Introduction: Courts in Latin America

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Introduction

Courts in Latin America

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Courts are central players in Latin American politics. Throughout the region, judges now shape policies that were once solely determined by presidents and legislators. Over the last two decades, courts have been asked to decide a litany of hot-button social, political, and economic questions. Whether reelection should be permitted, executive powers expanded, emergency economic measures upheld, presidents impeached, human rights abuses prosecuted, divorce and abortion permitted, foreign wars supported, and AIDS medication made available, these are the sorts of major policy issues now being decided by Latin American judges. As the list of areas in which courts intervene has grown, the judiciary has emerged as one of the most important — if still deeply contested — institutions in posttransition Latin American politics.

Such developments are sharply at odds with the long-standing image of Latin American courts. Weak, ineffective, dependent, incompetent, unimportant, powerless, decaying, parochial, conservative, and irrelevant — these were the adjectives used by scholars to describe the region’s judicial systems for most of the twentieth century. Under dictatorship, courts were a frequent casualty of regime change, and judiciaries were largely dismissed by scholars as pawns of de facto governments.¹ But even as democracy took root, many of the same problems identified with courts under authoritarianism — executive dominance, conservative legal philosophy, lack of adequate infrastructure, lack of public trust and support, and ongoing political instability (cf. Verner 1984) — seemed to persist. Carlos Menem’s notorious packing of the Argentine Supreme Court in 1990 and the string of highly questionable judicial decisions that followed led observers to conclude that checks and balances in Latin America were frustratingly elusive (Larkins 1998). Conversely, scholars warned that even if judges enjoyed independence, the conservative legal philosophy and bureaucratic mind-set rooted in the civil law legal tradition (cf. Merryman 1985) prevented

¹ But see Ginsburg and Moustafa (2008) and Barros (2002).
Latin American judges from protecting individual and human rights. This was the main lesson provided by the Chilean Supreme Court (Couso 2002; Hilbink 2007).

Yet, as scholars began to look more closely at the region’s courts, they also began to realize that not all the news was bad. First, the increasing social demand for greater accountability (Peruzzotti and Smulovitz 2006, 10) began to spill over into a demand for courts to insert themselves into the very sorts of political controversies listed earlier. This suggested that judges could and should play an important role in shaping society, allocating resources, and keeping governments in check, even if reality often falls short of expectations. Second and related, although conceptions of the role of judges in a democracy have been slow to change, an ideological shift has clearly been under way. The global doctrine affirming that human rights constitute the central category of constitutionalism has gradually been incorporated into the legal curriculum (Pérez-Perdomo 2006, 102–113; Couso, forthcoming; see also Chapter 4). Third, as Ríos-Figueroa carefully elaborates in Chapter 1, Latin American judges now enjoy greater formal institutional protections than ever before. At the same time, they also have been granted an expanded portfolio of legal instruments of constitutional control. This blend of more insulation from political pressure and a growing capacity to influence policy is considerably greater than what existed in the recent past.

Nevertheless, in many Latin American countries, the historical legacy of weak judicial institutions has been hard, if not impossible, to overcome. As several of the chapters in this volume attest, throughout the region, judges continue to face threats ranging from impeachment and forced resignation to court packing and en masse purges. Drawing on a new data set on interbranch crises compiled by Helmke (2009), Helmke and Staton (Chapter 11) identify more than fifty instances of threats or attacks on the survival of high-court judges in the region between 1985 and 2008. Such assaults range from Menem’s court packing and Fujimori’s dissolution of the supreme court to the impeachment of judges in Ecuador under President Gutiérrez,

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2 The creation of the Interamerican Court of Human Rights in 1979 signals the beginning of this process that then developed in international conference meetings such as those regularly organized since 1981 by the International Association of Constitutional Law, which bring together prominent constitutional scholars, or those organized since 1995 by the Conferencia Iberoamericana de Justicia Constitucional, which summon constitutional judges.

3 The relative number of lawyers in Latin American countries has also been steadily increasing. Data are scarce, especially for earlier periods, but Pérez-Perdomo (2006, 86–114) provides some calculations. By around 1940, the average number of lawyers per one hundred thousand habitants was thirty-eight. A boom has taken place since the 1950s, pushing the average by the year 2000 to 189. However, the average masks important differences across countries because the number of lawyers per one hundred thousand habitants varies from 85 in Ecuador (1991 data) to 345 in Argentina (2001 data, a figure close to that of the United States, with 379 lawyers that same year, according to the American Bar Association).

4 Judicial reforms have also considerably increased judicial budgets all over the region (see Vargas Vivancos 2009).
Hugo Chávez’s efforts to remake the Venezuelan Supreme Court, and Evo Morales’s assault on Bolivia’s Supreme and Constitutional courts (cf. Chapter 10).

Another disturbing fact is how poorly the public regards the judiciary. Latino-barómetro surveys allow us to gauge the evolution of public opinion over time and across countries. Overall, the evidence is damning. Figure I.1 shows that on average, the percentage of people reporting that they had “a lot” or “some” confidence in the judiciary has varied between a high of just 38 percent to a low of 20 percent. Moreover, average levels of confidence seem actually to have declined over time. During the late 1990s, around 60 percent of those surveyed had “little” or “no” confidence in the judiciary, but in the new millennium, that percentage has risen to over 70 percent.

Closer examination of these data, however, reveals considerable cross-national variation (see Figure I.2). In Ecuador and Peru, only one in five citizens surveyed has any confidence in the judiciary. Argentines, Bolivians, and Paraguayans have only a slightly better impression of their courts. But in Brazil, Costa Rica, Dominican Republic, and Uruguay, between 40 percent and 50 percent of people on average have a positive view of the judiciary. Yet even in those countries, judges are not immune from criticism. In Brazil, judges have come under increasing public
Average Public Approval of Courts by Country, 1995-2008

Figure 1.2. Average Public Approval of Courts by Country, 1995–2008.

Public opinion of courts also varies dramatically over time within individual countries. For example, in Argentina, average approval ratings of courts fell throughout the 1990s during the second Menem administration, rose briefly under the short-lived de la Rúa administration, crashed in 2002 during the height of the economic and political crisis, and have recovered following the impeachment of several Menem appointees to the court in 2003–2004. Interestingly, in Bolivia, average approval of courts was highest in 2006, just as current president Evo Morales began to dismantle both the constitutional tribunal and the Bolivian Supreme Court (cf. Chapter 10). Although relatively high, public confidence in the judiciary has waxed and waned in Chile, Colombia, Mexico, Venezuela, and even Costa Rica. Of the countries in this volume, only Brazil has had positive approval ratings consistently above 30 percent.

