

**New Courts for New Democracies:  
Judicial Changes in Latin America from 1975 to 2009**

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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 also reformed these courts, ostensibly with the goal of creating more independence, more rule of law, more rights protection, or all of these combined. These courts, the literature suggests, are increasingly consequential. Countries have always had courts, of course, but 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). We do not yet have, however, a satisfactory explanation for the approximately simultaneous appearance of more powerful, more consequential courts in countries scattered across the globe.

There is, to be sure, a great deal of useful and informative research about particular courts and particular contexts. We have some tentative explanations proposed for one of the principal consequences of this phenomenon – what some scholars have called, somewhat imprecisely, the judicialization of politics (Tate and Vallinder 1995b), others the legalization of policy areas (Gauri and Brinks 2008) and still others juristocracy (Hirschl 2004). Most of these explanations focus on domestic politics: Ginsburg (2003), Finkel (2005, 2004) and Bill Chavez (2004), for example, all focus on the effect of domestic political fragmentation on the creation, design and operation of apex courts. Tate (1995) similarly argues that the increasing importance of courts is a consequence of rising levels of democracy in many countries around the world. Gloppen, et al. (2004) emphasize the demand side, especially the role of social organization and ease of access.

Others, however, focus on international influences: Moustafa (2003) argues that even dictators empower courts to protect rights in response to international (economic) pressures, Rodriguez Garavito (forthcoming) discusses the effect of international networks on the spread of “the global neoconstitutional project”, and Domingo and Sieder (2001) document the efforts of international financial institutions to reform courts in Latin America. And yet the purely domestic accounts, on their face at least, appear unable to account for the global spread of stronger courts, while the international accounts fail to incorporate the very credible results of research on the impact of domestic political conditions – specifically, political fragmentation – on judicial institutions.

In this project we intend to bring these two strands of research together, to explore the role of international and domestic factors in producing changes in judicial institutions. The project seeks to account for the appearance of facially similar courts in countries with differing domestic political circumstances, while incorporating the effect of domestic politics on the detailed design of these courts. We are doing, in effect, what Ginsburg (2008) calls for: “while no general diffusion-based study has yet been undertaken to examine the spread of constitutional review, casual empiricism suggests there is a good deal of diffusion or institutional isomorphism with regard to structures of constitutional review.... An account that combines institutional considerations with some of the recent diffusion-based approaches may be a more fruitful direction than either approach alone. Isolating the factors that push towards adoption or retardation of particular elements of institutional design would advance our understanding a good deal.”

On a purely descriptive level, we also offer a more detailed, nuanced and theoretically informed analysis of judicial institutional design and its potential consequences for judicial

authority and autonomy. Using this conceptual framework, which can be extended to any court around the world, we offer a detailed survey of judicial institutional arrangements in Latin America and their changes over time. Finally, we use the spread of courts to elucidate important questions for the literature on diffusion more generally, such as the ways in which symbolic values and instrumental self-interest affect the importation of policy solutions, in an area that has crucial consequences for both democratic legitimacy and the exercise of power: judicial authority, judicial autonomy, judicial review, and the protection of rights.

The data are partly taken from the Comparative Constitutions Project, led by Tom Ginsburg and Zach Elkins (for more details on this project, see [www.comparativeconstitutionsproject.org](http://www.comparativeconstitutionsproject.org)). We are extremely grateful for the access they have given us to their data, particularly on judicial institutional structures in Latin America. However, in order to test our hypotheses on what we have called the “finer morphology” of judicial institutions and practices, we require information that in some cases is not contained in constitutional text or has not yet been coded. We completed the CCP data, therefore, by gathering and coding data ourselves on many of the most important constitutional changes that took place in Latin America – such as the 2008 Ecuador constitution or the 1997 and 2005 amendments to the Chilean constitution, to take just two important and contrasting examples. We have, however, just completed the coding process and are still working to complete the data for many of the key variables of interest. As a result, this paper is much more of a roadmap to a future project than it is a report on a completed project. Here we present the theoretical framework and some preliminary results based on the data we have available, and we offer some glimpses at the approach we expect to take in the future.

Judicial reform is an especially fertile area in which to examine the interplay of international and domestic forces. Powerful courts are intimately related both to the exercise of power and the ability of political actors to pursue their goals unhindered on the one hand, and to international and domestic democratic legitimacy on the other. Courts – and consequently judicial reforms – have emerged as important arenas for contesting competing visions of the relationship between the state and the market, the way to deal with an authoritarian past, the way to order social assistance and national health care, and often the very nature of the nation itself (see, e.g., Hirschl 2004, especially his discussion of courts and "metapolitics"). International financial institutions have made "the rule of law," and by extension courts, a central element of their aid and reform agendas (Rodriguez Garavito forthcoming). Domestic political actors emerging from authoritarianism also view courts as crucial components of a new democratic regime (Alfonsín 1993; Aristide 1993). By looking at the diffusion of different judicial arrangements we can build on the insights of Weyland's (2007) investigation into bounded rationality and the importation of foreign policy solutions. Specifically, we examine the extent to which international pressures, the impulse to borrow legitimacy-conferring institutions from abroad, and the sincere adoption of global normative ideals override self-interested rational calculation, as conventionally understood by scholars of courts and judicial politics.

To briefly anticipate the argument, if instrumental rationality modifies symbolism and domestic politics trump international pressures, we expect to find that domestic actors borrow the basic outlines of high visibility, high legitimacy institutions such as constitutional courts (that is, they adopt what we will call their symbolic attributes), but then modify their less visible but possibly more consequential finer details (what we might call their operative attributes) so as to obtain the measure of judicial power that more closely follows from local political

circumstances. In this way, they can create, if they wish, beautiful monuments to the rule of law “*para inglês ver*,” as the Brazilians say – that is, mostly for show, to satisfy outside demands. The operative attributes of these institutions would then be engineered so as to either constrain or not constrain politicians depending on the ordinary domestic determinants of judicial authority and autonomy. This dynamic would produce the simultaneous cross-national appearance of facially similar institutions that nevertheless vary widely in terms of their expected autonomy and authority. If symbolism and normative commitments to democracy and constitutionalism have priority, on the other hand, we expect that the fine morphology that determines the true extent of judicial power will be linked to available international models and goals rather than to domestic conditions.

Elkins and Simmons (2005) ask “whether diffusion is responsible for nations squeezing into ill-fitting but fashionable institutions or whether it leads them to the most functional and efficient ones available?” In the overall project, we add a third alternative: do they (a) adopt the normative goal – strong courts – but blindly imitate fashionable institutions, (b) adopt the normative goal and learn how to craft functional, powerful judiciaries adapted to local conditions, or (c) produce fashionable institutions for show, while undermining their ostensible purpose through fine tuned institutional design? In other words, this paper examines whether the judicial changes taking place in Latin America appear to be the fruit of blind imitation, whether they appear more or less uniformly aimed at producing more autonomous, stronger courts, or whether, despite convergence around the symbolic attributes of a new judicial model, there is evidence to suggest that various countries are undermining the model by building control over

the courts back into the design.<sup>1</sup> At this preliminary stage, we can only tentatively distinguish between b and c, tentatively opting for c, but, as we will see, we have good reason already to rule out a.

