NÚMERO 216

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Institutions for Constitutional Justice in Latin America

DICIEMBRE 2009

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Acknowledgement

Thanks to John Carey, John Ferejohn, Andrea Pozas-Loyo, Jeffrey K. Staton, and participants in the CIDE conference Judicial Politics in Latin America, the APSA 2009 Annual Meeting, and the ECPR 2009 General Conference, for their comments. Yolanda Lamothe, Judith Nieto, and Jorge Puma provided excellent research assistance in the construction of the database. I gratefully acknowledge the support of the CONACYT grant "Investigación Científica Básica 2007" for the development of this project.

Abstract

This paper surveys arguments that consider an institutional feature to explain the behavior of constitutional judges and maps their existence or absence in a sample of eighteen Latin American countries from 1945 until 2005. The first part shows that Latin American constitutional judges have experienced important institutional improvements regarding their independence from the other branches and their power to influence the making of policies and laws. The second part of the paper unpacks both dimensions –independence and power– and unveils a more complex combination of institutions for constitutional justice across Latin American countries. The paper provides an overview of the institutions for constitutional justice in the region. By mapping the existence of institutional features that are thought to induce certain judicial behavior, the paper also suggests testable hypotheses for future empirical research.

Resumen

Este trabajo presenta argumentos donde distintas características institucionales se proponen para explicar el comportamiento de los jueces constitucionales. El trabajo también explora la existencia o ausencia de dichas instituciones en una muestra de dieciocho países latinoamericanos de 1945 a 2005. La primera parte se enfoca en las instituciones que determinan la independencia y el "poder legislativo" de los jueces constitucionales. La segunda parte explora los distintos elementos que componen los índices de poder e independencia, y presenta una visión más completa del conjunto de instituciones que afectan el comportamiento de los jueces constitucionales. El trabajo presenta un mapa institucional de los sistemas de control constitucional en la región, así como varias hipóteis para futuros trabajos.

Introduction

Constitutional judges consider matters relevant for the protection of rights, political competition, and the exercise of power. Why, however, are there constitutional courts that stand out for their work regarding rights enforcement[1] —while others distinguish themselves for their role in arbitrating disputes between political actors? In Latin America, for instance, the Colombian Constitutional Court or the Costa Rican *Sala Cuarta* have been highly active in the protection of rights (e.g. Uprimny 2006; Wilson 2005), while the Mexican Supreme Court or the Chilean Constitutional Tribunal have not. But the two latter courts have been involved as efficient arbiters regulating political competition in their respective countries (e.g. Magaloni B. 2003; Domingo 2005; Scribner 2004).

Institutions that are thought to impact the independence and power of constitutional judges are often invoked to explain their behavior (e.g. Rosenberg 1991). This is the main rationale behind changes in the basic rules designed to insulate judges from undue political pressure (e.g. appointment, tenure, and removal institutions) and to give them power to intervene in policy-making (e.g. their powers of judicial review). More recent institutional arguments point to specific institutional features within the two broad dimensions —independence and power— to explain why and to what extent constitutional judges tend devote relatively more time to arbitrate conflicts between branches and levels of government or to uphold rights. For instance, the institutional location of the constitutional court, as part of the judiciary or as an autonomous organ, is said to influence the type of judges that reach this court and therefore the role it can play within the political system (e.g. Ferreres 2004). It has also been argued that different characteristics of the instruments available for constitutional adjudication (e.g. abstract or concrete, *a priori* or *a posteriori*) are more or less effective tools for rights protection or political dispute resolution (e.g. Magaloni A.L. 2007).

This paper surveys arguments that consider an institutional feature to explain the behavior of constitutional judges and maps their existence or absence in a sample of eighteen Latin American countries from 1945 until 2005. As is shown in the first part, Latin American constitutional judges have experienced important increments in the independence and power institutional dimensions since 1945. The second and third parts of this paper show that unpacking both dimensions into some of their components reveals a more mixed picture regarding the particular institutions that insulate and empower constitutional judges in the Latin American countries.

[1] I mean all kind of rights, economic, social, and political, although it is the defense of social and economic rights that has given some courts such as the Indian Supreme Court or the South African Constitutional Tribunal, worldwide reputation.

It is important to mention at the outset that the institutional framework is taken as given. This paper exclusively discusses arguments on the potential consequences of different institutional arrangements and does not attempt to answer what determines the existence of those institutions in the first place.[2] In addition, whether the institutional features indeed produce certain effects is also beyond the limits of this paper.[3] By mapping the existence or absence of such institutional features in the Latin American countries, however, the paper not only provides an overview of the institutions for constitutional justice in the region; it also suggests testable hypotheses for future empirical research.

Independence and Power of Latin American Constitutional Judges, 1945-2005

Institutions that influence independence

Independence of constitutional judges from undue political pressures, especially coming from the executive and legislative branches, is often mentioned as a condition for judges to sincerely evaluate the cases that come before them without conditioning the content of their decisions (e.g. Rosenberg 1991). That is, in order to either enforce rights or arbiter conflicts, constitutional judges should enjoy a healthy degree of autonomy from the political branches in the first place. Scholars have pointed out a variety of institutional features aimed at producing an autonomous space for judges, among which appointment, tenure, and removal mechanisms are considered paramount.[4]

Practitioners and scholars alike agree that the wave of judicial reforms that swept Latin America in the last two decades of the XX Century generally strengthened the institutions that aim to promote judicial independence, to the point that now some consider that judicial accountability should be taken care of in order to strike a better balance (Hammergren 2007, 207). Without doubt there are still challenges. But these reforms have changed the appointment, tenure, and removal mechanisms of constitutional judges in such a way that, at least on paper, Latin American judges now enjoy a considerably higher insulation from political pressures than they did in the recent past.[5]

[2] On this question see Ginsburg 2003; Magaloni 2003; Finkel 2008; Pozas-Loyo and Rios-Figueroa, forthcoming.

[3] On this question see Przeworski 2007. Helmke and Staton 2009 develop a model where the length of tenure may produce both judges more willing to counter the government or more deferent judges, depending on other factors. Thus, while the distinction between causes and consequences of institutions is useful for analytical purposes it should be taken cautiously in empirical analysis.

[4] For a conceptual map and an evaluation of different measures of judicial independence see Rios-Figueroa and Staton 2008.

[5] These reforms have also considerably increased judicial budgets all over the region, see Vargas 2009.

In order to document this trend more systematically, let us look at a simple index that considers five institutional features aimed at promoting the independence of constitutional judges from undue political pressures: *(i)* whether the appointment procedure is made by judges themselves or by at least two different organs of government, *(ii)* whether the length of tenure is at least longer than the appointer's tenure, *(iii)* the relation between appointment procedure and length of tenure, *(iv)* whether the process to remove judges involves at least two thirds of the legislature and, finally, *(v)* whether the number of constitutional judges is specified in the Constitution. In the following paragraphs I briefly explain these five elements.

Appointing procedures range from cooptation of new judges by the sitting judges to direct election by the executive or by the people (as in Bolivia's 2009 Constitution). Between those extremes one finds procedures in which the concourse of a different set of state and non-state organizations (e.g. the executive, the legislature, the judicial council, bar associations, NGOs) is required to fill a vacant in the constitutional court. It is not trivial to determine which of all the different appointing methods produces more autonomy for judges, nor which one produces a better mix of independence and accountability. But let us consider here a simple distinction between procedures in which the appointment is done by judges themselves[6] or by at least two different state or non-state organs and procedures in which a single organ or organization that does not belong to the judiciary appoints the judges.[7] The former appointment methods would guarantee at least a minimum degree of independence of judges from their appointers, while the latter would not meet even this minimum requirement.

Closely related to appointment is the length of tenure. The appointment process may involve many different organs, but if judges' tenure coincides with that of their appointers or with that of the executive and legislators, there is potential for undue pressures. Thus, let us consider that judges' tenure should be at least longer than that of their appointers. Arguably, if tenure is sufficiently long, for life in the extreme, the appointment method tends to become irrelevant.[8] The index presented in this paper considers this relationship between appointment and length of tenure in the following way: I gave three points for those countries in which both the appointment procedure and tenure meet the minimum requirements, two for those countries where only the minimum tenure requirement is met, one for countries where only the appointment minimum requirement is met, and zero for countries where neither minimum is met.

[6] This can be a cooptation mechanism, or appointment by a judicial council in which judges are the majority.

[7] As Hans Kelsen (2001, 57) argues regarding the appointment method of constitutional judges, "it is not advisable the election by Parliament or the direct appointment exclusively by the Executive […] but perhaps both can be combined into a single method"

[8] As Madison argues in Federalist 51, "…the permanent tenure by which the appointments are held in that department [i.e. the judiciary], must soon destroy all sense of dependence on the authority conferring them".