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Taken together, these advances and setbacks have captured the imagination of a new generation of Latin Americanists, convincing them that judicial institutions warrant sustained scholarly attention. Rooted in the deep conviction that the rule of law is essential to sustained democracy and economic growth, research on judicial politics in the region now blossoms. Kapiszewski and Taylor (2008) recently chronicled the rapid evolution and diversity of literature on Latin American courts, identifying themes ranging from transitional justice and judicial reform to interbranch relations and judicial decision making. By their count, approximately 90 pieces of research primarily focused on the judiciary in Latin America have been published since 1980, with many of the most influential and innovative work done by contributors to this volume. Never before has there been so much scholarly interest in how Latin America’s courts function or why they fail to function.6

This book builds on that momentum in several ways. Empirically, the book takes seriously the potential role for constitutional review in a democracy by focusing on two fundamental questions:

- To what extent are courts in Latin America willing and able to protect individual rights?
- To what extent are they willing and able to arbitrate interbranch disputes that affect the separation of powers?

Taken together, the answers provided by chapters of the book reveal considerable variation both across countries and over time within countries. Courts in Costa Rica and, to a somewhat lesser extent, Colombia have tended to succeed in both respects; the picture has been far more mixed in Argentina and decidedly worse in Bolivia. At the same time, other chapters also highlight the fact that these two standard judicial roles – upholding rights and ensuring checks and balances – need not always go together. For instance, whereas the Brazilian, Chilean, and Mexican courts have been actively involved in arbitrating interbranch disputes, they have been far more reluctant to uphold individual rights. Such patterns raise broader questions about the conditions under which spillover versus substitution effects occur across legal issue areas.

In addition to documenting the rich empirical variation that exists across the region’s courts, the book also seeks to push forward long-standing theoretical debates about judicial behavior. In so doing, the broader questions the book seeks to answer include the following: What explains the choices Latin American judges make?

6 A series of edited volumes also testify to the growing importance of the judiciary in the region. An early volume by Stotzky (1993) brought together legal scholars and politicians focusing on the role of the judiciary in the transition to democracy. More recent volumes have broadened the research agenda by discussing the rule of law in the region (Méndez et al. 1999; Domingo and Sieder 2001), judicial reform (Pásara 2004), the judicialization of politics (Sieder et al. 2005; Sieder et al. 2010), the judicial protection of social and economic rights (Gargarella et al. 2006; Gauri and Brinks 2008), and the accountability function of courts in Latin America (Gloppen et al. 2010).
To what extent do concerns about sanctions drive judicial behavior? How does the institutional and partisan context shape decision making on the bench? How important is the judicial selection process? What role, if any, do judges’ attitudes or the law play? Do judges care about their legitimacy, and if so, how might they seek to build it? How does public opinion affect judicial behavior? And what sorts of trade-offs might judges in Latin America face as they navigate among different institutional actors and the public? Like Latin American legislatures and executives (cf. Mainwaring and Shugart 1997; Morgenstern and Nacif 2002), Latin American courts provide a series of fresh opportunities for evaluating and reformulating existing institutional models, most of which have been confined to American politics.

Along these lines, we note that much of the recent literature on judicial decision making in Latin America has revolved around the fragmentation hypothesis derived from the separation of powers approach (e.g. Chávez 2004; Scribner 2004; Ríos-Figueroa 2007; cf. Chapter 8). In a nutshell, this approach contends that judges will be more capable of handing down decisions that go against the government when political power is divided across the branches of government. The basic reasoning is that if power is fragmented, sanctioning judges is that much harder. Having judicial decisions overturned is less likely because new legislation is harder to pass; impeachment, jurisdiction stripping, and court packing are less likely because putting together a legislative coalition to carry it out is more difficult. Simply put, fragmentation guarantees judicial independence. It makes it possible for the basic Hamiltonian design, on which Latin America’s constitutions also rest, to work.

Each of the chapters in the volume grapples, to some extent, with this basic fragmentation story. But, as we discuss more fully later, not all contributors arrive at the same conclusions. If the separation of powers approach provides the theoretical linchpin of the book, for many of the authors, it merely serves as a starting point. Thus, while the book provides ample new evidence that judges are indeed constrained utility maximizers, it also broadens considerably our understanding about what goes into judges’ utility functions and what factors – institutional, cultural, or sociological – constrain or enable them.

The remainder of this introduction has three main objectives. First, we develop a basic typology of the roles that constitutional courts play and use it to structure our discussion of the enormous empirical diversity that characterizes Latin American judiciaries over time and across countries. Second, we synthesize the theoretical contributions made by each of the authors. Specifically, we describe the various ways in which the volume pushes forward scholarly debates about the nature of interbranch relations, judicial motivations and goals, and the effects of various institutions on judicial decision making. We conclude with an overview of the volume’s overarching lessons and its organization.
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THE EMPIRICAL FOCUS

The central empirical focus of this volume is the choices that Latin American judges make. Our starting point lies in the observation that, like their North American and European counterparts, Latin American justices potentially exercise two basic modes of constitutional control. The first, which we call horizontal control, involves judges arbitrating interbranch or intergovernmental disputes. The second we refer to as vertical control and involves judges interpreting the scope of individual or human rights. In this section, we provide a brief overview of these two fundamental roles and then draw on some of the evidence contained in the volume’s individual chapters to illustrate the wide variety of judicial decision making that takes place across the landscape of contemporary Latin America. First, however, we offer a brief word about the scope of the analysis and our decision to limit the inquiry primarily to constitutional courts.

Constitutional review, after all, is just one of the many functions that Latin American judges serve. As elsewhere, judicial systems in Latin America also include judges of various ranks (first instance and appellate), specializing in different types of disputes (e.g., criminal and civil, electoral, administrative, labor, military) as well as a host of additional institutions beyond courts (e.g., ministries of justice, prosecutorial organs, and judicial councils). Although these other types of judicial institutions surely matter, this volume concentrates the vast bulk of attention on constitutional courts. Our reasoning is straightforward. As political scientists, we are interested first and foremost in how judges interact with other political actors and how these interactions shape policy outcomes. Whereas lower-level courts can sometimes play this role, courts imbued with constitutional review jurisdiction – whether they are supreme courts, constitutional chambers, or separate constitutional courts – hold the proverbial last word over whether to enforce the political rules of the game, at least within the judicial hierarchy. Moreover, given that the field of Latin American judicial politics is still quite young, the fact is that most of the available systematic data on judicial decision making exist only for Latin America’s high courts. That said, as the field continues to mature, we expect – and hope – that efforts will be made to incorporate lower-level courts. This is especially important in contexts, such as present-day Latin America, where important efforts are being made to establish firmly stare decisis and convert the lower courts, which handle the quotidian business of most litigants, into effective protectors of constitutional principles.