Our initial task, then, is to contrast the symbolic attributes, which we have suggested are more cosmetic, with the operative attributes that in theory have the potential to truly determine levels of judicial power. In order to do this, we will need to present an analytical framework for determining the expected or intended level of judicial power that can be attributed to a particular judicial design. For all the ink devoted to the notion of “powerful” courts, the concept and measurement of judicial power remain elusive. As developed in more detail below, we define (formal) judicial power as the extent to which a high court has the formal capacity and formal autonomy to act as a distinct and influential political force relative to other branches of government. A powerful court is a consequential court, one that can affect the course of politics to produce different outcomes than would otherwise obtain. To repeat: our concern here is with the institutional arrangements that might make this more likely. Whether or not and under what conditions the judges who sit on a formally powerful court make use of their institutional potential is left for subsequent research.

This institution-centric focus is deliberate. In the first section of the paper we lay out the empirical expectations that flow from different possible mechanisms of diffusion, or indeed, non-diffusion. Then we offer a theoretically informed conceptual scheme for analyzing the institutional design of national high courts as a first step to testing hypotheses about the effect of institutional design on judicial behavior and judicial intervention into politics. In the final section

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<sup>1</sup> We should clarify that, in keeping with the research question, in this project we will examine only the institutional choices made, in light of the conventional wisdom about judicial design, and not the actual operation of these new or reformed courts. Whether domestic actors actually succeed in crafting a court that exercises the expected level of power is a question for further research.

we use preliminary data to explore the determinants of judicial design, and in particular, the extent to which diffusion and domestic political conditions might influence the design chosen for a given country.

**The Constitutionalist wave:** Consequential courts are not an isolated phenomenon. In Latin America, for example, the conventional wisdom was that for nearly two hundred years the courts have been largely passive instruments of the executive: "The sad reality is that the citadel of judicial independence has been perennially besieged in Latin America" (Rosenn 1987: 23). But the last twenty or so years have been marked by the appearance of decidedly important courts such as Costa Rica's constitutional chamber (the Sala IV), the Colombian Corte Constitucional, Brazil's Supremo Tribunal Federal, Argentina's newly active Corte Suprema de Justicia de la Nación, Chile's suddenly awoken Corte Constitucional, Mexico's recently emboldened Suprema Corte, and others. And yet, as noted above, the explanations offered so far for the appearance of more powerful courts have been almost exclusively domestic and largely unrelated to institutional design. Tate (1995a), for example, argues that judicialization is driven primarily by the spread of democracy, which in turns creates the conditions for stronger courts. Ginsburg (2003) shows how political uncertainty at the time of transition to democracy impels constitution makers to delegate more power to courts. Finkel (2005, 2004) similarly describes the impact of electoral uncertainty on judicial reform. Bill Chavez's (2004) explanation is also purely domestic in nature, and driven by the fragmentation of political power. If these accounts give us the full picture, the apparent spread of strong courts is driven not by some form of diffusion but by simultaneous domestic processes (which may or may not themselves be the consequence of diffusion).

There are some accounts of the influence of international actors on judicial reform, but they do not answer the question we pose here. Hammergren (1998), for example, focuses on international efforts to disseminate best practices. Her focus, however, is on the success of reforms measured primarily as the extent to which the reforms are actually put in place. Domingo and Sieder (2001) describe the international promotion of justice reform, but again focus closely on the goals of international actors, and their relative success in achieving those goals. Neither of these works explores the combined effect of international and domestic pressures on the configuration of high courts or on their eventual power and authority. In short, in spite of the scores of works celebrating, decrying or simply documenting the rise in judicial power, we have very little work that adequately defines and measures it, and even less that evaluates the combined effect of international and domestic impulses on the growth of judicial power.

As anticipated above, we should expect that all the international attention to rule of law institutions (and the more than a billion dollars that followed that attention in Latin America alone), the dissemination of constitutionalist ideals, the identification of democracy with an independent judiciary with the power of judicial review, and the influence of new ideas regarding the value and priority assigned to rights would have an effect on countries considering new institutional arrangements. But we might also expect that savvy domestic political actors would find a way to superficially comply while undermining the full constraining effect of truly consequential courts. As the Spanish proverb – *“hecha la ley, hecha la trampa”* – suggests, in Latin America the very fabric of the law often undermines its ostensible purpose.

Dargent’s (2009) discussion of reforms to the Peruvian Constitutional Court under Fujimori provides an excellent example of this dynamic. The constitutional convention, where

Fujimori's party was dominant, bowed to international pressures to include a separate constitutional tribunal on the Spanish model in the 1990 constitution, but then made sure to include some relatively obscure details – principally the need for a supermajority vote on the court to declare a law unconstitutional, plus appointment mechanisms that gave Fujimori the ability to control enough of the appointments to produce a reliable veto – that in combination rendered the court ineffectual in any politically salient case. Sadat's creation of a constitutional court in Egypt follows a similar pattern, in that it appears to respond to investors' demands (Moustafa 2003), but contains some design features that allow the regime ultimately to destroy its independence by controlling the nomination process.

The literature on diffusion has begun to address precisely these sorts of questions. Recent and ongoing research both engages the interplay between domestic and international factors, and undertakes a finer analysis to distinguish true diffusion from pseudo-diffusion and to infer the precise mechanisms by which innovations from abroad enter into the domestic policy arena. We propose to contribute to that effort by distinguishing between the different outcomes we might predict from different causal processes.

We follow conventional definitions of diffusion in specifying it as the communication and adoption of a particular innovation across members of a social system – in this case, states (Brinks and Coppedge 2006: 468; Rogers 2003; Bunce and Wolchik 2009). As anticipated, the question is, are the observed changes truly the result of diffusion, properly defined, and if so, what does that process look like? Our data, once it is complete, will allow us to test four possible alternatives. Roughly following Weyland (2007), within “true” diffusion we can distinguish three kinds of processes that might be at work. The first is what Elkins and Simmons (2005) have also called learning: (1) normative adoption and true “technical” learning (that is, the

internalization of values plus the means to achieve them), in which domestic actors learn to value a particular institutional end, acquire the technology to produce that end, and then roll out the policy solution. The second is what Weyland describes as simple imitation employing the devices of “bounded rationality,” in which (2) domestic actors take imported models and apply them regardless of their domestic appropriateness because of the goals they supposedly help attain. The third is akin to Elkins and Simmons’ (2005) adaptation – (3) the cynical application of new knowledge about policy solutions in mostly reluctant response to pressures by external actors, without the accompanying internalization of values. This third possibility includes the imposition of a particular institutional model by foreign actors, such as the IFIs that have been so active in promoting “governance” or “rule of law” reform. While it is debatable whether this should be labeled diffusion, many have done so (e.g., Weyland 2007: 16-17) and we will continue the usage. In addition, we can distinguish all three of these diffusion processes from mere temporal and geographic coincidence, the pseudo-diffusion that could produce a wave of similar institutional innovations: (4) the independent, domestically-driven response to simultaneous domestic changes.

Given the nature of judicial institutions and the international pressures that favor new constitutionalism, each of these distinct causal processes should produce a distinct pattern of innovation:

a) **Normative adoption and true learning:** Some have argued that these changes are happening because a new generation of Latin American jurists and constitution-makers has internalized the values of new constitutionalism, and has decided that the newly democratic regimes require courts that are willing and able to vigorously defend a new, human rights-based conception of constitutional rights (Couso and Hilbink, unpublished, Perez Perdomo, get cite).

