent: binding v discretionary for lower courts; *erga omnes* versus *inter partes* effects
Penalties	Penalty if military courts exist Penalty if supermajority consensus required for any decision/ judicial review

Table A3. Formulae for each dimension

Autonomy	(total number of actors required for nomination and approval + 1 if judicial council involved) * 1.5 if supermajority consensus required * 1.5 if external actors involved
Ex post autonomy	(protected tenure + difficult removal + 2*fixed salary + 2*fixed jurisdiction + 2*fixed number of judges)
Authority	[(open access * 1.5 if amparo is present) + proportion of rights + number of Ancillary Powers of SC and CC (including EC) + binding precedent - 1 penalty if military courts present)] x .5 if no Judicial Review x (.67) penalty for supermajority requirement to find unconstitutionality

Table A4. Constitutional Rigidity (global multiplier-not used in this draft)

Rigid Constitution	Number of actors involved in proposing and approving constitutional amendments and level of consensus required

Appendix B:

Table B1: correlations among extant quantitative indicators of judicial independence for our sample

	F&V de jure	Keith	Laporta	H & Carey	BTI	F&V de facto	fraser	Law & Order PRS	Polity	Henisz	Tate & Keith	CIRI	CIM
Feld & Voigt de jure	1												
Keith	.	1											
Laporta	0.15	.	1										
Howard & Carey	.	0.06	.	1									
BTI	.	.	.	.	1								
Feld & Voigt de facto	0.42	.	-0.48	.	.	1							
Fraser	0.4	0.56	0.12	0.42	.	0.62*	1						
Law & Order PRS	-0.2	0.31*	0.21	-0.02	0.37*	0.16	0.22*	1					
Polity - xconst2	0.04	0.27*	0.40	0.36*	0.52*	0.11	0.32*	0.34*	1				
Henisz	-0.19	0.20*	0.33	0.06	0.24	-0.05	-0.02	0.80*	0.36*	1			
Tate & Keith	0.34	0.09	0.41	0.56*	.	0.46	0.72*	0.15*	0.20*	0.12*	1		
CIRI	0.12	0.16*	0.33	0.47*	0.73*	0.45	0.68*	0.17*	0.19*	0.24*	0.60*	1	
CIM	.	0.25*	.	0.33*	.	.	0.19	0.47*	0.34*	0.42*	0.18*	0.17*	1
LJI	0.15	0.34*	0.32	0.62*	0.84*	0.49	0.74*	0.51*	0.80*	0.46*	0.60*	0.53*	0.54*

* $p<.05$
. Variables with no temporal/geographic overlap show missing correlations.

The conceptual relationships among all these variables are complicated and we do not attempt to parse them fully here. Some (e.g., LJI or Henisz) are derived from other variables in this table, others attempt, at least, to include identical information, still others are based on independent codings of the same sources, sometimes with different conceptual ends. Please refer to Ríos Figueroa and Staton's (2012) analysis for an exhaustive evaluation of all these relationships.

The original sources of all these variables are listed here (as taken from Jeffrey Staton's website, http://userwww.service.emory.edu/~jkstato/page3/index.html):

- Polity IV "Constraints on the Executive" ("xconst2")
  - See: http://www.systemicpeace.org/polity/polity4.htm
- Contract Intensive Money Measure ("CIM")
  - Clague, Christopher, Philip Keefer, Stephen Knack and Mancur Olson. 1999. "Contract-

Intensive Money: Contract Enforcement, Property Rights, and Economic Performance." Journal of Economic Growth 4(2):185-211.

- Wittold Henisz's measure of "judicial independence" ("Henisz")
    - o Henisz, Witold J. 2002. "The institutional environment for infrastructure investment." Industrial and Corporate Change 11(2):355-389.
- Political Risk Services "Law & Order" measure ("PRS")
    - o See: http://www.prsgroup.com/ICRG_Methodology.aspx
- Tate & Keith measure of judicial independence ("tatekeith")
    - o Tate, C. Neal and Linda Camp Keith. 2009. "Conceptualizing and Opera- tionalizing Judicial Independence Globally. " working paper.
- Cingranelli & Richards measure of judicial independence ("CIRI")
    - o See: http://ciri.binghamton.edu/documentation/ciri_coding_guide.pdf
- Howard & Carey measure of judicial independence ("howardcarey")
    - o Howard, Robert M. and Henry F. Carey. 2004. "Is an Independent Judiciary Necessary for Democracy?" Judicature 87(6):284-290.
- Feld & Voigt de jure and de facto measures of judicial independence ("feldvoigt defacto" and "feldvoigt dejure")
    - o Feld, Lars P. and Stefan Voigt. 2003. "Economic Growth and Judicial Independence: Cross-country Evidence Using a New Set of Indicators." European Journal of Political Economy 19(3):497-527.
- Global Competitiveness Report's measure of "judicial independence" ("Fraser")
    - o See: http://www.weforum.org/en/initiatives/gcp/index.htm
- Bertelsmann Transformation Index of Judicial Independence ("BTI")
    - o See: http://www.bertelsmann-transformation-index.de
- Apodaca-Keith Scale of de jure judicial independence ("Keith")
    - o Apodaca, Clair. 2004. "The Rule of Law and Human Rights." Judicature 87(6):292-299.
    - o Keith, Linda Camp. 2002. "Judicial Independence and Human Rights Protection Around the World." Judicature 85(4):195-200.
- La Porta et al de jure measure of judicial independence ("Laporta")
    - o La Porta, Rafael, Florencio López de Silanes, Cristian Pop-Eleches and Andrei Shleifer. 2004. "Judicial Checks and Balances." Journal of Political Economy 112(2):445-470.

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