Institutional Determinants of the Judicialisation of Policy in Brazil and Mexico

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Institutional Determinants of the Judicialisation of Policy in Brazil and Mexico*

JULIO RIOS-FIGUEROA and MATTHEW M. TAYLOR

Abstract. This article offers a comparative perspective on judicial involvement in policy change in Latin America during the last decade and a half. Drawing on the literature on new institutionalism and the judicialisation of politics, and on case studies from Latin America’s two largest countries, we propose a comparative framework for analysing the judicialisation of policy in the region. On the basis of this framework, we argue that institutional structure is a primary determinant of patterns of the judicialisation of policy. In particular, institutional characteristics of the legal system affect the way political actors fight to achieve their policy objectives and the kinds of public justifications used to defend policy reform.

Introduction

Decisions on whether re-election should be permitted, the civil service should be reformed or public hospitals should provide medication to AIDS patients used to be the primary province of presidents and legislators, working in conjunction with party leaders, bureaucrats and interest groups. Recently, however, in countries as diverse as Brazil, Colombia, Costa Rica and Mexico, decisions on these matters have been heavily influenced by judges. The list of issues and countries in which courts now intervene in areas historically reserved for other branches of government continues to

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grow, with judicial influence on policy emerging as one of the most important new trends in post-transition Latin American politics.\(^1\)

It is difficult to know if this phenomenon is here to stay or precisely what its long term consequences will be, but the increasing use of courts is already changing how political actors fight to achieve their policy objectives and the kinds of public justifications used to defend policy reform. Not all recourse to the courts has the effect of directly enhancing policy: some plaintiffs seek out the courts and the legal instruments that offer the best chances of policy victory, while others seek the legal instruments that offer the greatest publicity, even when the chances of a legal victory are slim. That said, court involvement in policy making has widened the scope of public deliberation over policy to include not only legislative and political considerations but also new issues, such as debates over clashing rights claims and constitutionality concerns, and new actors, such as opposition parties and minority groups with little direct influence on the legislative process.

This article develops a framework for understanding how court structure has shaped the judiciary’s influence on policy reforms undertaken in much of Latin America over the past decade and a half. Just as bicameralism or the structure of the committee system affect the substance of bills that legislatures produce, we argue that the institutional structure of the legal system shapes policy outcomes. Drawing on the experience of the region’s two largest countries, Brazil and Mexico, we show how the federal judiciary’s institutional structure in each country shapes political actors’ legal and political strategies, which in turn affect the federal judiciary’s relevance to policy formation. In other words, we signal how the institutional structure of the federal courts shapes the patterns of the ‘judicialisation’ of public policy choices and may thus also influence policy outcomes.

Two definitions are essential at the outset. First, ‘public policy’ is defined rather loosely as ‘whatever governments choose to do or not to do’,\(^2\) but with the implicit assumption that a public policy includes a particular object or goal, a line of action, and the declaration and implementation of intent.\(^3\) ‘Policy reform’ is a change in the intended goals, lines of action, and intent

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of a given public policy, and is used interchangeably with ‘policy change.’ Although we focus on the most contentious forms of policy change – major state reforms – this is because they illustrate patterns of policy behaviour in higher relief; the arguments made here can be extended to more mundane policy debates as well. Second, we define the ‘judicialisation of policy’ as the increasing displacement of policy conflicts from their traditional arenas in the executive and legislative branches to the judiciary, with the important consequence of ‘changing the kinds of considerations – the kind of deliberative justifications – that go into choosing among policies’. Due to space constraints, we do not directly address the flipside of judicialisation – the politicisation of the judiciary – except in our closing comments.

Our focus is on the manner by which policy reaches the courts, and thus, the extent to which court structure channels some policy conflicts into judges’ hands more than others. We do not attempt to explain a second element of court involvement – that is, decision-making by individual judges – other than to suggest that long before any judge rules on a particular policy, institutional structures influence the likelihood and the particular channels by which that policy arrives at and is accepted for review by the courts.

Courts are limited in what policy issues they hear by the ‘raw material’ that arrives on their doorstep: they cannot pick and choose between policy engagements as presidents or assemblies do. But this provides a particularly good reason to study more closely the institutional rules governing courts, especially in Latin America, where institutional diversity abounds. We illustrate here how variations in judicial independence and judicial review influence the patterns by which policy debates arrive (or fail to arrive) at the doorsteps of courts, thus widening the scope of policy debates to include not only pragmatic and political reasons but also rights-based and constitutional considerations.

This paper compares Brazilian and Mexican experiences in two stages. First, we propose a tentative framework for the comparative analysis of the influence of institutional differences on patterns of the judicialisation of policy. Second, we analyse recent case studies of similarly contentious state reforms in both countries to illustrate how judicial involvement in policy reform is influenced by underlying institutional rules and structures.

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Judicial Structure and Political Strategies

What determines the judicialisation of policy? A first explanation is motivational and is driven by the contentiousness of the policy itself and, especially, whether or not a plaintiff (be they an individual or a group) is sufficiently exercised by the policy to go to the trouble of contesting it in the courts. A second explanation is the institutional structure of the judiciary, which shapes the political and/or legal strategies of policy opponents. In this section we focus on these institutional factors.