Similarly, Nunes (forthcoming) argues for the case of Colombia that neoliberal reformers have also internalized the idea that markets need strong independent courts to safeguard property rights. In this view, these true believers gain the upper hand in domestic processes of judicial reform and produce powerful courts modeled on other powerful courts abroad. Moreover, given the proliferation of examples on which they can draw, from the United States Supreme Court to the Spanish Constitutional Court, judicial engineers have plenty of judicial models to draw from in crafting a court that can support this new approach to rights-based democracy and human rights-oriented constitutionalism. If this is so, then we should observe countries with courts that may well vary in terms of their merely symbolic attributes, but that have uniformly moved toward a broader scope of authority and a higher degree of autonomy, regardless of the level of domestic political fragmentation.

b) **Imitation with strictly bounded rationality:** If court designers have simply caught the constitutional court bug and are adopting foreign models more or less blindly, with little regard for the details that give them more or less autonomy and authority, then we should observe courts that match closely on both symbolic and operative attributes, regardless of domestic conditions. Courts should be converging around a single model, regardless of domestic conditions so that there is less variation in institutional design at the end of the period than at the beginning (assuming, of course, that this dynamic is more pronounced in today's globalized world than it was whenever these courts were initially designed). Moreover, as Weyland (2007: 6-8) points out, we should see the overall morphology, symbolic and operative, track the devices employed in the most recently successful and salient cases – those countries that have managed to install and maintain high quality, stable democratic regimes.

In the Latin American context, there are several possible candidates for role model, but one is most likely. This is probably Spain, which democratized first, is viewed as having a successful democracy and a “good” court, and has had a generally strong economic performance since democratization. Chile could be another example, with its tradition of rule of law and its strong economic performance, but the democratic credentials of its institutional arrangements are tarnished because its constitution was drafted under Pinochet. Moreover, its judicial history is tarnished by complicity with the repression and by corruption and obstructionism under democracy. Costa Rica is a strong leader in terms of both democracy and the rule of law, and so may well be a model to emulate, but it has a weaker economy, and so is a less obvious success story. We will, therefore, look for convergence on the Spanish model – a separate constitutional court with centralized judicial review and well-insulated justices who serve limited (9 year) terms, and are the product of an inclusive, multi-body appointment mechanism, including some appointment power for the judiciary.

**c) Cynical/rational application of true learning in response to external pressure:** If, on the other hand, the crafters of these new courts have decided that there are strong international pressures and good legitimacy-enhancing reasons to adopt facially strong judiciaries, but have learned the lessons of judicial review well enough to craft truly powerful courts only when the domestic political conditions call for them, then a different pattern should arise. We should see courts that track very closely on high visibility symbolic attributes, but that vary widely on the finer but potentially more important details, producing courts that vary in terms of authority and autonomy. While we cannot test this at this stage, we also expect that these courts would be, at least in design, more powerful where there is greater political fragmentation and less so in more monolithic political environments.

d) **Mere temporo-regional coincidence:** If Latin American countries are more or less simultaneously but independently responding to domestic conditions – say, an increase in democracy across the region – we should see changes that simply track domestic conditions. Courts should become more powerful where fragmentation increases, weaker where it decreases and more or less stay the same where fragmentation does not change. Gross and fine morphology should track domestic conditions. Court design should respond fairly directly to movements toward greater democracy and more political pluralism. Table 1 summarizes our expectations.

**Table 1: summary of observable implications from different processes at work**

Hypothesis	Symbolic attributes	Operative attributes
Normative adoption + learning	Change overall but with considerable variation	Uniform movement toward more powerful courts, regardless of fragmentation
Cynical/rational response to pressures	High degree of consistency across cases; more change in countries more exposed to international pressures	Actual power co-varies with level of fragmentation
Bounded rationality	High probability of change regardless of domestic conditions, high degree of consistency across cases	High degree of consistency across cases, regardless of domestic conditions, especially following high quality democracies
Pseudo-diffusion	Change where there is a change in local conditions, otherwise no change. Considerable variation responsive to domestic dynamics	Actual power co-varies with level of fragmentation

As is implicit in the previous discussion, we will take as a given, at least for now, two important findings of the previous literature on courts. The first is that perhaps the most important interest-driven domestic determinant of judicial power, whether at the design stage or at the operational stage, is the level of political fragmentation and the consequent uncertainty about future electoral outcomes (Ginsburg 2003; Bill Chavez 2004; Finkel 2005, 2004). The other is that an important if not the dominant feature of courts is their constraining effect on

other political actors, in particular the executive. We should note, of course, that courts with a broad scope of authority can also be instruments of governance (Shapiro 1981; Nunes forthcoming 2010; Whittington 2005; Graber 1993). But they are the executive's or the legislature's instruments of governance only to the extent that they respond to those outside interests. For this reason, as we will see below, we include both authority and autonomy in our measure of judicial power. While we may expect strong but controlled courts (or, for that matter, weak but independent ones), in the absence of political fragmentation, we should not expect truly powerful, consequential courts without it.

### **Defining and operationalizing judicial power**

One major difficulty is that power—and judicial power, no less—defies direct observation and simple operationalization (Bachrach and Baratz 1962; Riker 1964). Power need not be exercised to be politically influential; its latent threat alone is frequently sufficient to change the course of politics (consider a majority party's power to set the legislative agenda, or an executive's potential veto of legislation). We consider that, in order to function as consequential actors in a dynamic political environment, courts (or, more precisely, the judges who sit on them)(a) must be capable of developing and expressing preferences that are substantially autonomous from those of any single outside actor – that is, they must be autonomous or impartial, in the sense in which we use that term – and (b) 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 political decision. Highly effective 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 merely 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 cut out from deciding on the most important issues of the day, or if they can be activated only by, say, a representative of the executive.

We acknowledge that these necessary conditions for judicial power can be obtained through diverse institutional mechanisms. No single prescription for judicial power exists for several reasons. First, institutional outcomes are a conditional function of their social and political contexts; thus similar institutions produce different outcomes and different institutional solutions can lead to the same outcome (Brinks 2008: 256-59; Locke and Thelen 1995). Moreover, there are different institutional arrangements that might equally promote impartiality and scope of authority. Finally, everything we know about courts so far suggests that whether courts will translate their institutional power into actual powerful behavior is contingent upon at least two variables beyond the scope of the present analysis: the political environment in which the court operates, and the willingness of judges to use their institutional power (which may or may not be a function of the former). No institutional mechanism will move judges to act who are otherwise disinclined to exercise their power. But the entire institutionalist enterprise is premised on the notion that different institutional features produce predictable outcomes. In this section, therefore, we offer a framework for evaluating judicial institutions for their potential to produce more or less judicial power.

As noted, we conceptualize power as a function of two dimensions along which all courts can be located: autonomy and scope of authority. The first problem, therefore, is to define autonomy. For purposes of this exercise, we define autonomy as the extent to which a particular court is free from control by an identifiable faction or interest outside the court. In theory, political actors can (and do) seek to ensure favorable judicial outcomes either by ensuring the appointment of friendly judges, or by retaining the capacity to punish and reward sitting judges,

or both. In the first case, the designers' goal would be to produce a court with preferences that are indistinguishable from their own. In the latter, the sincere preferences of the court are more or less irrelevant, as the goal is to have the capacity to generate the necessary incentives so that justices will subordinate their own to outside preferences. We call the first kind of control "preferential" control, and assume that it is – again, in theory, at least – the product of pre-appointment, or *ex ante*, mechanisms of control. We call the second kind of control "incentive-based" or *ex post* control, and assume it is a function of the ability of outside actors to punish or reward justices on the basis of their behavior while on the bench.