To provide a common starting point for the volume, we begin with a simple conceptualization of the role of constitutional courts based on the organization of modern constitutions. Structurally, constitutions are divided into an “organic” part that establishes the different branches of government, their powers, and their reciprocal relationships and a “normative” part that deals with individual rights. These two
elements were prefigured by Montesquieu (1997, Book XII, 216), who distinguished between the “political liberty as relative to the constitution,” that is, “formed by a certain distribution of the three powers,” and the “political liberty of the subject” that defines the relationship between the state and its citizens. Classic twentieth-century constitutional theorists Hans Kelsen and Carl Schmitt also refer to the two parts of modern constitutions: the former in his discussion of the “material” and “formal” understanding of the constitution,7 the latter distinguishing between the “principle of distribution” (basic rights) and the “organizational principle” (separation of powers) of modern constitutions.8

These two parts are clearly present in all Latin American constitutions. For instance, the first twenty-nine articles of the Mexican Constitution enumerate all the fundamental rights that the charter guarantees to the citizens, whereas the second part of the constitution is dedicated to the prerogatives and responsibilities of the different institutions of the state and the interactions between them.9 Of course, the extent of rights included in Latin American constitutions and the particular ways of organizing interbranch relations vary across countries and over time within countries, as shown in data reports from the Comparative Constitutions Project, compiled by Tom Ginsburg and Zachary Elkins.10

The central question that we asked each of the contributors to tackle was how judges in Latin America deal with these two fundamental elements of the constitution. More specifically, we invited each of the authors to address whether Latin American courts are willing and able to arbitrate interbranch disputes and, if so, whether any discernible patterns emerge. Likewise, we asked them to speak to Latin American judges’ willingness and ability to respond to demands regarding a variety of constitutional rights and then to assess whose rights precisely judges are protecting.

Here we classify these basic elements of constitutional control using a simple two-by-two schema (see Table I.1). On the right-left dimension, we distinguish between courts that engage in horizontal control over intergovernmental disputes and those...
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Table 1.1. Judicial power: horizontal and vertical control

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<th>No</th>
<th>Enforcing Rights</th>
<th>Cell II</th>
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<td>Argentina (1989-1997)</td>
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<td>Bolivia (pre-1999; post-2008)</td>
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<td>Brazil (pre-1988)</td>
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<td>Mexico (pre-1994)</td>
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<td>Yes</td>
<td>Cell III</td>
<td>Arbitrating Interbranch Conflicts</td>
<td>Cell IV</td>
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<td>Costa Rica (post-1989)</td>
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that do not. More specifically, we argue that judges exercise horizontal control when (1) they are able and willing to get involved in intergovernmental dispute cases and (2) they are able and willing to decide cases against the more powerful party. The first criterion effectively sets the lower bar for establishing whether judges engage in horizontal constitutional control: judges must have the appropriate jurisdiction, the relevant actors must turn to the court for adjudication, and the justices must be willing to get involved in such disputes. Obviously, if any of these things are lacking, then judges are not able to exercise horizontal control. For instance, in Mexico in 1994, the court finally earned the right to effectively adjudicate disputes among different levels and branches of government, though the thresholds for standing remain quite high (Chapter 7). Prior to that time, the court could not have exercised horizontal control, even if it had wanted to.

The second criterion focuses on who wins and who loses and thus sets a qualitatively higher, though perhaps more controversial, bar for determining whether horizontal control exists. Here we follow the literature in roughly ordering the different branches in terms of the relative powers they enjoy. Thus we assume that Latin American presidents are more powerful than legislatures, albeit to varying degrees (e.g., Mainwaring and Shugart 1997), and that federal governments are more powerful than state and local governments (e.g., Gibson 2004). This enables us to address certain kinds of questions (e.g., Does the court check the power of the president? Does the court limit the power of the federal government?) that we believe are fundamentally important. Thus, in classifying the role of the court in a country like Brazil or Mexico, it matters not only that constitutional courts have the ability to
adjudicate intergovernmental disputes but also that they sometimes use this capacity to rule against the national government and/or the president.

The upper-lower dimension of our schema focuses on vertical control, which entails the adjudication of various constitutional rights. As with horizontal control, the baseline conditions for courts to exercise vertical control are that litigants and judges have the requisite institutional instruments to entertain such cases. For example, the Costa Rican Constitutional Court’s particularly expansive rules for standing allow citizens virtually unfettered access to demand their rights be upheld. As Wilson writes in Chapter 2, “anyone in Costa Rica (without regard for age, gender, or nationality) can file a case with the Sala IV at any time of day and any day of the year, without formalities, lawyers, fees, or an understanding of the point of law on which the claimant is appealing. Claims can be handwritten or typed on anything and in any language, including Braille.” By contrast, until 2005, the Chilean Constitutional Tribunal was purely limited to abstract review, which only a limited set of political actors could pursue, thus dramatically reducing the number and types of claims the judges received (Chapter 4). Different degrees of access to instruments of constitutional control, between the extreme cases of the Costa Rican and Chilean cases, can be found across the region (Chapter 1).

Beyond the institutional rules for standing, of course, it matters what courts say about such rights. Perhaps even more than horizontal control, using our “less powerful wins the case” rule to assess the degree of vertical constitutional control is sometimes challenging. The most straightforward sorts of cases involve judges deciding whether to protect an individual right against government encroachment. For instance, in 1996, the Colombian Constitutional Court was called to decide whether a recently passed statute regulating television networks violated the constitutional freedom of expression of thoughts and information. Here, because the court made a clear decision to strike down the law, it seems relatively unproblematic to classify this as an example of vertical control.