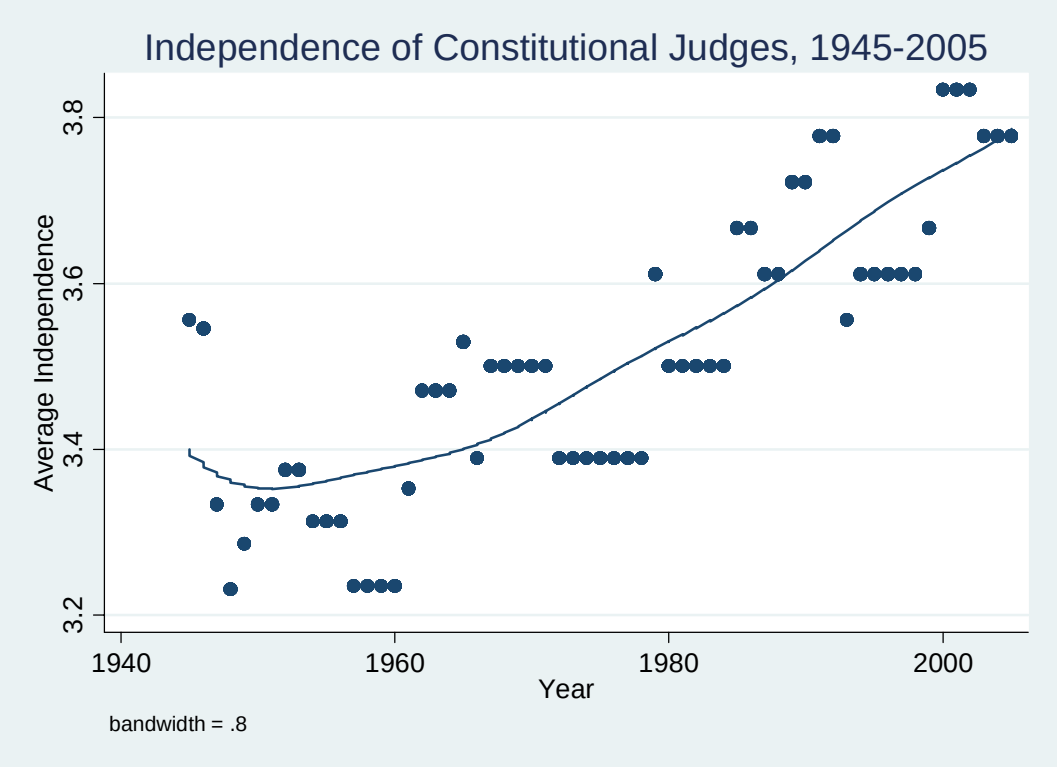
Removal proceedings also relate constitutional judges with the elected branches of government. Particularly important is the accusation part of the process because a simple accusation may tarnish a judge's reputation; so the easier it is to accuse, the more likely that the judge be unduly pressured.[9] Let us then distinguish between removal procedures in which the president can start the impeachment or removal process (a value of zero to the index), cases in which a simple majority in Congress or the Court itself can do that (a value of one), and removal procedures that at a minimum require a supermajority of one chamber of Congress to initiate the accusation (a value of two). Finally, given that if the number of constitutional judges is specified in the constitution it is more difficult for the political branches to pack or unpack the court, this element is also included in the index of independence.

With data from Rios-Figueroa's *Latin American Judicial Institutions Database* (LAJID, in progress), Figure 1 shows the average level of the index of independence of constitutional judges just described for the eighteen largest Latin American countries, except Cuba, from 1945 to 2005 (see Figure 1).[10] It is apparent that independence has been steadily increasing. This index of institutional independence may be simple and crude. Nonetheless, it points in the same direction as the evaluations of experts with practical and academic experience in Latin American judicial reforms (e.g. Vargas 2009; Hammergren 2007; Gargarella 1997). In the second part of this paper, I unpack this index of independence in order to appreciate interesting variations across countries.

[9] The outcome of removal or impeachment procedures is usually, but not always, decided by a different organ from the one that accuses.

[10] The database includes all national constitutions enacted since 1945 in the eighteen largest Latin American countries (except Cuba) and all the amendments to the articles of those constitutions that specify the institutions of the justice system. The observations in the sample are (*denotes an amendment): Argentina 1853, 1949, 1957*, 1994; Bolivia 1945, 1947, 1961, 1967, 1995, 2002*, 2004*, 2005*; Brazil 1946, 1967, 1988, 1993*, 1997*, 1998*, 2004*; Chile 1925, 1970*, 1980, 1989*, 1991*, 1997*, 1999*, 2000*, 2005*; Colombia 1886, 1945*, 1947*, 1957*, 1968*, 1979*, 1991, 2002*, 2003*; Costa Rica 1949, 1954*, 1956*, 1959*, 1961*, 1963*, 1965*, 1968*, 1975*, 1977*, 1982*, 1989*, 2002*, 2003*; Dominican Republic 1966, 1994*, 2002*; Ecuador 1945, 1946, 1967, 1979, 1984*, 1993*, 1996*, 1998; El Salvador 1950, 1962, 1983, 1991*, 1992*, 1996*, 2000*; Guatemala 1945, 1956, 1965, 1985, 1993*; Honduras 1957, 1965, 1982, 1990*, 1998*, 2000*, 2002*, 2003*; Mexico 1917, 1946*, 1951*, 1962*, 1967*, 1974*, 1977*, 1979*, 1982*, 1987*, 1992*, 1993*, 1994*, 1996*, 1999*, 2005*, 2006*; Nicaragua 1948, 1950, 1955*, 1962*, 1966*, 1971*, 1974, 1987, 1995*, 2000*, 2005*; Panama 1946, 1956*, 1963*, 1972, 1978*, 1983*, 2004*; Paraguay 1940, 1967, 1977*, 1992; Peru 1933, 1939*, 1979, 1993, 1995*, 2004*; Uruguay 1952, 1967, 1992*; Venezuela 1947, 1953, 1961, 1999.

FIGURE 1. AVERAGE LEVEL OF INDEPENDENCE OF LATIN AMERICAN CONSTITUTIONAL JUDGES (MIN = 0, MAX = 6)



Note: the graph shows a locally weighted regression (lowess) of the average level of the independence index on time.

Institutions that influence power

Constitutional judges are in charge of declaring null any law or act of government that contradicts the constitution. As Allan Brewer-Carías points out, the judicial guarantee of constitutional rights and the upholding of constitutional limits can be achieved either through the general procedural regulations that are established in order to enforce any kind or personal or proprietary rights or interest, or it can also be achieved by means of specific judicial proceedings established particularly for the protection of the prerogatives, responsibilities, and rights declared in the constitution (2009, 265). While the former solution describes more closely the situation in the United States, the latter can be considered the general trend in Latin America "mainly because the traditional insufficiencies of the general judicial means for granting effective protection of constitutional rights and limits" (Brewer-Carías 2009, 65).

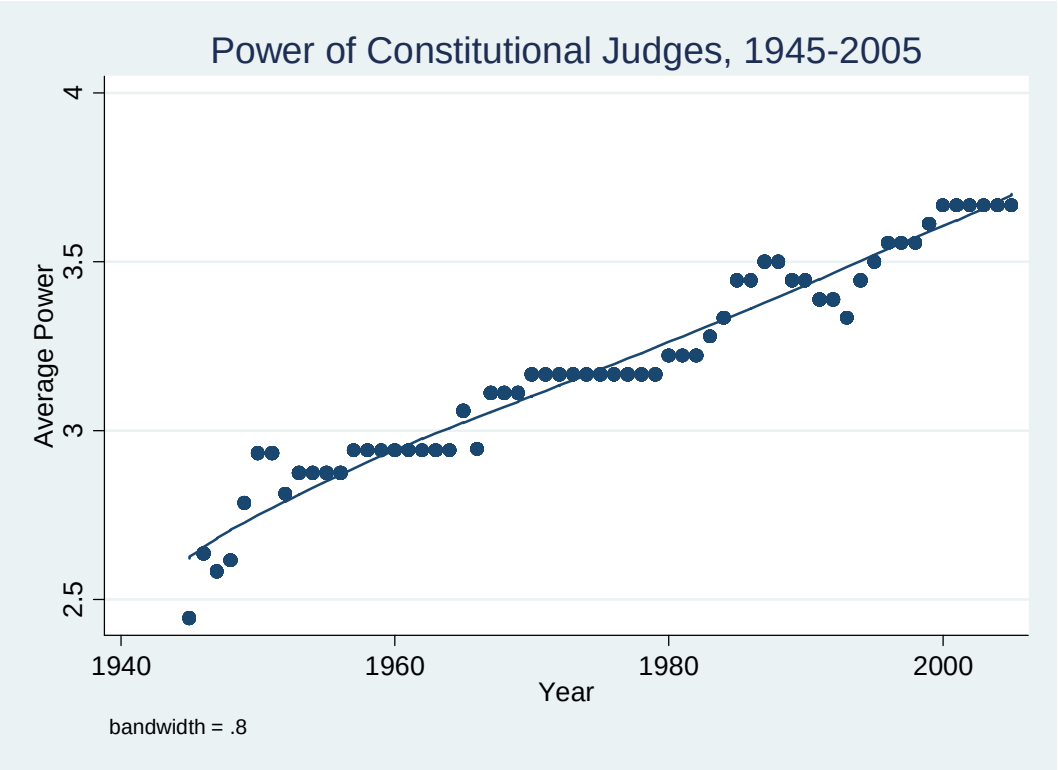
Thus, for instance, the *amparo* suit is a legal instrument specified in the constitutions of Latin American countries in order to protect the individual constitutional rights from encroachments by public authorities. In addition to *amparos*, the Latin American constitutions specify other instruments such as

habeas corpus (to protect the physical integrity of the individual), *habeas data* (to guarantee the right of access to information), actions of unconstitutionality (to challenge the constitutionality of a law or a decree), constitutional controversies (to make valid the prerogatives and responsibilities of political authorities as stipulated in the constitution), and so on. Interestingly, there is cross-national variation in the number of instruments available for constitutional review; some countries have created several specific instruments that allow constitutional judges to participate in law and policy-making in many different ways while others restrict the way in which constitutional review is carried out to one or two instruments. Access to the instruments also varies; some are open to any citizen while others can be used only by public authorities. Moreover, the effects of judge's decisions vary with each instrument. For instance, in Mexico the effects of decisions in *amparo* cases are valid only for the parties in the case (i.e. *inter partes*), while the effects of decisions in actions of unconstitutionality are valid for everybody (i.e. *erga omnes*).