In terms of the institutional mechanisms that should produce autonomy, our starting assumption is that the more veto players are involved in the control mechanisms, the more difficult it is for any one actor to exercise control (Tsebelis 2002). As a result, we take **autonomy** to be a function of the extent to which a single interest controls pre- or post-appointment mechanisms of control, and therefore the (sincere or strategically expressed) preferences of the judges who staff the court. If a single political actor or institution can control the preferences of the judges who arrive on the court or can exercise mechanisms to punish or reward its judges, then that court will become more like a pure agent of that outside actor, and therefore lacks autonomy. By scope of **authority**, on the other hand, we mean the nature and breadth of the court's potential sphere of action. An authoritative court has the ability to speak decisively on a wide range of conflicts and on behalf of a wide range of actors. A **powerful** court has both autonomy – so it can prefer and pursue outcomes that are distinct from those of other dominant actors – and a broad scope of authority – so it can pursue its distinctive sincere preferences in areas that really matter to national politics.

These two dimensions are continua and are conceptually distinct. Thus theoretically a court may have low autonomy and high authority, or vice versa. What happens in practice is subject to competing theoretical expectations. Political actors sincerely desiring a powerful court would presumably pay attention to both dimensions, and thus a court institutionally empowered on one dimension may have a greater probability of empowerment on the other dimension. On the other hand, political actors fearful of an unduly powerful court may be reluctant to confer more authority without taking back some autonomy, and vice versa. In other words, whether the two dimensions will be positively or negatively correlated depends on the fears and hopes, the capacities and limitations of the institutional designers. As noted earlier, it is precisely this ability to tailor judicial power by playing with various dimensions that makes judicial design a fruitful arena in which to evaluate different models of diffusion.

**Operationalizing Autonomy:** As noted, in our conceptual model, the autonomy dimension is composed of two subdimensions: the *ex ante* factors (the mechanism(s) by which the preferences on the court are chosen) and the *ex post* factors (the mechanism(s) by which the sincere expression of preferences on the court is constrained). The table below summarizes the subdimensions and indicators for the autonomy dimension. The subdimensions have the potential to neutralize each other. That is, one can either appoint cronies and leave them free to act, or appoint neutral parties and pressure them, post appointment, to behave in a compliant manner. In either case, autonomy is compromised. In our analysis we do not aggregate these subdimensions, in effect remaining agnostic about whether sincere preferences or strategic calculations dominate judicial behavior.

**Table 2: Subdimensions and indicators for autonomy**

Autonomy		
<i>ex ante</i>	Appointment	Number of actors involved in nomination and percent agreement required
		Number of actors involved in approval of nominees and percent agreement required
<i>ex post</i>	Tenure	Length of term (and limits, if applicable)
		Renewable appointment (if applicable)
		Mandatory retirement age (if applicable)
	Removal	Conditions for removal
		Number of actors involved in removal
		Percent agreement required
	Number of judges	Number of actors and percentage agreement required to modify number
	Constitutional Jurisdiction	Controlled by court or by external actor(s)
Salary	Protected from political discretion	

The greater institutional autonomy a court has, the greater its potential to have either sincere or strategically conditioned preferences that diverge from those who appoint judges or can affect their fate. Conversely, the greater the influence by any single interest over the *ex ante* and *ex post* mechanisms of control of the court, the lower the court’s potential institutional autonomy from that actor. Thus, we expect that mechanisms of selection and removal that increase and diversify participation and representation in the process will produce more impartial justices who are more free to follow their preferences. This is perhaps more intuitive in the case of *ex post* control: more veto players in the process of punishing or rewarding judges make it harder to affect a judge’s incentive structure. But by a similar logic, more veto players in the appointment process should also lead to greater impartiality. From a theoretical but thoroughly pragmatic perspective, Holmes notes that “the balance of many partialities is the closest we can come to impartiality” (Holmes 2003: 50). A more empirical theoretical framework leads in the same direction: the presence of multiple veto players in the appointment process will tend to

narrow the range of possible outcomes, eliminating out-of-the-mainstream candidates, and leaving only those who fit broadly shared definitions of what it means to be an acceptable justice (Tsebelis 2002). In short, increasing the number of veto players 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.<sup>2</sup>

Regarding term length, we have two competing expectations. 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 (2009) 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. 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 autonomy. Short terms with reappointment are

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<sup>2</sup> 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 US literature on courts).

coded as more seriously reducing autonomy by increasing *ex post* mechanisms of control. Short non-renewable terms will be considered to moderately reduce autonomy by increasing *ex ante* control over judicial preferences (that is, judges will be the product of more recent majorities) and by creating incentives to please powerful people for judges who are worried about post-term jobs. By the same logic, we will code a young mandatory retirement age as negatively associated with judicial autonomy.

The final three institutional features have a more straightforward impact on autonomy. Where the number of justices on the high court, the court's jurisdiction, and the justice's salaries are internally controlled or stipulated in the constitution, judicial autonomy should increase. Where these controls are left to ordinary law or the discretion of other actors, they are open to abuse by those who would "pack" the court, diminish its member's salaries, or strip its jurisdiction in retribution for unpopular decisions.<sup>3</sup>

**Authority:** Still, the most autonomous 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. Table 3, below, summarizes the subdimensions and indicators that in theory comprise the authority dimension.

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<sup>3</sup> The formula for the measure of *ex ante* autonomy is total number of veto players in nomination and approval of judges, plus 1 if an electoral council or the judiciary have an important role in the process, times 1.5 if any of the veto players require a supermajoritarian vote to approve the appointment. The formula for *ex post* autonomy is more complex: courts score higher if they have longer terms (up to 3 points for life tenure, minus one if the retirement age is less than 70); they lose up to two points if they have short, renewable terms; and they earn, on average 1.5 points for the difficulty of the judicial impeachment process (measured by the number of veto players involved, and increased if a supermajority is required, or if the constitution specifies strict standards for removal). Summary statistics for all the constructed index variables are in Appendix 1.

**Table 3: Subdimensions and indicators for Scope of Authority**

Scope of Authority	
Agenda setting	Internal docket control mechanism (e.g., the US <i>cert</i> device)
	Primarily appellate rather than original jurisdiction
	Ease of ruling (maj or supermajority to strike law)
Access	Standing (open vs. restricted)
	Special expeditious procedures (amparo, similar mechanisms)
Text	Extent and nature of negative and positive justiciable rights in constitution
	Aspirational commitments or limits to judicial discretion
Judicial Review	Court empowered to interpret C and invalidate legislative or executive acts inconsistent with the C
	Centralized v diffuse
	Concrete v abstract review
	Pre v post promulgation
Rigid Constitution	Number of actors involved in proposing constitutional amendments and percent agreement required
	Number of actors involved in approving amendments and percent agreement required
Ancillary Powers	Presence of multiple (important) functions besides adjudicating disputes
Effect of decision	Force of precedent: binding v discretionary for lower courts
	Applies <i>erga omnes</i> v <i>inter partes</i>

At this stage, however, our coding on these variables is incomplete. As a result, we have used a limited subset of indicators, shown in the shaded cells, above, to construct our authority index. Essentially, a court’s scope of authority increases (+1) if the general public has standing to challenge the constitutionality of legislation, if the constitution specifies individual causes of action for alleged rights violations, and if its decisions are broadly binding. It increases on a sliding scale if the constitution is rigid and includes a high percentage of the 33 possible rights coded in the Comparative Constitutions Project, or if the courts have more ancillary powers. All these components are weighted equally except the ancillary powers, each of which only counts for a half point (max 1.5), and the rigidity of the constitution, which contributes just less than

two points, on average.<sup>4</sup> If a court has no judicial review, we score it as a zero, since we are primarily interested in courts that exercise constitutional control. And it bears repeating that what we are coding are attempts in constitutions to construct strong courts, so what we code are explicit, formal grants of authority, rather than any de facto or behavioral attribute.