Once a policy is contentious enough to drive at least one plaintiff to court, what determines the legal strategies they use in their attempt to thwart policy change? The likely costs and benefits of legal action are central in this respect: the cost of filing suit, the access policy players have to the courts, the likelihood of overturning policy, the speed with which courts act, and the political as well as the legal repercussions of court action are all implicit in the decision to challenge policy. Courts can thus be evaluated across several cross-nationally comparable dimensions that shape the patterns of policy contestation. The most important factors fit into two groups. First, the structure of judicial independence, which we divide along three axes: the autonomy of the judiciary, the external independence of Supreme Court judges from other branches of government, and the internal independence of lower court judges from their superiors in the judicial hierarchy. Second, the structure of judicial review, which includes constitutional arrangements, the scope of juridical power, and differences in the formal standing granted to diverse political actors.

The Structure of Judicial Independence

Without a certain degree of judicial independence from other branches of government, courts cannot be credibly used to contest policy reforms. Judicial independence is thus a *sine qua non* for the judicialisation of policy.

Scholars who have used a legal framework to analyse judicial independence face the criticism that their *de jure* assessments may not accurately reflect political reality. To avoid this problem, scholars carrying out

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6 The list we rely upon is necessarily partial, as there are numerous other factors that may affect the generation of the ‘raw material’ facing the courts. Space here is too limited to do these justice here, but a few stand out as subjects for future research: the fragmentation of power between the executive and legislative branches; the strength and independence of the prosecutorial body; the political engagement of civil society; the history of court institutionalisation; the degree to which the courts use a political doctrine question, which might limit their involvement in some cases; a country’s tradition of judicial activism; and the prevalence or acceptability of corruption.

single-country studies have sometimes used judicial decisions against the
government as a proxy for judicial independence. Yet independent courts
can decide in favour of the government, and there is also a problem of
generalising results from single country studies. Measures of independence,
however, tend to be even less precise in multi-country studies which use
expert surveys, personal classifications or other indices that frequently
overlook the relations between the three branches of government or fail to
differentiate between different types of courts or levels of judges.

So what exactly matters about judicial independence? Two clear distinc-
tions exist in the literature: (1) between the judiciary and other branches
of government; and (2) between pressures on judges that originate either
inside or outside the judiciary. For the sake of clarity, we label the first
‘autonomy,’ and the second as either internal or external ‘independence.’
Our overall measure of independence is therefore based on three com-
ponents: (a) autonomy, or the relation between the judiciary as an institution
and the elected branches of government; (b) the external independence
of Supreme Court judges, that is, their relation with elected branches of
government; and (c) the internal independence of lower court judges,
defined as their relation with high court judges.

(a) Autonomy

The judiciary can be described as fully autonomous if its general structure
and budget is self-regulated, freeing it from potential pressures from other
branches of government. The degree of autonomy is highest where the
judiciary itself decides on issues such as its budget, the numbers and
jurisdictions of courts and judges. It is lowest when these decisions are in

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the hands of the executive and/or legislative branches through statutes or decrees. The autonomy of the judiciary also depends on whether it has the capacity to regulate and control the arbitrary exercise of power and the capacity to strike down unconstitutional laws. Thus, if these powers are closely held within the judiciary (for instance, in the Supreme Court), we can say that the judiciary is more autonomous from the other branches of government than if such power lies outside the judiciary (for instance, in a constitutional tribunal).

In the Brazilian case, major reforms to the judicial structure must be made via constitutional amendment, thereby complicating blatantly political efforts to impose direct control over courts and judges. One such constitutional amendment – which, among other things, created a judicial council composed of both judges and external nominees to oversee the judiciary – was approved after ample debate (which included judges) in December 2004. At the time of writing this article, the amendment was still being implemented. Although we expect it will do little to alter the patterns described here, our analysis of Brazil formally focuses solely on the period prior to this implementation of this measure, namely 1988–2004.

During this period, decisions on internal administrative affairs have been tightly centralised in the hands of judges and, indeed, the 1988 Constitution guarantees the judiciary ‘administrative and financial autonomy’, granting it so much authority that accountability has been sorely lacking on occasion.11 Although the Constitution does not establish a fixed judicial budget, other constitutional guarantees of funding and the bargaining strength of the federal judiciary have combined to produce a judicial budget that has grown nearly eight-fold over the past two decades.12 Brazil’s federal courts remain the best funded federal court system in the hemisphere outside the United States.13 Meanwhile, the power of constitutional adjudication remains firmly ensconced by constitutional mandate in the Supreme Federal Tribunal (STF).

Our analysis of the Mexican case focuses on the period between 1994 and the present, during which autonomy was improved through a number of institutional changes. The 1994 judicial reform not only concentrated
constitutional adjudication in the Supreme Court, but also created a powerful Judicial Council (with judges in the majority) that was charged with managing the entire structure and budget of the judiciary, as well as the careers of all federal judges.\textsuperscript{14} Like Brazil’s Constitution, the Mexican Constitution of 1917 does not establish a fixed judicial budget. However, the budget proposed each year by the Judicial Council has not been altered by Congress since 1994 and in fact has never reduced.

In sum, over the last decade these two federal judiciaries have shared relatively high levels of autonomy. While both face the prospect of reduced funding, such a move would require a significant change in executive and legislative stances toward the courts. Meanwhile, courts in both countries benefit from both strong control over their own internal operations, robust powers of constitutional adjudication as well as (like many countries in the region) a high degree of budgetary autonomy. However, our comparative analysis suggests that it is vital to acknowledge the consequences any possible curtailment of autonomy might have with respect to the future policy impact of the Mexican and Brazilian courts.