In order to give a sense of the empowerment of constitutional judges in the region, let us present an index that simply adds the number of different types of instruments for constitutional review specified in the constitution of a country plus whether the instrument has general effects and whether it is available to every citizen. This index, which goes from zero to eight,[11] basically captures the number of ways in which constitutional judges can influence the policy and law-making by controlling their constitutionality. Although simple and rough, this index can be a good proxy of the "legislative" power of constitutional judges.[12] Figure 2 shows the average across time of the power index for constitutional judges in eighteen Latin American countries since 1945 (see Figure 2). The positive trend is clear and unambiguous, with a minor jump up and down in the first half of the 1980s. This finding is also in line with experts' evaluations (e.g. Vargas 2009; Hammergren 2007).

[11] As detailed in the third section of this paper, the maximum number of types of instruments is four, but access for some of those is necessarily restricted and the effects of decisions with some instruments is necessarily *inter partes*.
12 The index does not capture other features that influence judicial power, such as its legitimacy among the people or the political actors, how often are those instruments used, or how effective are they in terms of producing compliance by other actors.

FIGURE 2. AVERAGE LEVEL OF POWER OF LATIN AMERICAN CONSTITUTIONAL JUDGES (MIN=0, MAX=8)



Note: the graph shows a locally weighted regression (lowess) of the average level of the power index on time.

Table 1 shows a classification of Latin American constitutional judges based on the combination of both dimensions in a 2x2 table. Countries were placed in each cell depending on whether the level of independence and power of their respective constitutional judges was above or below the average in 2005, the last year in the database. The table raises interesting questions about whether the institutions that influence power do in fact produce judges who are more willing to enforce rights, as in Costa Rica or Colombia that are both above the level in the power dimension, or whether the institutions that influence independence produce judges who invest relatively more time and resources arbitrating interbranch conflicts, as in Chile or Mexico that are both above the average in the independence dimension. Interestingly, however, there are countries such as Bolivia that are above the average in both dimensions but where the political actors have practically disappear the Constitutional Tribunal (see Pérez-Liñán and Castagnola, this volume).[13] Of

[13] Remember that this classification is based only on the institutions as specified in the country constitutions, so the answers to explain the intriguing location of some countries may lie in the outcomes produced by the interaction of institutional and other contextual variables.

course, there are other non-institutional variables that impact on the behavior of constitutional judges. But also distinctions within the broad dimensions of independence and power may give a clearer picture of the complexity of the institutions for constitutional justice in the region. I turn to that now.

Unpacking independence

Latin American constitutional judges work nowadays under an institutional framework that is believed to give judges more space free of undue pressures to sincerely evaluate the cases that come before them. However, there are variations in the way this independence is created and some of those differences may be consequential. Consider, for instance, Table 2 that shows the value of each variable of the independence index in the year 2005 for all the countries in the sample (see Table 2). Note that there is interesting diversity in the way countries combine these four institutional elements, and also that countries are rather concentrated around the average level 3.78 (the standard deviation is 1.17). The outlier in Table 1 is Peru, where the appointment and tenure of constitutional judges did not meet the minimum requirements set out above. In the rest of the countries, constitutional judges enjoy at least a moderate degree of independence according to this index. But, is there an optimal way to design institutions that insulate judges? For instance, consider Uruguay and Chile, two countries that score four in the independence index. Is it better that a single political organ appoints judges but that the requirements to remove them are harder to meet, as in Uruguay, or rather to have more than one organ participating in the appointment but making it easier to impeach judges, as in Chile? (See the discussion below on open versus closed appointment procedures).

TABLE 1. INDEPENDENCE AND POWER OF CONSTITUTIONAL JUDGES IN THE YEAR 2005

		POWER	
		ABOVE AVERAGE	BELOW AVERAGE
Independence	Above average	Bolivia Brazil Colombia El Salvador Guatemala Honduras	Argentina Chile Mexico Paraguay Uruguay
	Below average	Costa Rica Ecuador Panama Venezuela	Dominican Republic Peru Nicaragua

TABLE 2. UNPACKED INDEX OF JUDICIAL INDEPENDENCE IN THE YEAR 2005

COUNTRY	APPOINTMENT	TENURE	APP & TENURE	IMPEACHMENT	NUMBER	TOTAL*
Guatemala	1	1	3	2	1	6
Argentina	1	1	3	2	0	5
Brazil	1	1	3	1	1	5
Mexico	1	1	3	1	1	5
Bolivia	0	1	2	1	1	4
Chile	1	1	3	0	1	4
Colombia	1	1	3	1	0	4
El Salvador	1	1	3	1	0	4
Honduras	1	1	3	0	1	4
Paraguay	1	0	1	2	1	4
Uruguay	0	1	2	1	1	4
Venezuela	0	1	2	2	0	4
Costa Rica	0	1	2	1	0	3
Ecuador	1	0	1	1	1	3
Nicaragua	1	0	1	1	1	3
Panama	1	1	3	0	0	3
Dom. Rep.	0	0	0	2	0	2
Peru	0	0	0	1	0	1
AVERAGE						3.78

*Total = App & Tenure + Impeachment + Number.

Not only different combinations of the variables that are part of the independence index may have different impact, scholars have also made arguments about specific institutions that influence the type of judges that arrive at the constitutional court. If judges are made independent, the argument goes, they would be free to decide according to their own preferences. The attitudinal model of judicial decision-making holds that judges "decide disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices" (Segal and Spaeth 2007, 86). The type of judge that arrives at the court is, thus, crucial, at least according to this model of judicial behavior. For instance, it may be the case that in the American liberal-conservative continuum, more liberal judges would tend to be more sympathetic towards enforcing social rights and expanding the role of judges in policy-making whereas more conservative judges would tend to prefer the classic role of the judge as a self-restrained neutral dispute settler. But, what makes a liberal or a conservative judge reach the court in the first place? What institutions may promote having one or the other type of judge? As the literature on the United States clearly shows, the ideological and partisan concerns of the actors involved in the appointment process play an important role in determining who actually reaches the court (e.g., Epstein and Segal 2005). But, of course, who the relevant actors are varies depending on the institutional setting. In the reminder of this part of the paper, I discuss some arguments that link institutional features to the type of judges that may reach the constitutional court.

Institutional Location of the Constitutional Organ

Different arguments convey the message that if the constitutional court is located outside the judiciary it becomes easier to appoint respected lawyers with no previous judicial careers, or even respected professionals other than lawyers who are more likely to defend rights and expand the judicial role beyond its traditional dispute settler function. The reasons are varied. First, there is the possibility to design a completely different appointing process for constitutional judges than for ordinary career judges. According to Ferejohn and Pasquino, the inherent political nature of constitutional adjudication calls for politically appointed judges, better drawn from people particularly competent at making abstract comparisons among texts, and with the capacity to deliberate about norms and explain decisions and not necessarily from those with judicial experience (Ferejohn and Pasquino 2003, 251-252). Thus, constitutional judges may be chosen by the parliament, with executive approval, from a pool of judges, law professors and politicians. They may also be chosen with the participation of civil society organizations and other state organs, such as Human Rights Commissions (more on this below).

On the other hand, when the constitutional organ is at the same time the apex of the judiciary (e.g. the Supreme Court or a chamber of it) it is also the

pinnacle of the judicial career and there is more pressure from career judges to fill its vacancies from among their best and brightest. But career judges are selected by exams at an early age and climb up the judicial ladder based on seniority and civil service career incentives and punishments. Thus, they share the values of civil service such as long tenure, respect for the rules, technical capabilities and they are more likely to favor a more traditional role of the judge (*cfr*. Guarnieri and Pederzoli 1999, 65).