Although the particular structures that constitute each dimension will vary greatly across contexts, courts that lack either autonomy or authority to a sufficient degree will lack judicial institutional power as we have defined it. The definition's requirement of "distinct and influential force" captures both the autonomy and authority dimensions. A court with great autonomy but little authority is unlikely to contribute consequentially to the political process (distinct but not influential), just as a court with high authority but little autonomy is unlikely to contribute a consequential political force (influential but not distinct). In the next sections we discuss first what we have called the symbolic attributes – those high visibility features of courts that the international community was highly interested in promoting – and then how the overall mix of attributes might affect the dimensions in which we are interested – ex ante and ex post autonomy, and the scope of judicial authority.

### **Symbolic vs Operative Attributes**

As anticipated in the earlier discussion of the mechanisms that might account for the wave of judicial changes, from all these attributes we must select the few that we believe are the most visible and most likely to be promoted by international actors, the most likely to be susceptible to outside pressures. Fortunately, we know quite a bit about the features of courts that were of crucial interest to international actors working on behalf of judicial reform. Domingo

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<sup>4</sup> The formula for creating the variable is as follows:  $\text{authority} = (\text{openaccess} + \text{amparo} + \text{rightsprop} + \text{amendtot}/2) + ((\text{conancil} + \text{supancil})/2) + \text{precedent} * \text{judrev}$

and Sieder (2001: 6-16), for example, identify four clusters of actors working on rule of law reform in Latin America during the 1990s, with slightly different emphases. From this we can extract some common themes.

Some of the key preoccupations of international donors are not pertinent to this project. Donors were interested in improving office management, computerizing docket systems, adding free legal counsel, creating alternative dispute resolution procedures, strengthening the police and prosecutors, working with NGOs, and creating ombudsmen's offices. All of these activities undoubtedly are important and contribute, more or less directly, to the strengthening of courts and the rule of law. At the same time, the connection to apex court behavior is too remote and contingent, so for now we will leave all these features aside.

More pertinently, it is clear that for many of the international actors access to courts and restraining the executive was a central concern, whether for enforcing contracts and protecting property rights (for the international development agencies and banks), or for protecting human and constitutional rights (for human rights NGOs and pro-democracy movements)(Domingo and Sieder 2001). Two of the solutions they advocated here were American-style **judicial review** and an **individual cause of action for asserting rights violations** (e.g., the *amparo* or *tutela* actions). "Independence" was also a common concern. One solution was to simply **specify judicial independence** in the constitution, another was to **create new courts (usually constitutional courts)** in order to avoid the effect of a perceived judicial culture of deference to the executive; yet another was the creation of a **judicial council** with a **merit-based selection process**, which was supposed to cleanse politics from the nomination and appointment process (see, e.g., Salas 2001: 30-31; Hammergren 2002). In addition to these, USAID advocated **longer judicial terms** that did not overlap with the president's term in office (Sarles 2001). Drawing on

the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, international and domestic NGOs of different sorts pushed for the inclusion of **long rights catalogs**, especially economic, social and cultural rights.

**Testing the competing influence of diffusion and domestic politics:**

In order to test the competing influence of diffusion and domestic political variables, therefore, to the extent our data permit at this stage, we will test separately for convergence on the cluster of high visibility variables identified in bold letters above, and on less prominent but possibly more important features that affect judicial authority and autonomy.<sup>5</sup> First, we will test to see whether, as casual observation would suggest, judicial reform has been a prominent feature of institutional and constitutional reforms in Latin America, in the 1980s, 90s and 00s. Second, we will see whether Latin American courts are converging toward the model described above: new courts with “guaranteed” independence, long tenure and concrete judicial review, individual causes of action for rights protection and vindication, judicial councils and merit-based selection, and long lists of rights. Third, we will present preliminary data exploring whether these changes are uniformly associated with an increase in autonomy and authority or whether the story is more complicated than that, possibly reflecting domestic conditions. In a second stage, once the data on domestic political conditions are complete, we will carry out a multivariate analysis to ascertain whether judicial changes respond more closely to domestic political conditions or whether they follow international models.

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<sup>5</sup> Ultimately, we plan to incorporate domestic political variables into the dataset and test a multivariate model that would include both international and domestic variables. We have not yet, however, matched these independent variables to our database, which at this point is almost exclusively dedicated to our dependent variable, judicial institutional design.

### **The data:**

As noted earlier, we began with data from the Comparative Constitutions Project, which we supplemented with our own coding of constitutional changes not yet covered in the CCP database. Our data cover 21 Latin American countries, including Suriname, Guyana, the Dominican Republic and Haiti, but excluding Cuba, which is not a democracy. We cover the time period from 1975 to the end of 2009. While a longer time period might offer interesting comparisons to a less globalized time, a relatively shorter period allows a closer examination of fine morphology and more informed coding, as well as more detailed knowledge of domestic political conditions. The time period is appropriate for testing the effect of international pressures on judicial institutions, since most of the “rule of law” initiatives have been in place since the 1970s (Salas 2001). Moreover, Latin America is an appropriate region in which to test the hypotheses laid out earlier, since there is considerable variation in domestic political conditions, judicial institutions, and the timing and nature of reforms.

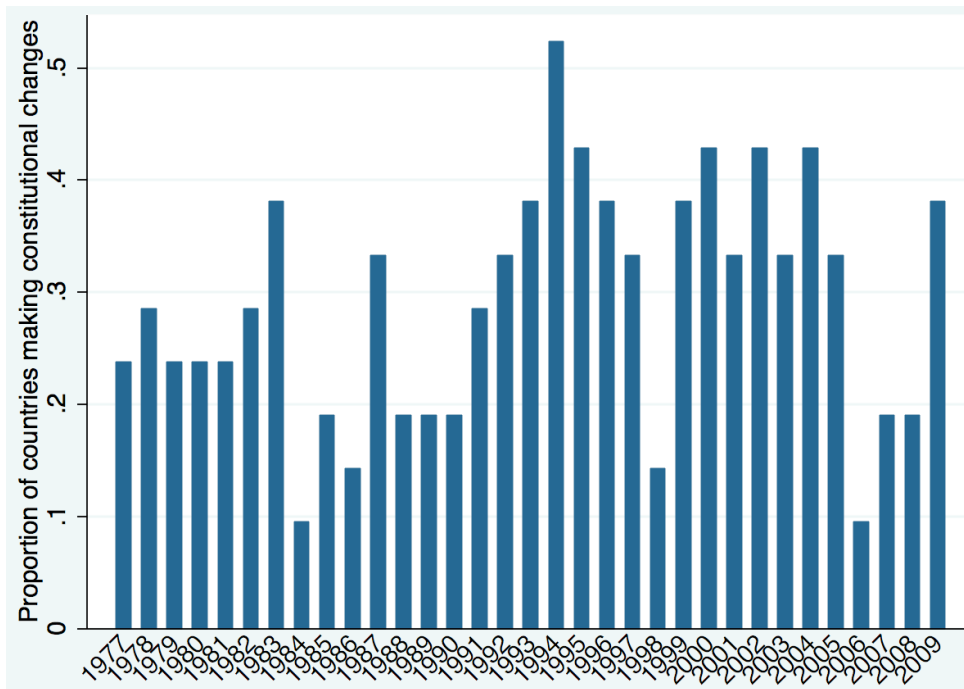
At the moment, our data is limited to what is explicitly in the constitution. Several courts are governed in part by organic laws that share some of the characteristics of the constitution (that is, they are super-majoritarian, and hard to amend), but we have not yet coded these. Yet others are largely governed by ordinary laws, or have important, Marbury vs. Madison-style decisions that expand their powers, and we do not have this information either. We plan to carry out additional coding over the course of this year, following largely the pattern used by the CCP, for purposes of comparability. Still, with the information we have, we can come to a tentative conclusion on two crucial points for this project: whether, over the last 30 years, Latin American constitution drafters created courts that approached or not the international model described

earlier, and whether their finer details suggest a corresponding increase or decrease in judicial power.