More complicated are cases that require judges to balance two or more types of rights, as in an abortion case decided by the Argentine Supreme Court in 2001, where the rights of the fetus were weighed against those of the mother. In such cases, of course, it is tempting to use the label of vertical constitutional control whenever one agrees with the decision and to reject it otherwise. Our decision rule helps address this problem, but again, only if we are clear about which of the two parties is most powerful. In this example, the mother is certainly more powerful than the fetus, but if the fetus is protected by state law or if the social consensus goes against women’s privacy rights, then the balance shifts. Still, our decision rule provides us with some leverage over this problem, and we use it with these caveats in mind.\[11\]

\[11\] Likewise, though we acknowledge that upholding rights can sometimes mean protecting the powerful or elites, as in the case of the jurisprudence of the U.S. Supreme Court during the so-called Lochner era, when property rights clashed with labor rights and the Court decided to uphold the former (see Friedman 2001), here we want to focus on the Court’s willingness to protect the rights of the relatively disadvantaged.
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Figure 1.1 shows the four ideal types of constitutional courts yielded by our schema. Each cell is populated with examples of the sorts of empirical outcomes charted by our contributors in the rest of the volume.

Cell I

The upper left-hand cell (cell I) refers to courts that do not exercise either type of constitutional control. Courts located in this cell correspond most closely to the traditional image of Latin American courts as inconsequential, weak, and ineffective. For many of our authors, this category serves as a kind of historical baseline against which subsequent changes, whether advances or setbacks, can be measured. For instance, the volume’s chapters on Brazil, Costa Rica, Mexico, and Chile all contain descriptions of constitutional courts that once fell into this category but that have subsequently managed to move beyond it. For other contributors, however, the cell serves as a kind of reversionary point to which certain courts may be forced to return. This, for example, fits the basic characterization that Bill Chávez, Ferejohn, and Weingast provide for both the U.S. and Argentine supreme courts, whereby justices under divided government occasionally manage to move into the other cells but are ultimately prevented from exercising effective constitutional control whenever power is concentrated among the other branches of government.

Castagnola and P´erez-Li˜n´an’s description of the Bolivian Constitutional Court implies yet a third trajectory, whereby a newly minted court starts out its institutional life exercising constitutional control (cell IV) but is quickly forced into submission (cell I). Along similar lines, Helmke and Staton point out in the final chapter of this volume that courts that engage in risky behavior by challenging the government often experience just this sort of unstable trajectory. Judges who sought to limit Alberto Fujimori in Peru suffered this fate in 1997, as have judges who dared to rule against current Venezuelan president Hugo Ch´avez in 2004 (see S´anchez-Uribarri 2009). Of course, such reversals of fortune are hardly limited to Latin America. From Yeltsin’s decision to dissolve the constitutional court (Epstein et al. 2001; Trochev 2008) to Mubarak’s attack on the Egyptian Supreme Court (cf. Moustafa 2007) to recent events in Pakistan, judges’ efforts to exert their power have often landed them back at square one – literally.

Cell IV

At the opposite extreme (cell IV) are courts in which justices are willing and able to exercise both horizontal and vertical control. To be sure, courts that fall into this cell do not decide every single case against, say, the federal government or the executive branch, nor do they always champion the rights of the powerless; rather what distinguishes courts that fall into this category is that judges are willing and able to do so at least some of the time. Of the four courts that are listed in this cell, undoubtedly the Costa Rican Sala Cuarta, which Wilson eloquently
describes in Chapter 2, provides the strongest, most consistent example of a court that regularly engages in both types of constitutional control. To cite just a couple examples, in 2004, the Constitutional Chamber declared the Costa Rican president’s declaration of support for the U.S.-led War on Terror unconstitutional and sharply reprimanded the president to adhere to the country’s commitment to constitutional and international treaties (Chapter 2). In the area of rights, over the last two decades, the Costa Rican court has consistently ruled in favor of society’s least powerful groups, including women, homosexuals, indigenous peoples, prisoners, and the blind (Chapter 2).

By comparison, in Chapter 4, the Chilean Constitutional Court is just on the cusp of assuming this dual role and, for this reason, might be better located closer to the center of the figure. Meanwhile, as described earlier, the chapters on Bolivia and Argentina imply that justices in these two countries have occasionally occupied this region but only temporarily. In the Bolivian case, for example, the constitutional tribunal managed to declare several norms, including five executive orders, unconstitutional between 1999, the year of the tribunal’s creation, and 2006, the year the institution began to collapse (Chapter 10).

**Cells II and III**

These last two cells contain examples of courts that tend to exercise one mode of constitutional control but not the other. In the upper right corner (cell II), courts are willing and able to arbitrate intergovernmental conflicts but are less prone to exercise vertical control. Conversely, in the lower left corner, courts show a capacity for protecting rights but shy away from exerting horizontal control. That the volume contains important examples of courts that fit into both these middling categories raises a series of fascinating broader questions, which we flag as topics for future research, about the extent to which the two types of constitutional control on which we focus in the book spill over versus substituting for one other. Here we simply sketch some of the key features of the exemplars of these two categories.

Contemporary Brazil and Mexico are best located, albeit imperfectly, in the second cell. To date, the Brazilian Supremo Tribunal Federal has gained recognition for its role arbitrating numerous intergovernmental disputes, ranging from the impeachment of former president Collor and the constitutionality of presidential decrees to deciding federal-state disputes over election rules and fiscal responsibility (see Chapter 6). But the Brazilian court has generally shied away from protecting social and economic rights or so-called second- or third-generation rights. This is the general portrait that comes out of the two chapters on Brazil by Kapiszewski (Chapter 6) and Brinks (Chapter 5), respectively. Yet it is important to note that both these authors also qualify this characterization. Chapter 5, for instance, emphasizes that despite the Supremo Tribunal Federal’s capacity and willingness to arbitrate interbranch conflicts, it tends to rule in favor of the executive branch or the federal
government. Thus, at least by the second outcome-oriented criterion we laid out earlier, the Brazilian court clearly falls short of our ideal type. At the same time, Kapiszewski and Brinks both note that the Supremo Tribunal Federal has done a fairly good job in protecting first-generation rights. For both these reasons, we situate the Brazilian case in the bottom left portion of the cell. A similarly nuanced picture emerges in Sánchez, Magaloni, and Magar’s excellent chapter on the Mexican Supreme Court. Although the recently reformed court has cut its teeth mainly as an arbiter of federal disputes, a string of recent decisions regarding due process rights, the privacy rights of transsexuals, and the right to terminate a pregnancy perhaps signal a future jurisprudence of rights enforcement (Chapter 7).