A different but related argument is that, in countries that have recently made the transition to democracy, the newly established Constitutional Courts and their judges represent the values of the democratic system, while the ordinary courts are associated with the authoritarian past, if not with corruption (Horowitz 2006, 126). Thus, in these places an autonomous constitutional court would be a better institutional choice since it would carry less baggage from the authoritarian period than the ordinary judiciary. In sum, for different reasons, the location of the constitutional courts as autonomous organs may promote the arrival of judges who are more open to expand the traditional role of the judiciary into policy-making areas traditionally reserved to the political branches.

In Latin America, seven countries currently have constitutional courts outside the judiciary (the year of creation is in parenthesis): Bolivia (1995), Brazil (1988), Chile (1970-73, 1980), Colombia (1991), Ecuador (1945),[14] Guatemala (1965), and Peru (1979). Venezuela had an autonomous constitutional tribunal from 1953 to 1960 but, in the Constitution of 1961 the Supreme Court became the constitutional organ and that continues to be the case to this day. In the rest of the Latin American countries, either the Supreme Court is the constitutional organ, as it is in Mexico since 1994, or a chamber of it plays this role, as does Costa Rica's famous *Sala Cuarta*. If the arguments presented are correct, then we should observe a tendency to appoint more liberal judges in those countries with autonomous constitutional courts.

Open versus closed appointment procedures

Appointment procedures vary wildly (see, e.g., Malleson and Russell 2006) but let us consider here a simple distinction between more open processes in which civil society organizations participate and less open processes that restrict participation to political organs such as the executive, the legislature, or the judicial council. "Civil society" participation includes, for instance, non-governmental organizations, bar associations, law schools, women and minority organizations, and unions. It has been argued that the participation of civil society organizations in the appointment process makes a difference

[14] Ecuador established a *Tribunal de Garantias Constitucionales* in its 1945 Constitution. It disappeared in the 1946 Constitution but a *Consejo de Estado* acquired the functions of constitutional control. In the Constitution of 1967 the *Tribunal de Garantias Constitucionales* was re-established.

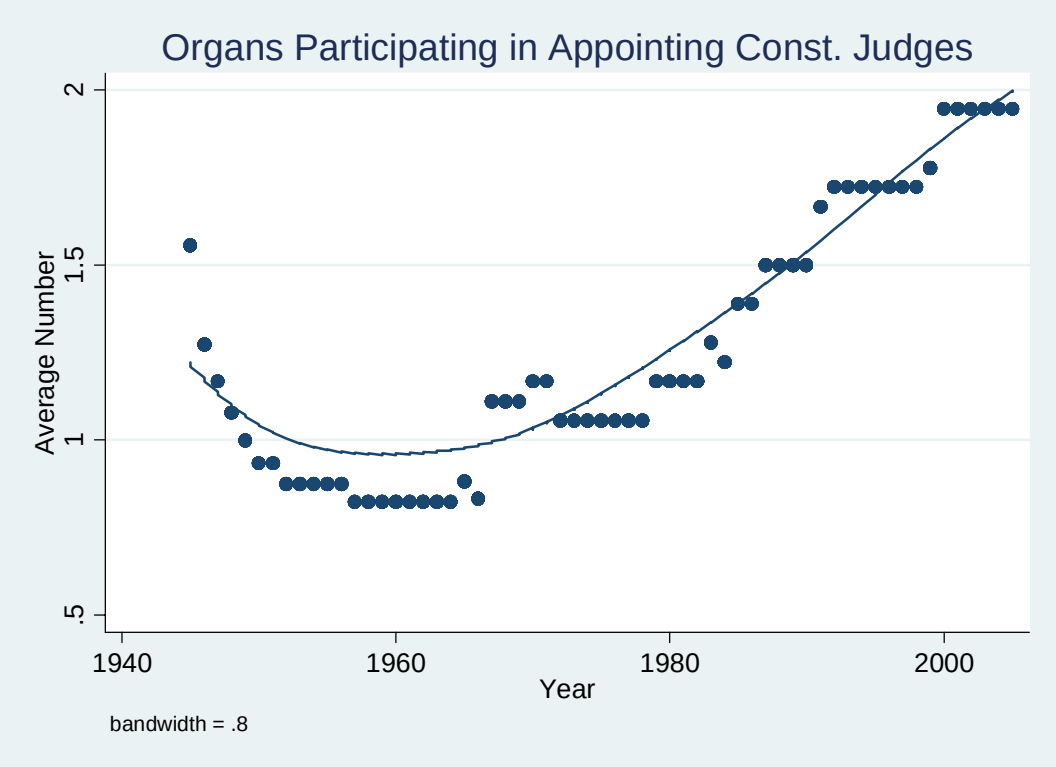
regarding the type of judges that arrive at the constitutional court. In particular, the more open the appointment procedure the more likely that less traditional judges will arrive at the constitutional court. This is the case because the participation of these organizations would tend to widen the pool of candidates, since they prefer judges who represent them better, who don't come from predominantly affluent and conservative backgrounds, and whose views are more expansive and in favor of enforcing social and economic collective rights (Russell 2006, 433). At the same time, as Victor Ferreres Comella has argued, this more democratic appointment process probably makes constitutional judges less worried about defying the legislature and participating in the policy-making process (Ferreres 2004, 1726).

Notice, however, that simply increasing the number of organs participating in the appointment process, per the logic of the standard veto player model, may actually decrease the set of viable candidates instead of widening the pool of candidates. Thus one should distinguish procedures in which the cooperation of many organs is required to appoint a judge from procedures in which different organs directly elect a number of judges in a collegial court (see Ginsburg 2003). It is clear that the latter mechanism would widen the pool of candidates. The former, cooperative appointment procedures, may actually not work as the standard logic of veto players predict, but to state a clear hypothesis on whether these cooperative procedures also produce a more diverse constitutional bench requires a stricter scrutiny of what inclusiveness mean and how it works.[15]

Figure 3 shows the average number of organs that participate in the appointment process of constitutional judges in Latin America (Figure 3). The maximum number is five and it is reached if all the following actors participate: the president, Congress, the courts, judicial council, and civil society (broadly understood to include all the organizations mentioned in the above paragraph). I counted an actor as participating whether it *(i)* nominates a judge from a pool presented by another actor, *(ii)* configures a list of judges from which another actor will nominate one, or *(iii)* directly elects at least one constitutional judge. Interestingly, the average number of participating organs has been increasing steadily since the mid 1970's, after a downward trend that started in the middle of the century.

[15] I thank John Carey and Daniel Brinks for this remark.

FIGURE 3. AVERAGE NUMBER OF ORGANS PARTICIPATING IN THE APPOINTMENT OF LATIN AMERICAN CONSTITUTIONAL JUDGES, 1945-2005 (MIN=0, MAX=5)



Note: the graph shows a locally weighted regression (lowess) of the average number of organs participating in the appointing process on time.

The Latin American countries in which the number of participating organs is more than the traditional two (i.e. executive and legislative) are: Guatemala , four organs since 1985; Honduras, three organs since 2000; Nicaragua, three organs since 2000; Chile, three organs since 1980; Colombia, three organs since 1991; Ecuador, four organs in 1945, three organs from 1967 to 1978, four organs from 1979 to 1983, three organs from 1984 to 1992, and six organs since 1993; Paraguay, three organs since 1992; and Peru, three organs from 1979 to 1992. Arguably, out of this set of countries the most interesting ones for our purposes are those in which "civil society" (broadly understood) participates in the appointment process. In this shorter list we find Guatemala since 1985, Honduras since 2000, Ecuador in 1945 and then again since 1979 and until 2005, and Peru from 1979 to 1992.[16] According to the argument, this last set of countries should display a different kind of constitutional judges

[16] The Ecuadorean case is interesting. In 1945 the constitution specified that a representative of the workers participated in the appointment of constitutional judges. This lasted only one year, and it is not until the Constitution of 1979 that another organ is added in the appointment process, but this time it is the president of the Electoral Tribunal. The military coup of 1978 and the heat of the Cold War probably explain why the worker's representative was replaced by the president of the Electoral Tribunal.

because of their open appointment process and the involvement of civil society in the election of a number of judges.

It is possible to combine the two arguments made above and ask if countries with an autonomous constitutional tribunal, that can have more flexible appointment procedures, are more likely to include civil society organizations in the appointment process. The answer, for the countries in our sample, is no. There are only two countries that have both a constitutional tribunal outside the judiciary and civil society participation in the appointment process: Guatemala and Ecuador. In these two countries, the combined presumed effects of having an autonomous constitutional tribunal and a more open appointment procedure should be more evident on the type of judges. In Guatemala, for instance, there is some evidence that the constitutional judges are more liberal than the rest of the members of the judiciary if we look at some decisions to uphold indigenous peoples' rights, although they are still subject to pressures from the executive in politically salient cases (*cfr.,* Sieder 2007, 223-224). In the case of Ecuador, a study that measured the ideological position of constitutional judges in a left-right scale from 1999 to 2003 showed that only two judges out of nine included in the sample were on the left side of the spectrum, which means that they favor a more active role for the state in the conduction of the economy (Basabe 2008, 166-168). This data is only suggestive. The relevant comparison to test the stated hypothesis is between judges of the constitutional court and those of other courts in the same country, for instance, the Supreme Court.