\textit{(b) External Independence}

‘External independence’ reflects the relation between Supreme Court judges and other branches of government, and can be defined as ‘the extent to which justices can reflect their preferences in their decisions without facing retaliation measures’ from the executive or legislative branches.\textsuperscript{15} Over the last decade Brazilian and Mexican high court judges have enjoyed similarly high levels of external independence, as assessed by the rules and arrangements regarding justices’ appointment, tenure, impeachment and salaries.

The external independence of ministers on the Brazilian Supreme Federal Tribunal (STF) has been guaranteed since 1988 by the appointment by the President of ministers who are then approved by the Senate. It is also guaranteed by judges’ life tenure (to age 70) and by salary protections written into the Constitution (these also apply to judges in the Superior Tribunal de Justiça, STJ, and lower federal courts). The divided appointment-confirmation process and the relative professional longevity of judicial appointees contribute to external independence, as STF ministers tend to outlast their nominators in the elected branches. Furthermore, in order

\textsuperscript{14} It must be noted that the first delegation of authority to the judiciary over courts’ structure and jurisdiction took place in 1987 during the administration of Miguel de la Madrid. Héctor Fix-Fierro, ‘La reforma judicial en México, ¿de dónde viene? ¿a dónde va?’ Reforma Judicial, Revista Mexicana de Justicia, no. 2 (July-Dec. 2003), p. 278.

\textsuperscript{15} Iaryczower et al., ‘Judicial Independence in Unstable Environments,’ p. 699.
to impeach members of the STF, a tough two-thirds majority in the Senate is needed. In order to remove judges on the STJ, a two-thirds vote by the judge’s peers is required.

Supreme Court judges in Mexico were largely PRI loyalists until the mid-1990s, with the advancement of constitutional rights often subjugated to short-term political interests.\(^16\) The judicial reform of 1994 provided judges with a constitutionally-protected salary and tenure of 15 years, long enough for them to become independent from their appointing authorities (the executive with Senate approval). The only feature that makes Supreme Court judges susceptible to undue interference from the legislative is that the accusation part of the impeachment process is contingent on a simple majority in the House (although the final judgement of these cases lies with a two-thirds majority in the Senate). However, increased political competition since the 1990s permitted the courts to take important decisions that checked PRI interests without provoking retaliation, suggesting the emergence of a good degree of external independence.\(^17\)

\(^{(c)}\) Internal Independence

‘Internal independence’ refers to the extent to which lower court judges can make decisions without taking into account the preferences of their hierarchical superiors. Internal independence is determined by the extent and location of administrative controls, the institutional culture of the judiciary, and the extent to which judges’ decisions are constrained by their peers (rather than by legal rules regarding bindingness).

The Brazilian judicial system is marked by a remarkable degree of internal independence. Each court below the STF and STJ fills its judgeship vacancies using rigorous civil service examinations and/or strict rules of seniority and merit specified in the 1988 Constitution.\(^18\) Lower court judges at all levels also enjoy strong guarantees of their tenure and have considerable latitude in their day-to-day decision-making.

Institutional culture can sometimes moderate the internal independence of lower court judges, as Hilbink has pointed out in the Chilean case.\(^19\)


\(^{18}\) For the STF, the President nominates a candidate of his choosing for subsequent Senate confirmation; and for the STJ, the President nominates a judge from a list of three candidates proposed by the court itself.

This phenomenon is also at play in Mexico, where lower court judges are subordinated to their hierarchical superiors by both institutional rules and informal institutional culture. Brazil lies at the other extreme whereby relatively weak hierarchical constraints are further limited by customary respect for each judge’s independence, contributing to fragmented decision-making. Furthermore, because promotion is based primarily on tenure, upper courts have little influence over the professional development of lower court judges. When combined with the relative absence of binding mechanisms (described below), this system of recruitment and promotion has the effect of generating a large degree of internal independence in Brazil. This contributes to an ‘atomisation’ of the judicial process: ‘at least potentially, there can be as many different decisions as there are judicial bodies activated’.  

Hierarchical control over lower court judges’ careers engenders a low degree of internal independence in Mexico. The Mexican Judicial Council controls appointments and promotions as well as disciplinary matters for all federal lower court judges, permitting the kind of top-down control by senior judges seen in Chile. Although life tenure may ensure a little more internal independence among judges than in Chile, the Mexican Council fills lower court judgeships. Life tenure is also granted only to those judges who have served a six-year term and been ratified by the Council. Since the Council is dominated by the Supreme Court, Mexican lower court judges have little independence from their hierarchical superiors.

To summarise, both Brazil and Mexico show signs of judicial independence in the aggregate, but with an important difference in its components. While both countries rate high on autonomy and on external independence, they differ significantly on internal independence. The high degree of internal independence among Brazilian judges (as compared to the strong top-down organisational control imposed on Mexican judges) suggests that the Brazilian federal courts can be used as either a means of delaying definitive policy choices or of muddying the certainty of policy choices, as our case studies will illustrate.