Finally, the Colombian Constitutional Court falls best within the third cell. Whereas the conventional image of the Colombian court is that of a powerful and activist court (cell IV), the overarching lesson of Rodríguez-Raga’s careful chapter (Chapter 3) is that this image is largely from the court’s handling of individual rights cases in concrete review cases. By contrast, he shows that the court is far more reluctant to exert control in abstract review cases. In the first quantitative analysis of the Colombian Constitutional Court’s decisions to date, Rodríguez-Raga finds a systematic bias toward the executive branch. Indeed, because he also finds that the court is even less likely to rule against the government in rights cases involving abstract review, it is tempting to locate it in cell I; the court’s record in concrete review cases, however, prevents us from doing so.

Taken together, these empirical observations raise a series of more general questions: Why are some courts able to exercise constitutional control? Why do others shy away from it? And what do we make of the fact that some courts exercise constitutional control in one area but are reluctant to do so in another? To what extent are judges’ roles shaped by their institutional environment? What other sorts of factors motivate judges? Are they compelled mainly by the desire to keep their jobs, or do they hold loftier goals such as establishing institutional legitimacy for the judiciary? Ultimately, what are the ways that judges attempt to navigate the opportunities and challenges posed to them by Latin America’s political landscape?

THEORETICAL PERSPECTIVES

The answers to these questions contained in this volume build on and, in several cases, reconfigure the basic models of judicial decision making developed in the U.S. judicial politics literature. Within that literature, the three main approaches to judicial behavior include (in chronological order of predominance in the field) the legal model, the attitudinal model, and the strategic model. Each approach turns on fundamental questions about what motivates and/or constrains judges. According to the traditional legal model, judges simply seek to follow precedent; thus motivations and constraints are basically one and the same. By contrast, attitudinalists claim that judges, particularly at the level of the U.S. Supreme Court, are
essentially unconstrained policy seekers and make decisions in line with their individual political preferences (see Segal and Spaeth 2002). Strategic theorists, in turn, accept the assumption that judges are policy seekers but instead treat judges as fundamentally limited by other institutional actors, including other judges on the bench, other branches of government, and public opinion (see Epstein and Knight 1998; Burbank and Friedman 2002).

The rapid evolution of the subfield of Latin American judicial politics in the 1990s serves, in many ways, as a mirror image to the theoretical trajectory followed in the U.S. judicial politics literature. Thus far, the strategic model has had more influence on the study of judicial decision making in the region than either of the other two approaches (Iaryczower et al. 2002; Helmke 2002, 2005; Chávez 2004; Scribner 2004; Staton 2002; Ríos-Figueroa 2007; Staton 2010). One reason is that this was where most of the cutting-edge theoretical work was taking place in broader disciplines at the time (Epstein and Knight 2000), but also it certainly made good practical sense to turn to models that gave pride of place to the enormous political pressures that Latin American judges notoriously face. As this volume attests, the “strategic revolution” is still very much under way for judicial politics in Latin America, but many of our authors are also reconfiguring and, in some instances, challenging it in a variety of ways.

Subsequently, we treat the standard separation of powers model as a baseline account of judicial decision making and use it to frame our discussion of the various theoretical contributions made by the chapters in this volume. Specifically, we use Epstein and Knight’s (1998) discussion of the three major components of the strategic account – (1) strategic interactions among judges and other actors, (2) judges’ goals and motivations, and (3) institutions – to organize our discussion. As we shall see, the chapters in this book provide a broad range of new evidence that Latin American judges are indeed strategic actors but also remind us of the importance of taking attitudes and legal culture seriously. At the same time, the book also suggests both familiar and novel propositions about how institutions shape the choices judges make.

Strategic Interactions

The central tenet of the standard separation of powers approach is that judicial decision making is interdependent. According to the logic of this theory, judges have preferences over certain policy outcomes but recognize the need to make their decisions palatable to other actors, including congresses and presidents, other judges, and/or the public (cf. Epstein and Knight 1998; Ferejohn and Weingast 1992; Spiller and Gely 1990). To give a flavor for this, consider the basic spatial model depicted in Figure I.3.12 In the figure, P, C, and SC represent the ideal points of

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12 For a similar model, see Ferejohn and Weingast (1992); also see Chapter 8.
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P Q SC C

Figure 1.3. Standard Separation of Powers Game.

congress, president, and supreme court, respectively. Q represents the status quo. It is easy to see that the best response of the court is simply to move policy to SC. The reason is that within the interval P and C, no judicial decision will be overruled. P will be made worse off by the court, but as long as C is required to overturn the decision, the court’s ruling will stand. Assuming that sanctioning the court depends on more than one institutional actor, the general lesson is that increasing the policy distance between such actors expands the ability of the court to rule sincerely. Conversely, if we instead imagine that C and P share the same ideal point or that the court’s ideal point falls outside the interval between C and P, then the court is unable to enact its policy preferences without risking punishment. Thus the central empirical hypothesis that emerges is that divided government tends to support judicial independence, whereas unified government undermines it.

Within this volume, Chávez, Ferejohn, and Weingast’s chapter (Chapter 8) comparing the Argentine and U.S. supreme courts makes just this sort of argument, showing that political fragmentation between congress and the president enhances dramatically the ability of judges to exercise constitutional control. Using an analytic narrative approach, their chapter provides substantial qualitative evidence that judges in both countries exhibit far more ability to check governments and uphold rights when government is divided than when it is unified. In Argentina, under periods of unified control, such as Perón’s government (1946–1955) or Menem’s government prior to the 1999 midterm elections (1989–1997), the Argentine Supreme Court frequently bent to the will of the executive branch, earning the sobriquet “jueces adictos” under the latter. Conversely, their chapter chronicles several examples of important decisions that upheld rights or limited the executive branch when political power was fragmented. For instance, under Raul Alfonsín’s divided government, the court pushed rights forward on several fronts, including declaring portions of the government’s economic policy unconstitutional, as in the case of Rolán Zappa.13

Several other chapters in the volume offer additional, if somewhat more qualified, support for the basic fragmentation story. Scribner (Chapter 9) uses a large-N quantitative analysis to compare the Argentine and Chilean supreme courts and finds substantial support for the view that constitutional control is enhanced whenever political power is divided, though such effects are mostly limited to so-called exceptional executive authority cases. Likewise, Magaloni, Magar, and Sánchez provide

13 In the Rolán Zappa case, the Supreme Court rejected President Alfonsín’s attempt to seize the assets of retired persons during an economic emergency (see Chapter 8).
quantitative support from Mexico that political fragmentation makes a difference, though, as in Scribner’s case, their emphasis lies in identifying how judges’ underlying preferences also affect the courts’ ability to exercise constitutional control. In a somewhat different vein, Rodríguez-Raga’s chapter (Chapter 3) on the Colombian Constitutional Court explores the strategic interaction between judges and the executive branch. Although Rodríguez-Raga acknowledges that the Colombian Supreme Court has a well-deserved reputation for independence in individual rights cases, he also points to numerous instances since 1991 in which the constitutional court has faced severe threats of sanctions, particularly by the executive. In lieu of governmental fragmentation, Rodríguez-Raga then develops an alternative measure of political pressure that focuses on the popularity of the executive branch.