The previous hypotheses of the impact of the institutional location of the constitutional organ and the appointment procedure on the type of judges should be taken with a grain of salt. Arguments about institutional effects should be taken with special caution in cases with a history of institutional stability, such as Guatemala and Ecuador. There are also potential problems with the measurement of civil society participation. For one, it may be the case that the participation of civil society in the appointment process is not explicitly mentioned in the Constitution, but regulated in an organic law and a common practice. This is the case of the 2003 statutory reform in Argentina, which created greater demands for transparency in judicial appointments. Moreover, our coding rule leaves out another form of civil society participation that has been shown to be quite effective, i.e. active participation to publicize and make more transparent the appointing process. This is the case, again, in Argentina where appointments to the Supreme Court after 2002 were made with an important participation of organizations such as the *Asociación de Derechos Civiles* (ADC) and the *Centro de Estudios Legales y Sociales* (CELS) and observers agree that the result was that first-level judges were appointed to the Supreme Court (see Ruibal 2007).

Unpacking the powers of constitutional judges

Before analyzing the arguments that link specific legal instruments available for constitutional adjudication with judicial behavior, let us categorize the possible types of legal instruments according to five relevant characteristics: type, timing, jurisdiction, effects and access. TYPE refers to whether the process of constitutional adjudication is *concrete* (when the review may not take place absent a real case or controversy) or *abstract* (when the review takes place absent a real case or controversy). TIMING determines if constitutional review occur *a priori* (before a law has been formally enacted) or *a posteriori* (after the law has been adopted). JURISDICTION can be either *centralized* (there is only one court responsible for it) or *decentralized* (more than one court can interpret the Constitution and render laws, decrees or regulations unconstitutional). EFFECTS of the decisions in constitutional cases may be *erga omnes* (valid for everyone) or *inter partes* (valid only for the participants in the case). Finally, ACCESS to legal instruments can be *open* (any citizen has legal standing to use them) or *restricted* (only public authorities, such as a fraction of legislators or leaders of political parties have legal standing).

The first three characteristics —type, timing, and jurisdiction— allow us to identify four different legal instruments for constitutional control (Navia and Rios-Figueroa 2005). Technically, with these three features there could be eight different legal instruments. However, four of those combinations are either impossible or not observed because they are unappealing for practical reasons.[17] For instance, notice that while abstract review might occur *a priori* or *a posteriori*, concrete review can only occur a posteriori. There cannot be concrete adjudication a priori, because "concrete" requires the review to occur after the law has entered into effect. Also, logically, when there is *a priori* review, jurisdiction cannot be decentralized because the law hasn't even been enacted. Similarly, although it is possible to imagine abstract review with decentralized jurisdiction, this combination is not commonly observed because it is unappealing for practical reasons. That is, if every judge in the country could declare a law, in the abstract, unconstitutional, this would create not only extraordinary legal uncertainty[18] but it would also make lower court judges extremely powerful and create a necessity for a system of automatic appeals that would have to be resolved quickly in order to give stability to the legal framework. For these reasons, we are left with four different instruments of constitutional review: *1)* concrete centralized *a posteriori*, *2)* concrete decentralized *a posteriori*, *3)* abstract centralized *a*

[17] I thank Matt Golder for pointing out this clarification.

[18] Kelsen believed that the concrete-decentralized adjudication approach of the U.S. system failed to produce unity and uniformity in decisions, and thus created legal insecurity among the citizens (2001, 43). Imagine a system in which the combination abstract-decentralized exists.

priori, and 4) abstract centralized *a posteriori*. This discussion is summarized in Table 3.

TABLE 3. LEGAL INSTRUMENTS FOR CONSTITUTIONAL CONTROL ACCORDING TO TYPE, TIMING AND JURISDICTION

	CONCRETE		ABSTRACT	
Jurisdiction / Timing	**A priori**	**A posteriori**	**A priori**	**A posteriori**
Centralized	Not possible	Yes	Yes	Yes
Decentralized	Not possible	Yes	Not possible	Not observed

Note: "Not possible" means that the combination of characteristics cannot logically occur, and "not observed" means that while the combination is logically possible it is unappealing for either theoretical or practical considerations.

The effects of the decisions in cases where one of the four instruments is used can vary, and access to each instrument can also be different. For "effects" and "access", it is also possible to identify some combinations that are either logically impossible or practically unappealing. For instance, take the first instrument of constitutional control (i.e. concrete-centralized-*a posteriori*), which would be like the Spanish *amparo,* the German *Verfassungsbeschwerde*, or the Mexican *controversia constitucional*. Decisions of cases in which this instrument is used can have *erga omnes* or *inter partes* effects. Similarly, access to this instrument can be open to all citizens or restricted to public authorities.

Now take the second instrument, i.e. concrete-decentralized-*a posteriori*, which is the Mexican *amparo* suit, the Colombian *tutela*, the Brazilian *mandado de segurança*, or the Anglo-Saxon *habeas corpus*. Since these instruments can be heard by any judge, the legal processes that use this instrument typically start in the lower courts and thus decisions in these cases generally have *inter partes* effects. If these decisions are appealed and reach the last court of appeals or the constitutional court then they may acquire general effects.[19] At the same time, this instrument is supposed to alleviate constitutional infractions of individual rights, thus, restricting access to this instrument although imaginable would be completely unappealing.

The prototypical example of the third instrument, abstract-centralized-*a priori*, is the one popularized by the French *Conseil Constitutionnel*. Decisions on this type of instrument must be *erga omnes* since the process is basically a quality control in the law-making process. For the same reason, even if it were possible, it would be unappealing to open access to this instrument to every citizen, and thus, it is generally available only for those who partake in the law-making process, i.e. the legislators and the executive.

[19] The Colombian *tutela* can reach the Constitutional Court and has explicit *interpartes* effects. However, this Court has argued that in some situations the *tutela* points to "unconstitutional states of affairs" and give general validity to its rulings (see Cepeda, 2005).

Finally, the fourth instrument, abstract-centralized-*a posteriori*, like the Mexican *acción de inconstitucionalidad*, implies literally deleting a law or a part of it from the codes, and thus it is impossible for decisions in these cases to have effects only for those who filed the suit. At the same time, access to this instrument can be open to all citizens or restricted to public authorities. This discussion is summarized in Table 4.

TABLE 4. EFFECTS AND ACCESS FOR DIFFERENT LEGAL INSTRUMENTS OF CONSTITUTIONAL CONTROL

	EFFECTS		ACCESS	
	ERGA OMNES	INTER PARTES	OPEN	RESTRICTED
Instrument 1	Yes	Yes	Yes	Yes
Instrument 2	Not observed	Yes	Yes	Not observed
Instrument 3	Yes	Not possible	Not observed	Yes
Instrument 4	Yes	Not possible	Yes	Yes

Note: "Not possible" means that the combination of characteristics cannot logically occur, and "not observed" means that while the combination is logically possible it is unappealing for either theoretical or practical considerations. Instrument 1: Concrete / centralized / a posteriori. Instrument 2: Concrete / decentralized / a posteriori. Instrument 3: Abstract / centralized / a priori. Instrument 4: Abstract / centralized / a posteriori.

We can now discuss some arguments that link legal instruments for constitutional adjudication to judicial behavior. The abstract–centralized-*a posteriori* instrument of constitutional control, invented by Kelsen, has been considered the most "political" tool that judges possess by some scholars because it directly implies legislating albeit in a "negative" way (e.g. Stone Sweet 2000, 142-5; Guarnieri and Pederzoli 1999, 113-115). However, it has been argued that this is not a good instrument for judges to enforce rights, because it is too rough a tool that forces constitutional judges to decide whether a law or a part of it violates a constitutional right, when answers to those kinds of questions usually require contextual arguments for which 'concrete' instruments are better suited. This is the idea behind Gerald Rosenberg's argument that, since "judges are gradualists", litigation for significant social reform must take place step-by-step, "small changes must be argued before big ones" (Rosenberg 1991, 31). Charles Epp made a similar point when he said: "[…] even landmark decisions are isolated symbols unless they are supported by a continuing stream of cases providing clarification and enforcement" (Epp 1998, 18).[20] That is, constitutional judges give meaning to the abstract clauses of the Constitution on a case by case basis, taking into account the complexity of the contextual situation in which those cases

[20] Carruba (2009) develops a model showing that once courts have been empowered they gradually generate compliance through a series of small, prudent decisions.

occur. This does not make abstract review a good instrument for enforcing rights: it is a saw for a job that requires a scalpel.[21]

For the same reasons, the abstract-centralized-*a posteriori* instrument may be better to arbitrate political conflicts, especially if access to this instrument is restricted to public authorities. In Mexico, for instance, the Supreme Court has been arbitrating partisan conflicts and leveling the playing field by nullifying biased state electoral laws (Finkel 2003; Ansolabehere 2007). Notice also that centralized/abstract instruments are, in addition to other characteristics, more immediate: it is generally the case that with this instrument judges have to strike down decisions made by a current administration and government. In contrast, concrete/decentralized instruments may take cases to court in which legislation passed by a previous administration is being challenged. [22]

In sum, we can posit the following hypothesis: the "abstract" and "restricted access" characteristics of instrument four make it a good instrument for settling political disputes but not that good for enforcing rights. At the same time, following the previous arguments, instruments that are "concrete" are better for enforcing rights. "Concrete" instruments not only allow judges to make incremental decisions and allow judges to consider the contextual richness of the case at hand, they also increase the Court's visibility and public awareness since they "bring the human drama associated to specific cases" (Hilbink and Couso in this volume).