*The Structure of Judicial Review*

We turn now to what we term the ‘structure of judicial review’ – the legal and constitutional rules that determine who can activate courts to play a role in the policy game, and the constraints they face in doing so. The

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21 A 1999 constitutional reform established Supreme Court control of the Council. Before this, the Council was filled by judges selected randomly from different levels of the judiciary. See Héctor Fix-Fierro, ‘La reforma judicial en México’.
structure of judicial review has two main implications for the judicialisation of policy. The first relates to how quickly the average case is likely to come to a conclusive judgement and, in particular, whether some plaintiffs can expect expedited decisions. A plaintiff who can leap the queue to appeal against a policy in the high court is more likely to be active in contesting policy, other things being equal, than a plaintiff who faces an interminable appeals process in lower courts. A second implication relates to the effectiveness of judicial resolutions and, in particular, whether some plaintiffs have access to decisions that are more binding and/or more widely applicable than those available to other plaintiffs. A plaintiff with such access would be more likely to use the courts whenever their policy preferences were not met; and such access would likely provide a greater potential

Fig. 1. Comparative Federal Judicial Structures, Brazil and Mexico. Note: Figure based on numbers of courts in 2002. Brazil's STF and STJ are, by the wording of the 1988 Constitution, not strictly part of the "federal" court system, which formally encompasses only the TRFs and federal judges, according to Article 106 of the Constitution. But the STF and STJ have national jurisdiction (Article 92, §2), meaning that they can hear cases rising from both the federal courts and state courts. Because cases appealed from the TRFs rise to the STJ and STF, and therefore affect federal policies, they are included in this diagram. Brazil has separate labour, electoral and military courts, although these are excluded from our analysis because of their highly specific policy arenas.

Mexico also has separate fiscal, labour, agrarian and military courts, not shown here. The Judicial Council is also formally part of the Federal Judiciary in Mexico, although it is not shown in either country because it is not a party to actual judicial decision-making. The Mexican line of appeals refers to non-electoral cases; electoral cases are heard at the Electoral Courts and the Electoral Tribunal (which are also formally a part of the Federal Judiciary). The Mexican Supreme Court can review cases from anywhere in the federal court system if it deems them important (all other non-appealed cases it hears arrive under original jurisdiction).
influence over policy. We discuss here three major factors influencing the structure of judicial review: constitutional arrangements, the scope of juridical power and the rules governing standing.

(a) Constitutional arrangements

Constitutional arrangements that influence how policy can be contested in the courts include the breadth of constitutional rights and the breadth of original jurisdiction at the high court. The breadth of constitutional rights is fundamental to understanding the judiciary’s role in Brazilian policy debates, especially in light of the extraordinarily broad, 250-article-long Constitution, and the wave of constitutional reforms undertaken in that country since the early 1990s. Mexico’s Constitution was first written in 1917; despite recent reforms, it remains less expansive in delineating rights than its Brazilian counterpart. This alone suggests different levels of court activation: if rights as diffuse as a right to health care or salary guarantees for civil servants are contained in the constitutional text, this makes it more plausible that high courts will be obliged to hear cases about policies that allegedly threaten these rights.

A second factor is the existence of a constitutional court and the breadth of its original jurisdiction. Although neither Mexico nor Brazil has a constitutional court that operates independently of the court system (in the manner of the French Constitutional Council or Chile’s Constitutional Tribunal), the fact that both countries’ high courts merge a constitutional function with the function of highest appeals court allows the same institution to be activated in different ways on the same issue. In such a way, the same contentious policy may reach the high court via appeals or via a specific legal remedy such as an ‘action of unconstitutionality’ or a ‘constitutional controversy’ suit.

The Brazilian STF hears all cases related to constitutional issues, arising either through appeal from lower courts or through legal cases brought directly under its original jurisdiction. Yet, given the large caseloads that make their way to the STF under the guise of constitutional questions, the manner in which cases arrive at the STF affects the time it takes to secure a resolution. A case challenging policy that arrives via the direct action of unconstitutionality (ADIN) mechanism will be heard several years prior to a case challenging policy that rises to the STF via repeated appeal. Although only one in every 13 cases (7.7%) is brought to the STF using case types of original jurisdiction like the ADIN, this is a far more significant number in both absolute and proportional terms than in Mexico (where only one in every 59 cases – 1.7% – comes under the court’s original jurisdiction). Although the large numbers suggest that constitutional cases under original
STF jurisdiction are a rather humdrum affair, nonetheless, having one’s case heard under the STF’s original jurisdiction – which leapfrogs the lower courts – is far preferable to being part of the great mass of appeals. The fact that more cases are heard does not imply more consequential decisions, but the breadth of cases that can be challenged on constitutional grounds does explain why there appear to be more policy challenges in the STF than in the Mexican Supreme Court.

Mexico’s Supreme Court is more typical of the regional pattern, with original jurisdiction in only two types of constitutional challenges (controversias constitucionales and acciones de inconstitucionalidad, of which there were a combined total of 133 cases in 2003), and appellate jurisdiction in only some types of cases heard by district and circuit courts. Unlike the Brazilian STF, the Mexican Supreme Court’s appellate jurisdiction is largely at the discretion of the Court itself. In addition, the considerably narrower scope of the Mexican Constitution also limits the number of potential appeals on constitutional grounds.

In sum, the Brazilian high court is more likely to be activated under its original jurisdiction: it hears a far greater proportion of cases under its original jurisdiction; the 1988 Constitution facilitates a wide-range of constitutionally-grounded suits; and, as we will see in the question of standing, a far greater number of policy actors are able directly to access the STF.

(b) Scope of juridical power

The scope of juridical power can be determined by a country’s placement along three axes: a priori versus a posteriori judgement of laws; abstract versus concrete review; and rules of bindingness and universality.22 As we will see here, Brazil and Mexico share similar characteristics regarding two of the three axes.