**The pattern of constitutional changes in Latin America**

**A wave of constitutional change:** Latin American countries have clearly been engaged in a wave of constitutional changes over the last 30 years. Figure 1 presents the proportion 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 continues at a high rate after the turn of the millennium.

**Figure 1: constitutional change by year in Latin America**



On average, each Latin American country has made approximately ten constitutional changes in the 35 years we covered, or about one every three years. Brazil and Mexico top the

list, with 27 and 30, respectively.<sup>6</sup> Haiti has made no amendments, but has had three different constitutions in that period, as has Ecuador. 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 autonomy and authority.

**Symbolic Attributes:** Perhaps the most basic distinction among courts is between those that have the power of judicial review – that is, the ability to strike down, render inapplicable or somehow suspend the operation of legislation considered to be unconstitutional – and those that do not. The US Supreme Court is perhaps the most famous example of a court with judicial review, while the British system is among the most familiar examples of a judiciary – recent changes notwithstanding – without such authority. Most Latin American courts adopted judicial review very early on in their history, whether explicitly or through judicial interpretation. Like the U.S. Supreme Court in Marbury v. Madison, Argentina adopted judicial review by judicial interpretation, in the 1887 Sojo case, and created an action equivalent to amparo in the 1957 Angel Siri case, but only added these explicitly to its constitution in 1994. Most other countries have specified this power in their constitution, some as early as 1844 (Dominican Republic), 1857 (Mexico), or 1891 (Brazil) (Brewer-Carías 2005: 196-211). The two or three countries that did not have judicial review adopted it since the 1970s (e.g., Peru, in 1979, or El Salvador in 1983). Only Honduras remains without some kind of express grant of constitutional review authority.

More recently, several countries have moved toward the adoption of a special purpose constitutional court. Spain adopted just such a court, after its transition to democracy, in its 1978

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<sup>6</sup> Each instance of constitutional change could – and usually does – encompass a much larger number of amendments. That is, we should not think of an instance of change as something that adds a single amendment to a constitutional text.

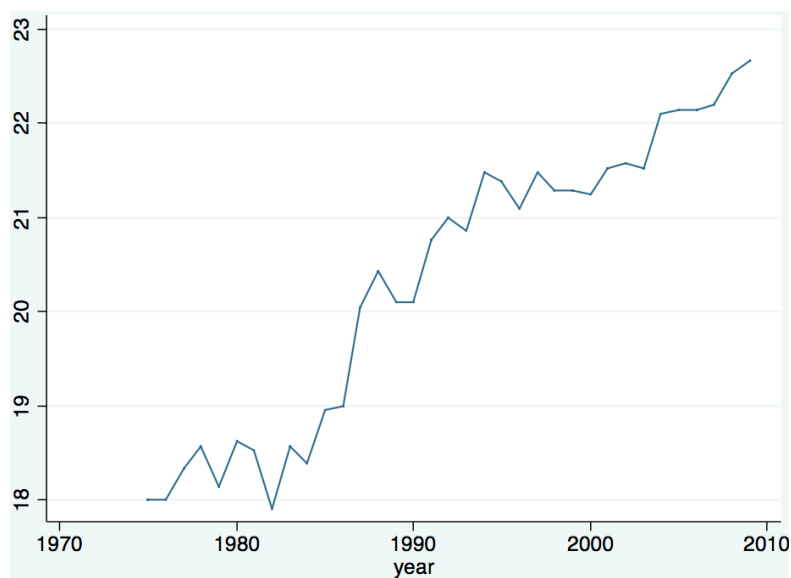
constitution, and regulated it in a 1979 organic law. At the beginning of our period, only 4 Latin American countries had a constitutional court. That number has doubled in the intervening period, to 8 (40% of the region's countries) – 9 if we count Brazil, which has a constitutional court but calls it the Supreme Federal Tribunal. And if to this number we add countries that created a separate Constitutional Chamber within the existing supreme court – Costa Rica, one of the most influential constitutional adjudication bodies in the region, and El Salvador – over half of all Latin American countries have something that resembles a constitutional court. Moreover, whereas none of the old constitutional courts had ancillary powers (for example, overseeing elections, impeaching presidents, or controlling the constitutionality of political parties), by the end of the period, 6 of the 8 had some ancillary powers that enmeshed them even more in the political process. The Spanish-style 9 year term is by no means the dominant one – only Chile and Ecuador mirror Spain in that respect – but several other countries have adopted 10 year terms for their constitutional court judges, and an 8 year term is the most common arrangement among Latin American constitutional courts.

Even those countries that did not add a constitutional court did what is essentially a functional equivalent: they added provisions for concentrated judicial review to existing Supreme Courts (i.e., allowing direct access to the apex court on constitutional questions, bypassing weaker lower courts). Most famously, Costa Rica added a constitutional chamber to its Supreme Court in 1989; Mexico added concentrated review power to its Supreme Court in 1994; Venezuela added it to its constitution in 1999 (it had previously been specified only in codes of civil procedure); and Nicaragua's 1987 constitution expanded standing to bring such a claim to all citizens. Clearly, during the period in question, Latin America embraced European

models of judicial review, layering them over the predominant, American-style model of constitutional control.

More strikingly perhaps, and again following the Spanish example and the international model, the number of countries with some sort of judicial council rose from 2 to 12 (representing more than half the countries of the region) over the last 30 years. Following other elements of the international model, the number of constitutions explicitly protecting judicial independence rose from about two thirds to more than three quarters. We also coded, following the CCP example, a list of 33 different rights that could be present in constitutions, including negative and positive rights, classic civil liberties and social and economic rights. One of the most striking changes in constitutional practice in Latin America is the dramatic expansion in the number of rights expressly guaranteed in the constitution. Figure 2 shows the growth in the average number of rights contained in the constitutions of the region.

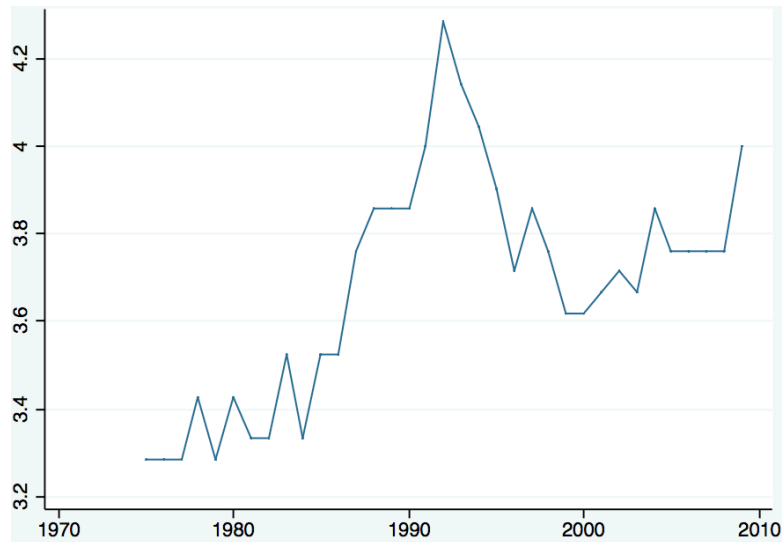
**Figure 2: Average number of rights in Latin American constitutions by year**



Moreover, this increase in the number of rights coincides with increasingly difficult to amend constitutions. Figure 3 shows first a dramatic overall increase in the average number of

actors required to approve an amendment to the constitutions of Latin America through 1990; followed by perhaps an episode of learning, in which detailed and overly rigid constitutions are made more flexible after 1990 by reducing the number of actors required to pass an amendment.