However, notice that there are two "concrete" instruments: one that is also "centralized" (instrument one) and one that is "decentralized" (instrument two). Is there an optimal design for this kind of instrument to serve as a mechanism for rights protection? Rosenberg's and Epp's arguments seem to imply that for enforcing rights, it is better to use the concrete-decentralized instrument, which is the U.S. style judicial review. However, the German and Spanish "individual complaints" that are concrete-centralized instruments seem to have also worked rather well for enforcing rights (cfr. Stone Sweet 2000, 107-112).[23] Notice, moreover, that "decentralized" instruments generally come with open access, while "centralized" instruments may come with either open or restricted access. This is important because scholars have shown that open access to constitutional justice is crucial for a court to be more active in the defense of rights (Wilson and Rodriguez-Cordero 2006; Smulovitz and Peruzzotti 2000). In sum, the hypothesis would be that instruments that are 'concrete' are better for rights protection, with

[21] As Tocqueville (2000, 101) argued: "When a judge, in a given case, attacks a law relative to that case, he stretches the sphere of his influence but does not go beyond it, for he was, in a sense, bound to judge the law in order to decide a case. But if he pronounces upon a law without reference to a particular case, he steps right beyond his sphere and invades that of the legislature".

[22] Thanks to Pilar Domingo for pointing this out.

[23] It should be noted that, in both Germany and Spain, this instrument has general effects so, as we will see below, it is not quite similar to many Latin American instruments of this type.

instrument two (concrete-decentralized-*a posteriori*) being the best suited tool for this task. However, it remains an empirical question to determine if this is actually the case in cross-national comparisons, and if a centralized/concrete instrument can be as good.[24]

Another argument that links the legal framework with constitutional judges more willing to enforce rights is simply that the more rights are specified in the Constitution, the more likely judges will enforce some of them (Rosenberg 1991, 11). Some explanations of why the Colombian Constitutional Court has been so active in rights enforcement is the more extensive catalogue of rights included in the 1991 Constitution as compared to the previous Constitution (Uprimny 2006). In general, however, as Siri Gloppen argues, "rights are now incorporated into the legal frameworks of most countries, either in national constitutions, or in the form of human rights provisions in customary international law and legally binding treaties" (Gloppen 2006, 40). Thus, in the contemporary world, it wouldn't be difficult for judges to find valid legal sources to sustain their rights-enforcement behavior, although the legitimacy of that move certainly varies across countries.[25]

Turning to the data on our sample of Latin American countries, Figures 4 and 5 show the proportion of countries that have each one of the four instruments of constitutional control previously identified. There are several interesting things to note, but I want to signal out the following: the proportion of countries with instruments that are concrete, either centralized or decentralized, has been more or less constant around 70% since 1945. These instruments are the different varieties of what can be generically called the Latin American *amparo* (see Brewer-Carías 2009), which is present in one form or another in almost all Latin American constitutions.[26] But there are interesting differences regarding both "concrete" instruments: when "concrete" is combined with "decentralized" (i.e. instrument two, Figure 5 left panel) access is by definition open, but when "concrete" is combined with "centralized" (i.e. instrument one, Figure 4 left panel) access to it varies across countries and across time. The tendency to open access to concrete-centralized instruments was reversed in the beginning of the 1990s[27] and very

[24] Instrument three, abstract-centralized-*a priori*, does not seem to favor a particular kind of judicial behavior.

[25] Scholars have also pointed out that if courts have the power to choose the cases they will decide, then they will choose more cases to enforce rights. In Latin America, only the Mexican Constitution specifies something similar but not exactly the same to the writ or *certiorari*, which is the faculty to attract cases. Ana Laura Magaloni has argued that the Mexican Supreme Court should actively use this power to engage more actively in rights enforcement (Magaloni 2007). Similar prerogatives exist in other Latin American countries (e.g. *per saltum* in Argentina) but they are not clearly specified in constitutional texts (see Brewer-Carías 2009).

[26] The Dominican Republic does not have the *amparo* instrument in its constitution, but the Supreme Court in that country actually created the instrument jurisprudentially. The Argentinean Supreme Court had done something similar in 1957 (Brewer Carias 2009, 52, 93).

[27] This downturn is explained by the cases of Ecuador, Peru, and Venezuela. Ecuador restricted access to this instrument since 1996. Peru created this instrument in the 1993 constitution, but it was born with restricted access, and the same is true for Venezuela and its 1999 constitution.

few countries allow for general effects with this kind of instrument (see Figure 4, left panel, solid, long-dashed line and short-dashed line, respectively). Variation in access to these instruments, thus, may be an important explanatory variable to why some constitutional judges are more prone to enforce rights.

FIGURE 4. PROPORTION OF COUNTRIES THAT HAVE INSTRUMENTS ONE AND FOUR, 1945-2005

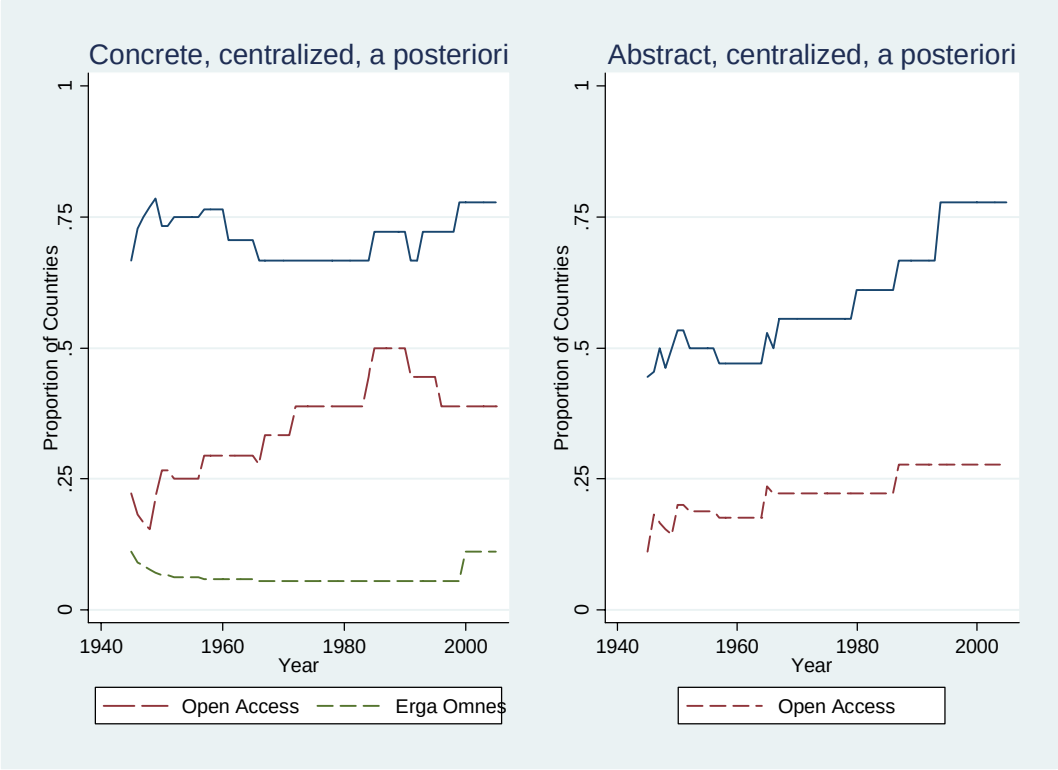
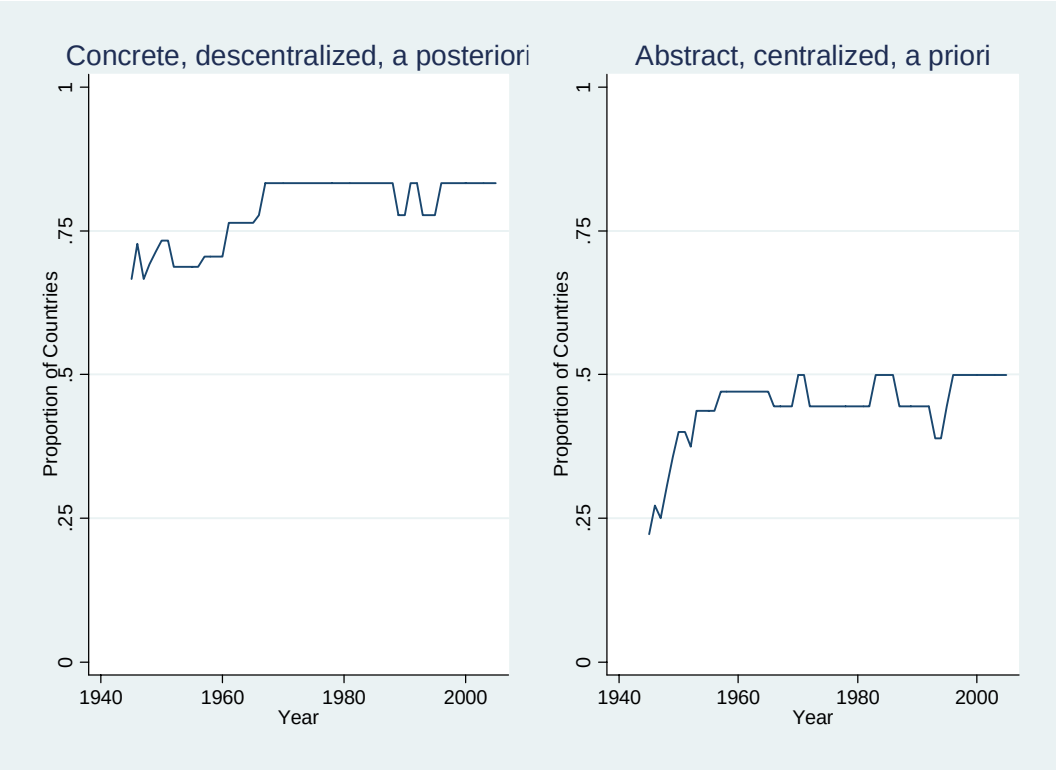