A priori versus a posteriori: Unlike some countries, including Chile, where a decision by the constitutional tribunal is handed down before the law in question goes into effect, thereby allowing the legislature, if necessary, to revise the law prior to implementation, a posteriori consideration may occur weeks, months, or even years later in Brazil. Mexico tempers the potential for this type of post hoc policy upheaval somewhat by placing a time limit for filing Acciones de Inconstitucionalidad, which must be entered no more than thirty days after a law goes into effect.

Abstract versus concrete: A court’s decisions can be based on either concrete cases, such as a plaintiff’s grievance against the effects of a

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particular government programme, or on abstract cases, such as a plaintiff’s grievances about a particular law or executive order even before the law’s concrete effects are visible. In both countries, both forms of review are possible, allowing policy to be contested in some cases even if the plaintiff’s interests are not directly affected by the policy.

Bindingness and universality: A first significant dimension of any court decision is whether it sets a precedent, and is therefore binding on any similar future cases; a second is the degree to which the decision is universifiable, meaning whether it applies to everyone affected by a given policy (erga omnes effects) or only to the parties to the suit (inter partes).

The extreme of binding precedent is found in common law systems, where the doctrine of *stare decisis* binds all future judges in the same or lower court to the same decision in similar cases. Although Mexico does not adhere to *stare decisis*, both the Mexican Supreme Court and Mexican circuit courts are able to set binding precedents. In *amparo* suits they may establish jurisprudencia by publishing five consecutive and consistent decisions on a given point of law. The established jurisprudence has a binding effect on the court that created it, as well as on all lower courts. The Supreme Court can also issue tesis sobresalientes of jurisprudence, guidelines for interpretation that are not binding on lower courts but can nonetheless be highly influential.

In contrast, the weakness of precedent in Brazil means that many cases are filed up the judicial hierarchy until they reach the STF on appeal for its constitutional judgement. The 1988 Constitution attempted to limit the use of the STF as a court of appeal by creating the STJ, which would

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23 The *amparo* suit is an instrument of individual constitutional complaint; although sometimes translated as *habeas corpus*, it encompasses more than what the term implies in English. Unlike countries like Spain or Germany where such complaints can be heard only by the Constitutional Tribunal, in Mexico an *amparo* can be filed in any federal court and then appealed all the way to the Supreme Court, provided it is deemed important enough to review. However, sentences in *amparo* suits only affect the particular plaintiff (unless there are five similar rulings on the same issue). An *amparo* can be filed only by the aggrieved party and only when ‘an act or law of the authority’ (Article 103, Mexican Constitution) has violated a constitutional right; thus, *amparos* cannot be filed against individuals. See Héctor Fix-Zamudio, *Ensayos Sobre el Derecho de Amparo* (Mexico, 1999).

There is no equally ubiquitous Brazilian parallel to the *amparo* suit. The *mandado de segurança* is perhaps the most similar, in that it seeks to guarantee individual or collective rights against an illegal or unconstitutional act by an authority. But there is no similar rule regarding precedent setting, and while a successful filing in the STF would be likely to stop a policy or government activity in its tracks, the STF does not have original jurisdiction in these cases unless the case has been rejected by all other courts. Furthermore, *mandados de segurança* are proportionally seldom used, representing fewer than 0.1% of all STF cases heard per year, and there are a number of other legal instruments – ranging from the Ação Civil Pública to the ADIN – that permit similar legal contestation on a variety of grounds.
function as a final court of appeal in non-constitutional cases. However, this intention has been foiled by the fact that most legal arguments can be couched in constitutional terms so as to be heard in the STF, and by the absence, even after the 2004 reform, of strong binding mechanisms that might prevent otherwise similar cases from working their way up through the court hierarchy.

Partly as a result of stronger forms of bindingness, the Mexican Supreme Court hears fewer than 7.5% as many cases per year as the STF. Meanwhile, the Mexican lower court system shows relatively greater uniformity in case decisions. In policy terms, this distinction is very important. It eliminates judicial uncertainty earlier in the legal process and, in the aggregate, it means that policy questions may be resolved more quickly and definitively than in Brazil.

In terms of universality, both countries give *erga omnes* effects to some but not all review cases by their high court. (In Mexico, such effects are limited to cases on which a super-majority of justices agree.) While the *erga omnes* effect avoids much of the potential chaos of conflicting decisions, it also provides an incentive to use high courts over lower courts whenever possible. When combined with weak binding mechanisms and/or low internal independence, this tends to funnel judicial decisions to the top of the judicial pyramid, centralising judicial review in the high courts of the two countries, increasing the likelihood of delays, and keeping policy choices under challenge longer than might otherwise be the case.

The absence of strong binding mechanisms in Brazil allows individual lower court judges to occasionally make a big political splash with a decision that temporarily overturns policy until it is overruled. The multiple opportunities to appeal trial court judgements mean that lower judges’ decisions are likely to be revisited repeatedly by upper courts. The value of lower court decisions thus decreases relative to high court decisions for all but strategically-motivated litigants such as those seeking delay (often the government itself) or those seeking temporary judicial victory, no matter in what court (such as political parties seeking to make a political point observable to their constituents). Lower courts otherwise are of very little tactical or strategic utility to groups with privileged standing in the high court. In combination, these factors all imbue the Brazilian high court with extraordinary importance, while diminishing the policy relevance of lower courts.24 While the Mexican Supreme Court is extremely important to policy opponents, the relative imbalance between the policy relevance of decisions

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by Mexico’s lower courts and the Supreme Court is much smaller than in the Brazilian case.