Other authors draw attention to judges’ strategic interactions with other types of actors. For example, Couso and Hilbink’s chapter on the Chilean judiciary (Chapter 4) notes how seemingly minor institutional reforms have altered fundamentally the strategic interaction between the lower and higher courts. Whereas previously, lower-court judges were severely constrained by the Chilean Supreme Court, which exercised enormous power over their careers, now lower-court judges can address questions directly to the constitutional tribunal, in effect gaining independence to decide cases by avoiding the strict control of the supreme court. The lower courts, in the words of one labor court judge they quote, now have “a space [in which to act] that wasn’t there before” (cited in Chapter 4).

Helmke and Staton’s chapter (Chapter 11), in turn, expands the scope of the standard separation of powers model to encompass the strategic interactions among judges, politicians, and litigants. Similar to a new class of strategic models (Vanberg 2005; Stephenson 2004; Carrubba 2009; Staton 2010) that effectively give the public the last word, the model explores how judges condition their decision making on whether politicians will sanction the court, whether the public will stand for such sanctions, and whether litigants will make use of a court. In so doing, the model also provides new insights into how the public constrains politicians from attacking judges who rule against them and how litigants evaluate the costs and benefits of going to court to address their grievances (see also Chapter 6).

Goals and Motivations

Understanding judges’ goals and motivations is important for several reasons. Most obviously, knowing what judges want is the first step in identifying whether they are behaving strategically or sincerely. As Epstein and Knight (1998, 11) put it, “to give meaning to this assumption – that people maximize their preferences – we must be sure to know what the actors’ goals are. If we do not, our resulting explanations become a tautology ‘since we can always assert that person’s goal is to do precisely what we observe him or her to be doing.’” As several of our contributors point out,
we cannot sensibly infer that a judge is behaving strategically simply by observing that he or she sided with the government of the day, unless we know ex ante that he or she would have preferred to do otherwise.

What motivates judges, of course, is a topic of enormous debate. This has long been the case in the U.S. judicial politics literature (Baum 1997; Posner 2008), and as this volume shows, it is increasingly so for those who study Latin American courts. Borrowing from Burbank and Friedman’s (2002) excellent overview of the U.S. judicial politics literature, judges’ utility functions can include not only the desire to enact one’s policy preferences or ideology but also the maintenance or advancement of judges’ careers, the approval of the legal community, and/or the search for broader institutional legitimacy. Although most strategic accounts have tended to emphasize judges’ ideology or policy preferences, the approach is certainly compatible with these other types of goals (cf. Epstein and Knight 1998). But how exactly judges trade off these various goals has only been addressed in a handful of strategic accounts of Latin American courts (e.g. Helmke and Sanders 2006; see also Chapter 11).

With these various motivations in mind, a core lesson that the volume emphasizes is that fragmenting political power is not always sufficient for judges to exert constitutional control. Assuming that ideology matters, judges must also have preferences that are materially different from the main political actors to be willing to take advantage of the space that fragmentation offers. We see this clearly, for example, in both Brinks’s (Chapter 5) and Kapiszewski’s (Chapter 6) outstanding chapters on the Brazilian Supremo Tribunal Federal, in which moderately conservative judges seemingly fail to exploit fully their independence, particularly in cases dealing with executive authority. Similarly, Scribner finds that in freedom of expression cases, the fragmentation of political power had little impact in Chile, where the conservative attitudes of the supreme court justices are legendary (see also Hilbink 2007).

Just as fundamental, the chapters in this volume remind us that judges must also have an underlying conception of their role that encompasses the exertion of constitutional control. This point comes across most clearly in Couso and Hilbink’s sweeping chapter on the transformation of the Chilean judiciary (Chapter 4). They trace how the broader legal culture has changed from one that was based on quietism, which they define as a traditionally deferential corporatist mind-set, to one that is distinctly activist, at least among lower-court judges and constitutional court justices. In their view, the nascent rights revolution that Chile is currently experiencing is thus not simply a matter of these judges having the independence to limit the government but rather of these judges having the cultural predisposition (along with the institutional tools, which we describe later) to take on this role.

Finally, Chapter 7, on Mexico, breaks new ground in incorporating both of these dimensions, the attitudinal and the legal cultural, into their account of judicial behavior. Specifically, they use Bayesian ideal point estimation techniques to assess
both individual judges' policy preferences (liberal or conservative) and individual judges' judicial philosophy or legal theory of interpretation. Their analysis shows systematically that judicial decision making on the Mexican Supreme Court indeed falls along these two dimensions and allows us to identify how different voting blocs within the court have changed over time. This chapter thus lies at the forefront of showing how strategic theories can accommodate a much richer view of what motivates judges. Using cutting-edge methodological techniques, the chapter reincorporates some of the more traditional insights from attitudinal and legalist approaches to explain judicial behavior in environments where judges are no longer politically subordinate to the government of the day.

**Institutions**

Institutions shape the strategic environment in which judges operate. From the specific rules for legal standing to the basic constitutional framework regulating how laws are passed to the broader legal and nongovernmental agencies within a given society, this volume shows how institutions help determine who comes to court and what sorts of complaints they bring, which types of judges occupy the bench, and the sorts of formal and informal constraints that judges face. In the basic separation of powers model sketched earlier, the constraints that judges face hinge on the institutional rules specifying who the other relevant actors are (in this case, congress and president) and what the relevant thresholds are for overturning the court’s decisions. If, for example, the rules were such that the president had no ability to influence legislation, then fragmentation between these two branches would have little impact on judicial constraints. If, instead, all legislative powers were concentrated in the executive, then the strategy for judges would simply be to enact the president’s preferences or risk being overruled.