**Figure 3: Average number of actors needed to approve amendments to the constitution**

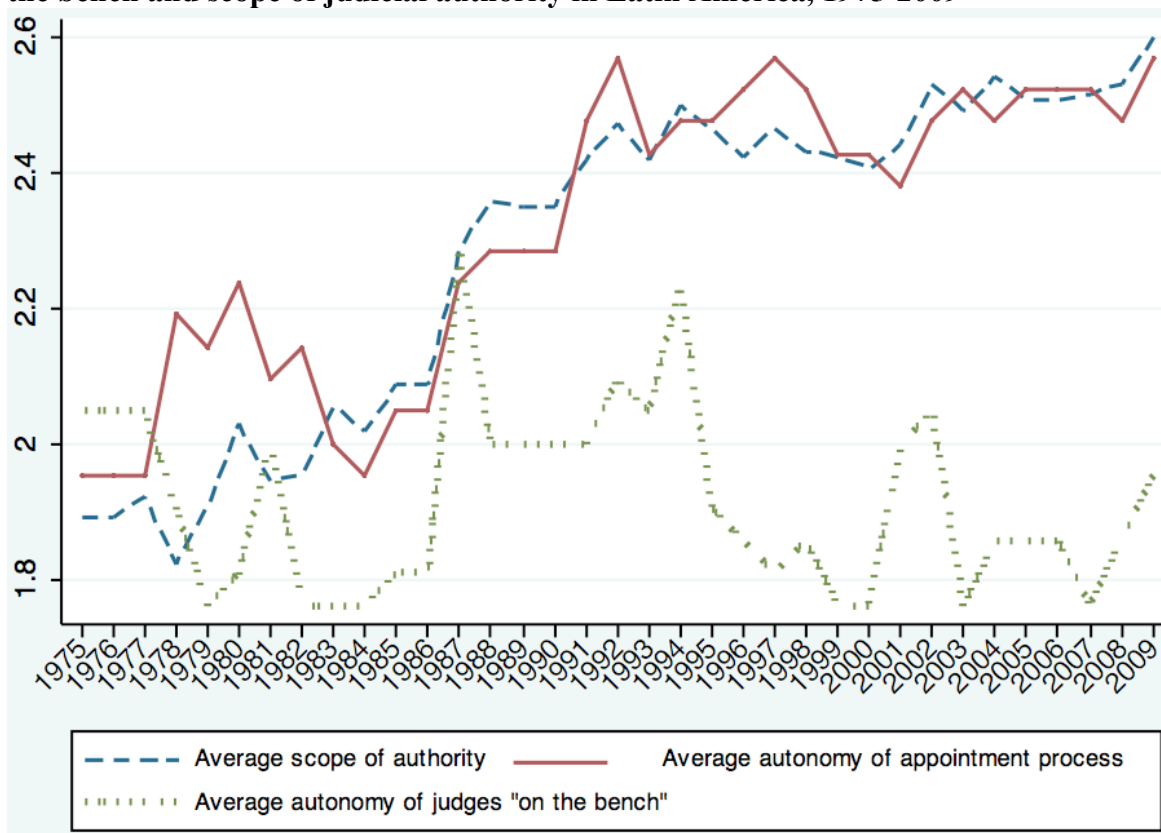


Clearly, then, many elements of the international model have entered into the region’s constitutions, especially those elements that mirror the Spanish experience. We have seen an increase in abstract, concentrated judicial review, an expansion in the roster of protected rights, rigid, difficult to amend constitutions, the adoption of judicial councils, and special provisions for the protection of constitutional rights from infringement by governmental actors. The question is, then, do these institutional changes add up to more powerful, more autonomous courts that might be up to the task apparently being assigned to them?

**Operative attributes:** If we look closely at the finer details the picture that emerges is murkier, suggesting a rather cautious approach to judicial power. In brief, as shown in Figure 4, we see (a) an expansion of judicial authority, coupled with (b) increased autonomy or depoliticization of the nomination and approval process, but with (c) a slight but noticeable reduction in the actual freedom of judges to rule sincerely. In other words, on average and

compared to 35 years ago, courts in Latin America today have a broader scope of authority, and judges who are the product of a more inclusive, less partisan appointment process but are more subject to political control and accountability. 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 democratic accountability. On the other hand, given that the comparison point is the pre-1975 status quo of subordinated judges in weak courts, the decline 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 4: Changes in levels of politicization of appointment process, insulation of judges on the bench and scope of judicial authority in Latin America, 1975-2009<sup>7</sup>**

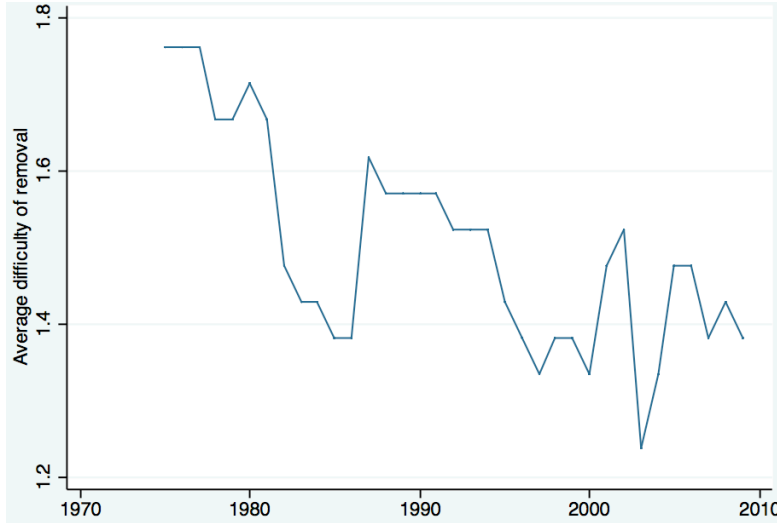


<sup>7</sup> The scope of authority variable has a linear transformation to facilitate reading the graph.

Notably, the three measures track from the mid-1970s to the mid-1980s, rising and falling together, only to diverge quite significantly beginning in 1987. The peak of ex post autonomy roughly coincides with the early stages of the most recent wave of democratization in Latin America. The divergence grows once democracy has become more established in the region. The measures of authority and ex ante autonomy are closely correlated (with a coefficient of .492, significant at the .001 level).

What does this mean for the logic of judicial design and transformation? The overall picture suggests that international and domestic actors have been successful in pushing for stronger courts, with more authority and a greater capacity to constrain the executive. It suggests that constitution-makers were unwilling to give more power to judges who were likely to be cronies of whoever was in power at the time, so if they increased power they depoliticized the appointment mechanism at the same time. On the other hand, they were equally unwilling to entrust this much power to judges who remained unaccountable once they were seated. The tradeoff, then, has been a slight increase in the ease with which these newly powerful judges can be punished or rewarded. That decline is attributable to the increasing ease with which judges can be removed from office, as shown in Figure 5, below (the variable that measures length of tenure, renewable terms and the like has actually improved over the same period). This suggests a bargain in which the mechanisms are put in place to produce more highly qualified, more consensual judges with a great deal of power, while retaining the capacity to fire these potentially more dangerous judges if they exceed their mandate.