(c) Standing

Standing is perhaps the most influential means by which institutional structure can predetermine the judicial influence of specific policy actors. Differences in standing have an impact not only on the types of plaintiffs heard but also – and this is important because it directly affects strategies of policy judicialisation – in the number of ways the same topic can be raised in the courts. The only individual citizens with standing to file suit directly in the Mexican and Brazilian high courts are those permitted to file amparo or habeas corpus suits. However, since the effects of such suits are strictly individual, their broader policy effect is very limited (unless, in the Mexican case, jurisprudencia is created).25 This severely limits individual impacts on policy: individuals ‘can only question the constitutionality of laws but cannot aspire to produce erga omnes effects in case the judiciary positively hears their case’.26

Standing in the Brazilian courts is determined by the type of case at hand: not all members of society are entitled to file the same sorts of cases. A broad range of policy actors have special access to legal instruments that are heard directly at the STF, notably via the ADIN mechanism, which provides, arguably, one of the broadest grant of group standing in the world. More specific policy actors in Brazil are able to bring cases before the courts than in most other Latin American nations (save Costa Rica and Colombia) or, for that matter, in almost anywhere in Europe. Nonetheless, standing is still limited to specific groups, and therefore not every citizen is able to directly contest constitutionality at the high court. Since these constitutional review instruments have erga omnes effects and are usually heard more rapidly than others that arrive on appeal, privileged standing therefore guarantees these groups considerable potential policy leverage.27

One further element to consider is how the various groups are given standing: in Mexico, although political parties are allowed to file actions of unconstitutionality, they are only permitted to use this standing to challenge electoral laws. Brazilian political parties, by contrast, have been able to file

25 In 2002, a bill was approved that gave cabinet ministers a special forum in the STF for suits against them as individuals. While suits against ministers often have a public policy motivation, we do not consider these here, given their relatively indirect effect on policy.
26 Patricio Navia and Julio Ríos-Figueroa, ‘The Constitutional Adjudication Mosaic of Latin America.’
Table 1. *Standing in High Courts*

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<th>BRAZIL</th>
<th>MEXICO</th>
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<td>Do certain groups have greater formal standing than others?</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>In what cases?</td>
<td>A number of cases, including the ADIN and cases involving senior members of the government, among others</td>
<td>1. The <em>Accion de la Inconstitucionalidad</em>, which must be brought by specific plaintiffs 30 days after law passed, and requires 8 of 11 justices to have general effects.</td>
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<td>2. Constitutional controversies between 3 branches of federation or 3 branches of government at any level.</td>
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<td>3. The Supreme Court can also opt to take on the role of an appellate court to get involved in cases, or can be activated by lower courts or by the Attorney General.</td>
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<td>1. In <em>Acciones de Inconstitucionalidad</em>, federal laws may be contested by 1/3 of either house of Congress, or by the Prosecutor General. State law may be contested by 1/3 of state legislators. Electoral law may be contested by political parties.</td>
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<td>2. In constitutional controversies, all three levels of the federation, and all three branches of government, are allowed to contest their counterparts.</td>
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<td>Which groups?</td>
<td>In ADINs, for example:</td>
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<td>– President</td>
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<td>– Senate; Chamber of Deputies</td>
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<td>– State governors and legislative assemblies</td>
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<td></td>
<td>– Prosecutor General (<em>Ministerio Público</em>)</td>
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<td></td>
<td>– Brazilian bar association (OAB)</td>
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<td></td>
<td>– Political parties represented in Congress</td>
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<td></td>
<td>– Unions or ‘class entities’ with national reach, including industrial and commercial federations.</td>
<td></td>
</tr>
<tr>
<td>Individual standing against constitutionality of laws?</td>
<td>Yes, but without <em>erga omnes</em> effects.</td>
<td>Yes, but without <em>erga omnes</em> effects.</td>
</tr>
<tr>
<td>Proportion of cases decided under high court’s original jurisdiction, 2003</td>
<td>7.7%</td>
<td>1.7%</td>
</tr>
</tbody>
</table>
ADINs contesting legislation across a wide range of policy arenas, occasionally to great effect. In the absence of privileged standing, the Brazilian high court would be less of an instrument of policy contestation or, at the very least, would have been used in a very different form, by different policy actors.

It is equally important to note that different rules of formal standing allow the same issue to be brought to the courts in different ways: via diverse actors with standing in the high court, through diverse legal remedies, or via appeals. In Mexico, for instance, the same contentious issue may be challenged in the high court on some grounds by a governor, who enjoys formal standing in constitutional controversy cases, and on different grounds by one-third of legislators taking advantage of their formal standing in action of unconstitutionality cases. In other words, within the same country and even in regard to the same policy, rules of standing have important implications in shaping the legal-political tactics adopted by different political actors and in broadening the scope of deliberative justifications used in choosing among policies.

The Judicialisation of Reform

Having laid out a framework explaining how judicial structure may influence patterns of the judicialisation of policy, we now turn to concrete case studies to illustrate how the variables we identified may influence the use of the courts in policy debates. We compare two pairs of cases: Brazil’s pension reform during the 1990s and the reform of civil service pension benefits in Mexico which occurred in the early 2000s; and the distinct experience of state ownership transformation of the two countries. Before investigating these case studies, we summarise here the criteria for selecting the cases, then present two propositions concerning the influence of court structure on patterns of judicialisation.