In addition to building on the now familiar observation that judges in Latin America often face threats far more daunting than simply having their decisions overturned, several chapters remind us that even the most stringent formal constitutional guarantees do not always protect judges from political pressure. Contra Hamilton, the volume thus underscores one of the most enduring puzzles of Latin American institutions writ large: that formal institutional rules do not always map cleanly on to real-world empirical regularities (cf. Helmke and Levitsky 2006).

To highlight this gap, here we use a simple scatter plot to show the lack of fit between the cross-national evidence on judicial independence and judicial instability presented in the chapters by Ríos-Figueroa (Chapter 1) and Helmke and Staton (Chapter 11), respectively. Figure I.4 clearly illustrates that countries that score well according to Ríos-Figueroa’s measure of de jure judicial independence do not necessarily correlate negatively with the set of countries that experience institutional instability. Only Brazil, Colombia, and Honduras are anywhere near the hypothetical regression line; the rest are equally split above and below it. Those countries that
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Figure 1.4. Instability and De Jure Independence in Latin American Courts. Note: El Salvador, Paraguay, and Panama are not shown to facilitate reading. These countries occupy an identical position to Uruguay, Venezuela, and Costa Rica, respectively.

are below the line experience less instability than their formal institutions would predict. These apparent overachievers include a couple of the usual standouts – Uruguay and Costa Rica – but also include some of the more typically problematic cases such as Peru and Nicaragua. Countries above the line are underachievers insofar as the level of institutional protection exceeds the predicted amount of instability. Ecuador, Bolivia, Argentina, and Guatemala are the worst offenders, but underperformers also include Chile, Venezuela, and Mexico.

Fully accounting for the gap between de jure and de facto measures of the judiciary far exceeds the scope of this volume. However, what we can say here is that simply concluding, therefore, that formal institutions do not matter is undoubtedly just as naive as Hamilton’s assumption that formal rules are entirely sufficient. Rather, as Helmke and Staton’s chapter argues (Chapter 11), formal institutions often produce ambiguous or competing effects. Lengthening judicial tenure, for instance, may make judges more concerned about attracting future litigants and thus less likely to cave to political pressures. But it also increases the value to judges of maintaining their seats and thus also potentially makes them more likely to cave to political pressure. In a similar vein, we might imagine that increasing judges’ de jure powers can simultaneously raise both the benefits and costs to politicians seeking to attack them. Capturing courts that are more powerful is certainly potentially more valuable.

See Ríos-Figueroa and Staton (2009) for a conceptual map and systematic assessment of de jure and de facto measures of judicial independence worldwide.
to politicians, but powerful courts may also stand a better chance of earning public support, which, in turn, can deter politicians from staging such attacks. Moreover, whether one effect or the other prevails may well be related to other institutions, such as those that define the appointing method, and thus the type of judges that may reach constitutional courts (see Chapters 1 and 5), and the interaction of institutions with the political context (see Chapters 5 and 8; see also Pozas-Loyo and Ríos-Figueroa 2007), with judges’ ideologies (see Chapter 4), or with the social context (see Chapter 6).

This takes us to another set of points about institutions that the volume collectively raises, namely, that focusing purely on the rules (formal or de jure) for sanctioning judges only takes us so far. Drawing on Robert Dahl’s (1957) seminal insights about the importance of judicial selection, for instance, Brinks’s chapter on Brazil (Chapter 5) shows how divided government in a separation of powers context forces political actors to choose moderately conservative justices to serve on the bench. Turning the standard separation of powers institutional story on its head, Brinks argues that the way in which Supremo Tribunal Federal justices are selected has far more explanatory power for the choices they make than the sanctions they face. Brazilian judges tend to support the regime, not because they fear it, but because they agree with it.

Along similar lines, Castagnola and Pérez Liñán’s chapter on Bolivia (Chapter 10) offers another twist on the importance of institutions governing selection versus sanctioning. Despite President Morales’s lack of a congressional majority, in the last three years, the government has managed to make inquorate both the constitutional tribunal and the supreme court. In this instance, divided government has obviously not been a sufficient deterrent against sanctioning judges; yet its principal effect has been to prevent the president from successfully appointing new justices to the bench.

Yet another core lesson that the volume teaches us about institutions is that sometimes seemingly minor institutional changes have major consequences. This point comes across particularly poignantly in the two individual country chapters on the Costa Rican and Chilean judiciaries. For instance, although the powers granted to Costa Rica’s new Constitutional Court in 1989 would prove to be among the most far reaching for any Latin American high court, Wilson argues that at the time, no one, including the politicians who passed the reforms, comprehended their magnitude. Very quickly, however, the court came to occupy a central role, both in moderating interbranch conflict and in advancing individual rights. Among the most important institutional changes underpinning this rights revolution were the chamber’s operating rules for standing. As we mentioned earlier, that anyone at any time can file a claim before the constitutional chamber created, in Wilson’s language, a significant new legal opportunity for multiple actors to turn to the court to resolve conflicts.
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Likewise, according to Couso and Hilbink (Chapter 4), the rights revolution that appears to be transforming the Chilean judiciary is in fact rooted in a series of rather mundane and technical reforms. Their chapter describes how President Alywin’s failure to pass sweeping judicial reform led to his successor, President Frei’s, more cautious efforts at reform, including the establishment of the judicial school, the overhaul of the criminal justice system, increases in judicial salaries, and a new retirement and nomination system for justices on high courts. Gradually, however, these institutional reforms altered dramatically both the culture and composition of the Chilean judiciary, especially for the lower criminal courts and the constitutional court.

Finally, the volume also paves the way for incorporating nongovernmental institutions and actors into our accounts of judicial politics. Following Charles Epp’s (1998) groundbreaking work on the legal support structure, Kapiszewski’s chapter on Brazil goes the furthest in this direction (Chapter 6). Whereas political and societal elites have routinely learned to use the Supremo Tribunal Federal to arbitrate interbranch disputes, for a variety of historical reasons, rights-based organizations and other nongovernmental organizations have not. The result is that the court has largely carved out a role for itself on the basis of arbitrating interbranch conflicts but not on pushing forward a rights-based agenda. Yet, precisely because such groups are starting to gain a foothold, the chapter suggests that the role of the Supremo Tribunal Federal is likely to expand.