FIGURE 5. PROPORTION OF COUNTRIES THAT HAVE INSTRUMENTS TWO AND THREE, 1945-2005



In turn, the proportion of countries with abstract-centralized instruments, either a posteriori or a priori, presents more variation. Instrument four (abstract–centralized–*a posteriori*) is now common instrument in the region (around 75% countries have it), but this was not the case in 1945 when only about half of the countries in the region had this instrument: this instrument has been expanded in the wave of judicial reforms since the early 1980s. Moreover notice the interesting gap between the countries that have this instrument, around 75% by 2005, and those in which this instrument can be used by any citizen, around 25% by 2005 (Figure 4, panel on the right, solid and dashed line respectively). The proportion of countries with instrument three (abstract–centralized–*a priori*) also increased steeply from 1945 to around 1960 (from 25 to 50%), but then it stabilized at around 50% since then.

Let us look at what particular instruments each country had in the year 2005. Table 5 and Table 6 show this information. The first thing to note is that, in general, Latin American countries have chosen to include many different legal instruments of constitutional control instead of having only one. Most countries have at least two, and many have three instruments; some countries have all four instruments (e.g. El Salvador, Ecuador, Panama),

while a handful have only one (e.g. Argentina, Uruguay). Instruments one and two, which share the characteristic that they are "concrete" and thus more suitable for enforcing rights, are present in several countries. Half of the countries that have instrument one restrict access to it, and only three countries (Bolivia, Honduras and Mexico) allow for *erga omnes* effects with this instrument.[28]

Notice that the Latin American countries that have been more active defending rights, i.e. Costa Rica and Colombia, have instrument one and two, respectively, both of which are concrete. These two countries also have instruments three and four. On the other hand, the instrument that was identified as better suited to arbitrate political conflicts, instrument four with restricted access, is present in Bolivia, Brazil, Chile and Mexico, among others. As was mentioned in the beginning of the paper, Chile and Mexico have been considered among the countries in which judges have been closer to being arbiters of the political conflict than to the active defense of rights (Magaloni 2003; Scribner 2004).

TABLE 5. LEGAL INSTRUMENTS OF CONSTITUTIONAL CONTROL IN LATIN AMERICA, YEAR 2005

CONCRETE & A POSTERIORI		ABSTRACT & CENTRALIZED	
CENTRALIZED	DECENTRALIZED	A PRIORI	A POSTERIORI
Instrument 1	Instrument 2	Instrument 3	Instrument 4
Bolivia	Argentina	Bolivia	Bolivia
Brazil	Bolivia	Chile	Brazil
Chile	Brazil	Colombia	Chile
Costa rica	Colombia	Costa rica	Colombia
Ecuador	Ecuador	Ecuador	Costa rica
El salvador	El salvador	El salvador	Dominican republic
Guatemala	Guatemala	Honduras	Ecuador
Honduras	Honduras	Panama	El salvador
Mexico	Mexico	Venezuela	Guatemala
Panama	Nicaragua		Mexico
Paraguay	Panama		Nicaragua
Peru	Paraguay		Panama
Uruguay	Peru		Peru
Venezuela	Venezuela		Venezuela

[28] In Mexico decisions need to be made by a supermajority of eight justices (out of eleven) to produce *erga omnes* effects.

TABLE 6. EFFECTS AND ACCESS OF INSTRUMENTS OF CONSTITUTIONAL CONTROL IN LATIN AMERICA, YEAR 2005

	EFFECTS		ACCESS	
	ERGA OMNES	INTER PARTES	OPEN	RESTRICTED
Instrument 1	Honduras Bolivia Mexico*	Brazil Chile Costa Rica Dom. Republic El Salvador Guatemala Panama Paraguay Peru Uruguay Venezuela	Brazil Costa Rica El Salvador Guatemala Honduras Panama Paraguay	Bolivia Chile Ecuador Mexico Peru Uruguay Venezuela
Instrument 2		Argentina Bolivia Brazil Colombia Ecuador El Salvador Guatemala Honduras Mexico Nicaragua Panama Paraguay Peru Venezuela	Argentina Bolivia Brazil Colombia Ecuador El Salvador Guatemala Honduras Mexico Nicaragua Panama Paraguay Peru Venezuela	Not observed
Instrument 3	Bolivia Chile Colombia Costa Rica Ecuador El Salvador Honduras Panama Venezuela	Not possible	Not observed	Bolivia Chile Colombia Costa Rica Ecuador El Salvador Honduras Panama Venezuela
Instrument 4	Bolivia Brazil Chile Colombia Costa Rica Dom. Republic Ecuador El Salvador Guatemala Mexico*	Not possible	Colombia El Salvador Guatemala Nicaragua Panama	Bolivia Brazil Chile Costa Rica Dom. Republic Ecuador Mexico Peru Venezuela

	EFFECTS		ACCESS	
	ERGA OMNES	INTER PARTES	OPEN	RESTRICTED
	Nicaragua Panama Peru Venezuela			

*Effects in these cases are *erga omnes* only if a supermajority of judges votes in the same direction.

In general, Latin American countries have quite a diversified portfolio of legal instruments of constitutional control. Some instruments have been pointed out as being better tools for litigants to fight for rights (i.e. those that have open access) and also for judges to enforce those rights (i.e. those that are designed to solve concrete disputes and controversies). Some other instruments have been signaled out as being better for judges and political actors to settle disputes between them (i.e. those that are abstract and with restricted access). We can find these instruments in many countries, and most of the time more than two instruments in the same country, thus, the region is a fertile ground for empirical research to determine whether certain institutional features related to legal instruments of constitutional control are directly or indirectly linked to the behavior of constitutional judges.

Of course, it is important to distinguish between the availability of an instrument and its actual use, in one country the bulk of legal activity may involve a particular instrument even though litigants have different options.[29] It is also important to keep in mind that even if instruments are available and used, there is still the problem of compliance with judicial decisions which in some case may invalidate the most creative and original pro-rights decision made by constitutional judges. Even if judges do have the legal power to, for instance, remove a public authority for non-compliance this capacity may actually backfire and make compliance harder to achieve (see Staton forthcoming).

[29] Thanks to Aníbal Pérez-Liñán for making this precision. The reasons are varied and interesting. For instance, it may be that lawyers are used to one particular instrument that serves their goals and do not want to invest resources in exploring others. This seems to be the case of the *amparo* suit in Mexico that is not only the legal instrument most commonly used but also, according to Mexican Justice José Ramón Cossío, lawyers file their *amparos* in the vast majority of cases recurring to ready-made time-tested arguments based on highly technical details of the due process clause in the Mexican Constitution. This would hamper the ability of the Justices to construct the meaning of the constitution because they don't get good inputs for making novel arguments and if they do it is clear that they are acting in an expansive, *interpretitivist* way.

Conclusions

This paper analyzed several arguments in which the institutional framework, or a certain feature thereof, is invoked to explain the behavior of constitutional judges. In particular, I discussed arguments that consider an institutional feature to explain why and to what extent constitutional judges tend to behave more like arbiters of political conflict or like active defenders of rights. The paper also mapped the existence or absence of the relevant institutional features in a sample of eighteen Latin American countries from 1945 through 2005. Why some countries have some institutions but not others, and whether those institutional features indeed produce a specific behavior are interesting questions that should be pursued. The impressive activity in reforming the judicial branch of government throughout Latin America signals that at least some of those involved in the reform processes (e.g. politicians, donors, consulting experts) believe that change in behavior can start with institutional change. It is an issue for future research to establish whether it is indeed the case.