Selection Criteria

Our selection criteria focus on policy changes that took place only after courts in both countries showed a high degree of independence. Critics may argue that the very different timing and sequence of policy change in Mexico and Brazil, and the appraisal of dissimilar policy topics, complicate comparison between the two countries. We recognise that no comparison of the patterns of judicialisation across countries will be perfectly parallel or rigorously predictive. However, we have drawn on a common logic in selecting our cases.
To restrict the universe of comparable cases, we have relied here on Lowi’s insight that ‘policy determines politics’. That is, it is possible to compare the political deliberations surrounding policies that are quite different in terms of substantive content if they share common patterns of contentiousness.\(^{28}\) Wilson suggests four combinations of the diffusion or concentration of costs and benefits that may determine a policy’s ‘politics’.\(^{29}\) Adopting these categories, we focus here on policy cases in which the costs of the policy are highly concentrated among specific groups, while the benefits are widely dispersed.

This combination of concentrated costs and diffuse benefits means that the policy reforms analysed here are likely to have received backing from a majority prior to implementation and also to have evinced strong reactions from minority groups affected by them.\(^{30}\) Our reasoning is that the logic of collective action applies in courts as much as it does in other political venues: policies with highly concentrated costs are likely to lead to more intense opposition, thus permitting us to study the resulting patterns of judicialisation in an environment in which all possible legal instruments and tactics are likely to be brought to bear.

**Expected Patterns of Judicialisation**

The first section of this article sketched out several components of judicial structure which influence the comparative use of the courts in policy debates. We recognise that it is not possible – at least not in a two country study – to make strong and definitive claims about the effects of each variable described here. Nonetheless, the brief case studies below are useful on at least two levels. First, the specification of the variables involved in the judicialisation of policy hopefully will provide at least a baseline to illustrate the potential gains of this paper’s comparative framework. Second, we provide empirical grounding that illustrates how court structure influences legal-political strategies, and as a result, how court structure influences patterns of policy contestation.

Table 2 summarises areas of similarity and difference in the two countries’ judicial structures. Brazil and Mexico differ on five variables: (1) internal independence; (2) the bindingness of judicial decisions; (3) the breadth of constitutional rights; (4) the breadth of the Supreme Court’s original

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jurisdiction; and (5) the breadth of standing. Our first proposition, drawn from Variables (3), (4), and (5), is that – other things being equal – contentious policies are likely to be more easily contested in Brazil’s STF than they are in Mexico’s Supreme Court. This is simply because in Brazil there are more justiciable rights in the constitution, the Supreme Court’s original jurisdiction is broader, and more political actors have standing before the high court to challenge policies in a politically visible manner with *erga omnes* effects.

Our second proposition regards the interaction between variables (1) and (2). Where internal independence is high and bindingness is low, as in Brazil, plaintiffs will be inclined to either head directly to the high court for a definitive ruling or, if they lack standing or doubt the high court’s sympathy to their cause, they may attempt to create delay and uncertainty through tactics that take advantage of the internal independence of lower court judges. If internal independence is low and the degree of bindingness is moderate to high, as in Mexico, we would expect to see more use of the high court (relative to use of the lower courts) for those plaintiffs with standing. Those without standing may still try to delay the process using *amparo* suits, but these delaying tactics will not be as effective as they might be under high internal independence. The ultimate goal thus becomes obtaining a final and binding legal decision by the Supreme Court. With these two propositions in mind, we turn now to our first pair of case studies.

**Pension Reforms**

Pension reforms undertaken by democratically elected governments in Brazil and Mexico differed significantly in scope and content, yet they shared the common challenge of reducing rights granted to a privileged group of civil
servants. The purported benefits accrued to no one specific group: they ranged from fiscal and efficiency goals to greater equality between public and private pensioners. The costs in both cases were to be borne primarily by civil servants. We turn first to Brazil.

Pension reform was a top policy priority for Brazil’s reformers in the 1990s, given the large drain that the pension system represented for the Treasury. The pension budget, including both National Social Security Institute (INSS) payments to private sector retirees and the government’s payments to public sector retirees, grew rapidly from 1988 through the 1990s due to the generous terms laid out in the new 1988 Constitution. The system functioned precariously, running annual deficits because of generous benefit payouts untied to real contributions into the system.\(^{31}\) The system was also patently unbalanced, with public sector pensions accounting for a majority of the spending.\(^{32}\)

Pension reform was initiated in March 1995, two months after President Cardoso’s inauguration, with a constitutional amendment proposal that was to face a turbulent, nearly four-year uphill battle in Congress. The administration’s three successive policy initiatives on pensions (passage of this constitutional reform package, civil service pension tax legislation, and a tax on public sector pensions above a certain limit) all led to major use of the courts.

The courts joined in the fray early on. Responding to a request from the Communist Party of Brazil (PCdoB), STF minister Marco Aurélio de Mello issued an injunction to suspend congressional hearings on the reform in April 1996. Supporters defended Mello’s decision by arguing that the Chamber had already rejected the proposed report once, and the Constitution establishes that no rejected bill can be newly submitted during the same congressional session.\(^{33}\) Critics argued that the case for judicial suspension of congressional hearings was weak, given that there was no imminent risk. The editorial page of one newspaper – no friend of the Cardoso administration – commented, ‘reforms face obstacles that come from where, \textit{a priori}, one would least expect them’.\(^{34}\) One month after the injunction was issued, it was overturned in a 10-1 vote by the full STF,

\(^{31}\) The pension deficit totalled 1.9% of GDP in 1996.