**Figure 5: Difficulty of removal from office, Latin American Judges, 1975-2009**

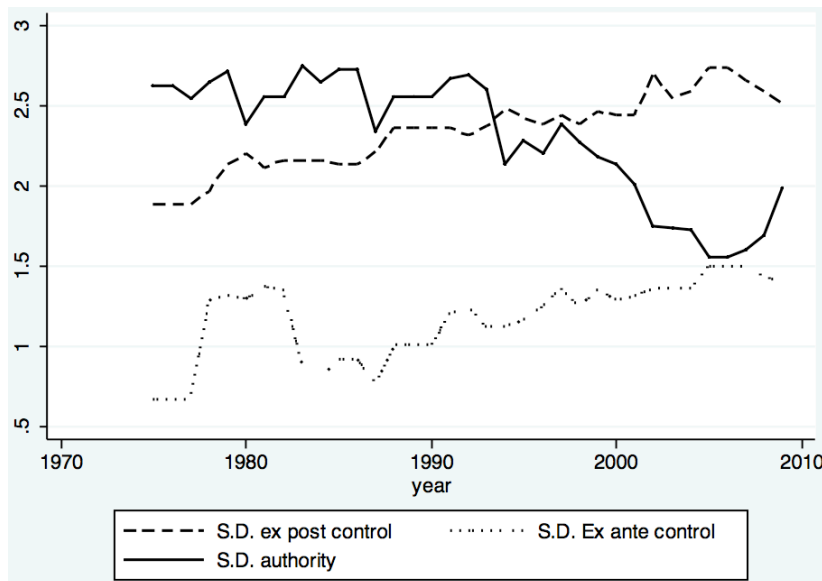


In summary, our data support the common wisdom that Latin American countries have been engaged in a process of judicial reform and in creating courts with increasing authority. Moreover, many of these courts appear to follow the Spanish model and the prescriptions of actors like the World Bank, USAID and the IDB for the creation of constitutional courts and judicial councils. At the same time, a look at the finer details suggests that, at least from an institutional design perspective, many of these courts continue to include features limiting their autonomy, primarily through the ability to punish and reward sitting judges. Since we have not yet incorporated the domestic political variables into the analysis, our conclusions regarding our diffusion hypotheses must remain tentative. But at this stage, we believe the data offer preliminary support for the cynical/rational response to external pressures model of diffusion. There is a clear movement toward the internationally preferred judicial model, as detailed above. But the equally clear tendency to weaken the protection of sitting justices suggests that political actors remain wary of creating truly autonomous courts, beyond their control.

It could be, of course, that the international model, for all its virtues, is somehow more deficient in terms of ex post autonomy than the original Latin American model was, or prizes

judicial accountability more so than historical Latin American courts. This fact, however, unlikely, could account for a uniform movement toward more accountability for sitting judges. But a look at the dispersion of scores over time suggests that the trend is not the result of convergence around one model. Figure 6 graphs the standard deviation in the scores for the three variables of interest on a yearly basis. It shows a clear convergence in the authority scores over time, but an increase in the dispersion of ex ante and ex post autonomy scores, suggesting that courts have become more not less different in this regard over the last 35 years. This pattern is consistent with the notion that countries crafted judicial institutions in response to external pressures for judicial reform, but then used less obvious means to limit the impact of these institutions as domestic conditions dictated.

**Figure 6: Standard deviation in annual authority and autonomy scores, 1975-2009**



Delving a little into country variations on these variables we get a similar picture of responsiveness to domestic conditions. The following table summarizes the changes that took place in each country over the 35 years of the study. For each country we present the average

changes in autonomy (ex ante and ex post) and the average changes in scope of authority (the table only averages actual changes, excluding years of no change).

**Table 4: Average value of changes in formal judicial authority and autonomy in Latin American countries, 1975-2009**

	mean change in ex ante control	mean change in ex post control	mean change in authority
Argentina	1	2	4.5
Bolivia	.33	.33	.83
Brazil	0	.33	.5
Chile	1	-.67	0
Colombia	2	.67	1.375
Costa Rica	-1	-2	-.167
Dom. Rep.	0	-2	3
Ecuador	.25	-.2	.18
El Salvador	2	1	1.5
Guatemala	1.5	-1.33	-3
Guyana	0	0	1.67
Haiti	0	2	0
Honduras	1	0	.167
Mexico	0	.5	.25
Nicaragua	.4	0	1.6
Panama	0	0	.375
Paraguay	1	-4	0
Peru	-.25	-.5	1.2
Surinam	-.67	3	1.75
Uruguay	0	0	-.33
Venezuela	-2	-2	-2

A few anecdotes drawing on this table tell the same story of an individualized response to pressures for judicial reform. Argentina, which carried out its principal constitutional judicial reform in an extensively negotiated agreement between the two main parties in 1994, increased formal judicial power. Venezuela, which made its most important reforms under a Chavez-dominated constituent convention (Chavez' party had 91.6% of the seats), dramatically

decreased judicial power and autonomy in that constitution. Chavez' "Bolivarian" colleagues in Ecuador and Bolivia, follow a similar though not identical pattern. Correa's party won a clear majority in his constitutional convention – reflected in the strong decline in ex post autonomy – but far from the near unanimity of Chavez' convention. In Bolivia, by our measure, Correa's constitutional convention slightly increased the power of a court that had historically been very weak. But this is a truly sui generis court for Latin America, with innovative provisions for direct election of judges, the participation of customary and indigenous authorities in selection mechanisms and the like. It would be hard to ascribe the specific attributes of that court to international influences of almost any kind, including those exerted by Chavez.

Some cases appear counterintuitive. To the extent we can trust the measure for this case, Costa Rica appears to have weakened its court over these thirty five years, but it is nearly the only country that begins the period with a strongly democratic system, so it is nearly the only country in which political fragmentation, however we understand it, likely did not increase. In the case of Costa Rica, the decline comes not in the context of an already weak court, but in the early 2000s, after the constitutional chamber of its supreme court had substantially transformed the politics of the country, and in the wake of some criticism that the court was too powerful and unaccountable. In sum, there is too much individual variation – tentatively associated with domestic conditions – to support at least a region-wide version of the “normative adoption + learning” model of diffusion.

**Conclusion:**

Much work remains to be done, of course, to complete our analysis of international and domestic influences on court design. The preliminary results, however, are encouraging. The data already demonstrate a clear variation in levels of authority and autonomy among the newly

reformed courts of Latin America, which we can compare in a subsequent draft to variations in domestic political conditions. Clearly, simple-minded, wholesale imitation is not taking place. Latin American constitution makers have learned at least this lesson from the law and development movement of the 1970s: slavish imitation of foreign legal models is not a recipe for success.

At least on its face, the data might support either a normative adoption plus learning model of diffusion or a cynical/rational adaptation model. In our view, however, the preliminary results suggest the latter. It seems clear that judicial developments in Latin America were a response to international pressures, but were significantly tempered by political realism. Moreover, there is simply too much variation in the final outcome to present this as a clear-cut, region-wide movement toward a constitutionalist, rights-based model of democratic politics achieved through the creation of powerful and autonomous courts. This is not to say that there has not been a diffusion-driven sea-change in Latin American judicial culture, as Couso and Hilbink (Couso 2007; Couso and Hilbink 2009) might argue. It suggests, rather, that this movement has been more successful in some countries than in others; and conversely that, 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.

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Appendix 1: Operationalizing Autonomy and Authority

Variable	Obs	Mean	Std. Dev.	Min	Max
Ex ante autonomy	735	2.319728	1.1914	0	7
Ex post autonomy	735	1.917007	2.299727	-2	6
Authority	655	5.422901	2.366418	0	10
Tenure length/renewal	735	.4163265	1.751062	-2	3
Difficulty of removing judges	735	1.50068	1.0923	0	5