CONCLUSION

Much like Latin America’s legislatures (cf. Morgenstern and Nacif 2002), the conventional wisdom that Latin American courts are irrelevant is outmoded. Constitutional courts have taken on a pivotal political role throughout the region. In countries like Costa Rica and Colombia and, increasingly, Chile, Brazil, and Mexico, judges are regarded as major political players, capable of shaping the most important policy issues of the day. And even in contexts where courts have been repeatedly cowed, such as Argentina during the 1990s or, more recently, Bolivia, Ecuador, Nicaragua, and Venezuela, the judiciary, for better or worse, has come to dominate the national political discourse. How judges across the region respond to the variety of constraints, incentives, and opportunities that confront them is the subject of this volume.

The collective message that emerges in the pages that follow is that the ability of Latin American judges to arbitrate interbranch disputes and/or protect individual rights varies considerably both across countries and within countries over time. In explaining this variation, the contributors to this volume build on the increasingly standard strategic view of judges but also expand and challenge it in several novel ways. Among the various lessons that we learn from the chapters, three are particularly
worth highlighting. First, whether judges have the proverbial space to decide cases against the government is only one part of understanding why they ultimately do so. In other words, if the selection process, the judicial culture, or the broader legal opportunity structure mitigates against judges arbitrating interbranch disputes or protecting rights, then divided government is likely to be insufficient. Moreover, to the extent that at least some judges in Latin America are becoming increasingly independent and powerful, we need to expand our theoretical tool kit accordingly and push beyond approaches that merely chart the possible reactions of the other branches of government.

Second, the volume reminds us that institutional reforms can have a variety of unintended consequences. As we described in the previous section, sometimes seemingly minor reforms can produce major changes, often well beyond the original intentions of reformers. This would seem to cast doubt on the generalizability of a certain class of theories of institutional reform, such as standard insurance accounts (cf. Ginsburg 2003; Finkel 2008), though we would counter that such accounts rise and fall on specifying actors’ beliefs and constraints at the time, not on subsequent outcomes diverging from initial expectations (cf. Pozas-Loyo and Ríos-Figueroa 2010). Conversely, the volume teaches us that seemingly surefire methods of expanding judicial independence, such as increasing life tenure or expanding judicial review, can backfire. The broader implication, again, is not that institutions do not matter but rather that designing the optimal set of judicial reforms requires thinking carefully about the different trade-offs and countervailing effects that such institutions produce.

Finally, the chapters collectively underscore that there is no one best way to study courts. Indeed, a great strength of the volume lies in its methodological diversity, ranging from qualitative single-country case studies to paired country comparisons to large-n statistical analyses to analytic narratives and game theoretic models. In expanding the study of judicial politics to less developed parts of the world, such as Latin America, where comprehensive data are notoriously in short supply, maintaining such pluralism is particularly important. That said, the chapters reinforce the editors’ conviction of the importance of specifying mechanisms, identifying microfoundations, and generating testable (and falsifiable) hypotheses.

The eleven chapters that follow are written by today’s leading political science experts of Latin American judicial politics: Rebecca Bill Chávez, John A. Ferejohn, R. Barry Weingast, Daniel M. Brinks, Andrea Castagnola, Aníbal Pérez-Liñán, Javier Couso, Lisa Hilbink, Gretchen Helmke, Jeffrey K. Staton, Diana Kapiszewski, Beatriz Magaloni, Arianna Sánchez, Eric Magar, Julio Ríos-Figueroa, Juan Carlos Rodríguez-Raga, Druscilla Scribner, and Bruce M. Wilson. They cover, singly or in paired comparisons (either with each other or with the United States), the most widely analyzed courts from the region’s four largest countries: Argentina, Brazil, Chile, and Mexico. In addition, the volume also contains individual chapters on two of the most powerful but understudied courts: Costa Rica’s Sala Cuarta and...
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Colombia’s Constitutional Court. We also include a chapter on the Bolivian judiciary, one of the region’s most troubled institutions. The first and last chapters contain broad cross-country comparisons that allow us to address many of the other embattled judiciaries in the region (e.g., Venezuela, Peru, and Ecuador).

The main body of the volume is organized around the different roles that constitutional judges play in Latin America. Chapters 2 and 3 begin with the long-standing success stories of Costa Rica and Colombia, countries in which, to different degrees, constitutional judges have been willing and able both to enforce rights and to arbitrate interbranch relations. Chapter 4 then focuses on Chile, a country long characterized by its traditionalism and orthodoxy regarding the role of the judiciary but where younger judges, incentivized by institutional innovations, appear to be moving toward a more activist role in both interbranch disputes and rights cases. The next three chapters focus on courts that have staked their reputations on arbitrating interbranch disputes but have largely eschewed the role of rights protector. From different perspectives, Chapters 5 and 6 examine the role played by Brazil’s Supremo Tribunal Federal. Chapter 7 focuses on how the recently reformed Mexican Supreme Court has significantly expanded its role as the arbiter of federalism but argues that the court has yet to pursue a “constitutional revolution” that privileges citizens’ rights.

The next three chapters paint a more troubled, if familiar, portrait of Latin American courts, examining the effects of political pressure, regime change, and political instability. Chapters 8 and 9 offer paired comparisons between Argentina and the United States and Argentina and Chile, respectively. The former chronicles the utter failure of judges to uphold rights whenever power is unified in a single branch, whether under dictatorship or democracy, whereas the latter contains similar findings but adds that even the absence of political constraints may not be sufficient for rights protection, as long as judges hold conservative views. Chapter 10, which concentrates on Bolivia, warns of the dangers judges face in trying to establish their power. Evo Morales’s recent dismantling of the Bolivian Supreme Court and the Bolivian Constitutional Tribunal is only the latest incident in a long and sordid history of institutional instability in this country.

Finally, the first and last chapters of the volume provide broader cross-national empirical and theoretical overviews of the region’s judiciaries. Chapter 1 offers a systematic empirical overview of the evolution of judicial institutions in eighteen Latin American countries between 1945 and 2005. Ríos-Figueroa identifies an important temporal regional trend toward granting judges greater institutional power and independence, while also identifying considerable variation across countries. Chapter 11 develops a unified game theoretic model that seeks to address several remaining puzzles in the literature on Latin American judiciaries, providing an overview of what we have learned thus far from existing models of judicial behavior in Latin America and elsewhere and charting numerous new directions for future research.
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