As Shugart and Carey have shown (1992) not all presidential systems are alike and the institutional differences in, for instance, presidential vetoes may be consequential (see also Alemán and Schwartz 2006). Similarly, this paper shows that there are interesting variations in the institutional structure of Latin American constitutional justice systems, all of which share the civil law tradition. If the institutional structure within which judges perform their jobs has an impact on their decision-making, the region is a good laboratory to explore these arguments. Kapiszewski and Taylor (2008) have pointed out interesting research avenues in the study of judicial politics in Latin America, and a comparative research agenda could bring the study of courts closer to the study of executives and legislatures, a field that has been growing and generating important insights.

References

Alemán, Eduardo and Thomas Schwartz (2006). "Presidential Vetoes in Latin American Constitutions", in *Journal of Theoretical Politics*, vol. 18, no. 1, 98-120.

Ansolabehere, Karina (2007). *La política desde la justicia: Cortes supremas, gobierno y democracia en Argentina y México*. México: FLACSO-Fontamara.

Brewer-Carías, Allan R. (2009). *Constitutional Protection of Human Rights in Latin America. A Comparative Study of Amparo Proceedings.* New York: Cambridge University Press.

Basabe, Santiago (2008). "Preferencias ideológicas y políticas judiciales: Un modelo actitudinal sobre el voto en el Tribunal Constitucional de Ecuador". *América Latina Hoy,* 49: 157-177.

Carruba, Clifford J. (2009). "A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems". *The Journal of Politics,* vol. 71, no. 1, pp. 55-69

Cepeda Espinosa, Manuel J. (2005). "The Judicialization of Politics in Colombia: The Old and the New". In Rachel Sieder, Line Schjolden and Alan Angell Palgrave (eds.), *The Judicialization of Politics in Latin America.* Basingstoke: Palgrave Macmillan.

Damaska, Mirjan R. (1986). *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process.* New Haven: Yale University Press.

Domingo Villegas, Pilar (2005). "Judicialization of politics: The changing political role of the judiciary in Mexico". In Rachel Sieder, Line Schjolden and Alan Angell Palgrave (eds.), *The Judicialization of Politics in Latin America.* Editors Basingstoke: Palgrave Macmillan.

Epp, Charles R. (1998). *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective.* Chicago: University of Chicago Press.

Epstein, Lee and Jeffrey A. Segal (2005). *Advice and Consent. The Politics of Judicial Appointments.* New York: Oxford University Press.

Ferejohn, John and Pasquale Pasquino (2003). "Rule of Democracy and Rule of Law". In José María Maravall & Adam Przeworski (eds.), *Democracy and the Rule of Law.* New York: Cambridge University Press.

Ferreres Comella, Victor (2004). "Constitutional Structures and Institutional Designs-The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism". *University of Texas Law Review,* 82 (7): 1705-1736.

Finkel S., Jodi (2003). "Supreme Court Decisions on Electoral Rules After Mexico's 1994 Constitutional Reform: An Empowered Court", *Journal of Latin American Studies,* vol. 35, pp. 777-799.

_____ (2008). *Judicial Review as Political Insurance: Argentina, Peru, and Mexico in the 1990s.* University of Notre Dame Press.

Gargarella, Roberto (1997). "Recientes reformas constitucionales en América Latina: Una primera aproximación". *Desarrollo Económico,* 36 (144): 971-990.

Ginsburg, Tom (2003). *Judicial Review in New Democracies: Constitutional Courts in Asian Cases.* New York: Cambridge University Press.

Gloppen, Siri (2006). "Courts and Social Transformation: An Analytical Framework". In Gargarella, Roberto, Pilar Domingo and Theunis Roux (eds.), *Courts and Social Transformation in New Democracies. An Institutional Voice for the Poor?* Surrey: Ashgate.

Guarnieri, Carlo and Patrizia Pederzoli (1999). *Los jueces y la política. Poder judicial y democracia,* Madrid: Taurus.

Hammergren, Linn A. (2007). *Envisioning Reform. Improving Judicial Performance in Latin America.* University Park, PA: Penn State University Press.

Hilbink, Lisa and Javier Couso (2009). "From Quietism to Incipient Activism: The Institutional and Ideological Roots of Rights Adjudication in Chile", presented at the conference Judicial Politics in Latin America.

Helmke, Gretchen and Jeffrey K. Staton (2009). "Courting Conflict: The Logic of Risky Judicial Decisions in Latin America", presented at the conference Judicial Politics in Latin America.

Horowitz, Donald L. (2006). "Constitutional Courts: A Primer for Decision Makers". *Journal of Democracy,* 17(4): 125-137.

Kapiszewski, Diana and Matthew M. Taylor (2008). "Doing Courts Justice? Studying Judicial Politics in Latin America". *Perspectives on Politics,* 6 (4): 741-767.

Kelsen, Hans (2001). *La garantía jurisdiccional de la Constitución.* Mexico: UNAM.

Magaloni, Ana Laura (2007). "¿Por qué la Suprema Corte no ha sido un instrumento para la defensa de derechos fundamentales?". Documento de Trabajo # 25, División de Estudios Jurídicos, CIDE.

Magaloni, Beatriz (2003). "Authoritarianism, Democracy and the Supreme Court: Horizontal Exchange and the Rule of Law in Mexico". In Scott Mainwaring and Christopher Welna (eds.), *Democratic Accountability in Latin America Oxford:* Oxford University Press.

Malleson, Kate and Peter H. Russell (eds.) (2006). *Appointing Judges in an Age of Judicial Power.* Toronto, CA: University of Toronto Press.

Navia, Patricio and Julio Ríos-Figueroa (2005). "The Constitutional Adjudication Mosaic of Latin America". *Comparative Political Studies,* 38(2): 189-217.

Pozas-Loyo, Andrea and Julio Rios-Figueroa. Forthcoming. "Enacting Constitutionalism. The Origins of Independent Judicial Institutions in Latin America", Comparative Politics.

Przeworski, Adam (2007). "Is the Science of Comparative Politics Possible?". In Carles Boix and Susan Stokes (eds.), *The Oxford Handbook of Comparative Politics.* New York: Oxford University Press, ch. 6, pp. 147-171.

Rios-Figueroa, Julio and Jeffrey K. Staton (2008). "Unpacking the Rule of Law: A Review of Measures of Judicial Independence". Working Paper # 21. Political Methodology Working Paper Series of the Committee on Concepts and Methods. International Political Science Association.

Rosenberg, Gerald (1991). *The Hollow Hope. Can Courts Bring About Social Change?* Chicago: University of Chicago Press.

Ruibal, Alba (2007). "The Process of Supreme Court Reform in Argentina: In Search of Legitimacy". Paper presented at the Midwest Political Science Association Meeting.

Russell, Peter H. (2006). "Conclusion". In Malleson, Kate and Peter H. Russell (eds.). *Appointing Judges in an Age of Judicial Power.* Toronto, CA: University of Toronto Press.

Scribner, Druscilla. (2004). *Limiting Presidential Power: Supreme Court-Executive Relations in Argentina and Chile,* PhD Dissertation, University of California, San Diego.

Segal, Jeffrey and Harold J. Spaeth (2007). *The Supreme Court and the Attitudinal Model Revisited.* New York: Cambridge University Press.

Soberg Shugart Matthew and John M. Carey (1992). *Presidents and Assemblies.* New York: Cambridge University Press.

Sieder, Rachel. (2007). "The Judiciary and Indigenous Rights in Guatemala". *International Journal of Constitutional Law,* ICON, 5 (2): 211-241.

Smulovitz, Catalina and Enrique Peruzzotti (2000). "Societal Accountability in Latin America: The Other Side of Control". *Journal of Democracy,* 11(4).

Staton, Jeffrey K. Forthcoming. *Judicial Power and Strategic Communication in Mexico,* New York: Cambridge University Press.

Stone Sweet, Alec (2000). *Governing with Judges.* New York: Oxford University Press.

Taylor, Matthew M. (2008). *Judging Policy: Courts and Policy Reform in Democratic Brazil.* Stanford: Stanford University Press.

Tocqueville, Alexis de (2000). *Democracy in America.* New York: Harper Collins.

Uprimny Yepes, Rodrigo (2006). "The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates". In Roberto Gargarella, Pilar Domingo and Theunis Roux (eds.), *Courts and Social Transformation in New Democracies. An Institutional Voice for the Poor.* London, GB: Ashgate.

Vargas Vivancos, Juan Enrique (2009). "Las cortes supremas y la reforma judicial en Latinoamérica". *Reforma Judicial. Revista Mexicana de Justicia,* 13: 271-300.

Wilson, Bruce M. (2005). "Changing Dynamics: The Political Impact of Costa Rica's Constitutional Court". In Rachel Sieder, Line Schjolden and Alan Angell Palgrave (eds.), *The Judicialization of Politics in Latin America.* Basingstoke: Palgrave Macmillan.

Wilson, Bruce M. and Juan C. Rodríguez Cordero (2006). "Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics". Comparative Political Studies, 39 (3): 325-351.

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