\(^{32}\) In 1996, 48% of pension spending went to 16.6 million private sector workers, while 52% went to 2.9 million public sector retirees. Public sector employees paid in contributions equivalent to only 17% of total public sector pension outlays in 1996, as compared to 94% in the INSS system. P. Godoy, ‘SOS Previdência,’ \textit{Folha de São Paulo}, 2 January 1998, p. 2–2; Ministério da Previdência e Assistência Social, \textit{Livro Branco da Previdência Social} (Brasília, 1997).


which argued that it unjustifiably interfered with a matter internal to the legislature.

Judicial contestation became even more heated with the final congressional approval of the reform package between November 1998 and January 1999. Constitutional challenges flew fast and furious, with an unprecedented number (33 in total) of ADINs filed against the Cardoso administration’s pension laws. One ADIN in particular, however, would have a spectacular effect. In September 1999, the STF approved an injunction requested in an ADIN filed by the Brazilian Bar Association (OAB), suspending the tax on civil service pensioners and the increased pension contribution by active civil servants, in a decision estimated to cost R$2.4 billion (US$ 1.26 billion). The rapporteur of the STF decision, who was not generally viewed as antagonistic to Cardoso’s policy reforms, argued that the law should have been implemented via constitutional amendment. More fuel was added to the fire at the end of October 1999, when the president of the STF argued publicly that a new government proposal that would enact the tax on civil service pensions through a constitutional amendment – created in the wake of the first defeat – was also likely to be unconstitutional. The government took the warning to heart, and no further reform was pushed by the Cardoso administration.

In Mexico, pension reform was a longstanding part of the structural reform programme that began soon after the debt crisis of 1982. We focus here on a single portion of this comprehensive transformation: the reform of pension systems for public sector employees of the pension bureaucracy. All wage-earning and salaried workers in Mexico are guaranteed access to basic welfare services provided by public institutions. The Mexican Social Security Institute (IMSS) addresses the needs of all wage earners, except those who work in the public sector. The reform in question here affected the pensions of the employees of the IMSS, who are represented by their union, the SNTSS (Sindicato Nacional de Trabajadores del Seguro Social).

In August 2004 the Mexican Congress passed a law modifying the pension system for these IMSS employees, making new employees responsible for their future pension payments through a system of obligatory salary deductions. This contrasted with the old system, in which generous IMSS pensions were paid by compulsory contributions from businesses and non-IMSS workers. According to its supporters, this reform constituted the first step towards reforming the civil service pension systems. The law was passed in both houses of Congress by a centre-right coalition of the PRI and PAN parties, against the opposition of the centre-left PRD party.

The SNTSS union has fiercely fought the reform, organising a series of political protests, including street demonstrations and the closing of buildings, as well as a legal campaign against the law. In the courts, the
union filed an *amparo* suit to ‘suspend immediately the effects of the law.’

The union anticipated this suit would be a cheap and expedient legal weapon with which it could win some time while continuing the battle on other grounds (recall that all citizens have standing in *amparo* suits, and although decisions in these cases have only *inter partes* effects, if the *amparo* is granted the law is temporarily suspended until a final decision is reached). In this case, however, the *amparo* suit was dismissed in district and circuit courts. The SNTSS asked the Supreme Court to directly hear its case, but this was denied. Instead the case was subsequently re-heard from scratch by an administrative judge who dismissed it. The SNTSS’ final attempt to have its case heard at the Supreme Court also failed, at which point it threatened a massive strike, an action which enabled it to achieve some of its demands, including the resignation of the Director of the IMSS.

The SNTSS was not the only group to challenge the modification of the pension system. Entrepreneurs and individual workers also filed *amparos*, arguing that their fees should not be used to finance overly generous pension benefits. These were at first dismissed by a district judge. The Supreme Court used its power of selective review to hear the *amparos* because of their salience, but ultimately ruled against both entrepreneurs and workers.

The biggest difference in these two cases lies in the avenues of access to each country’s high court. In both countries, individual challenges to the pension reforms were filed in the lower courts, with little success and no binding, broader implications. In both countries, opponents of reform also tried to halt change by appealing directly to the high court. Here our first proposition becomes apparent, with a far greater degree of access for policy contestation in the Brazilian STF than in the Mexican Supreme Court, influencing the degree of policy contestation regardless of prospect for success. The reasons for this differing level of contestation stem largely from the breadth of constitutional grounds which permit policy to be contested in Brazil, especially when compared with Mexico. Differentiated standing enabled a Brazilian opposition political party to directly contest congressional deliberations on the reform, and by hitting on Minister Mello (a particularly anti-reform STF judge), to generate considerable uncertainty by obtaining an injunction suspending the hearings. Under the rules governing standing in Mexico, such a case would not have been permitted (while the Brazilian STF minister was ultimately overturned, this was because he was considered to

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38 ‘Usa bien IMSS coutas – Corte’, *Reforma* 26 May 2005. At the time of this writing the SNTSS is preparing another legal challenge.
have intervened \textit{a priori}, not because of a problem with the party’s standing). Once the reform had passed Congress, the rules also permitted more than thirty constitutional challenges from a variety of different groups, in sharp contrast to the Mexican case, where only one such suit was filed.

The Mexican SNTSS might have been granted standing in the STF if it were filing its constitutional challenge in Brazil; it is, after all, a national union which would grant it standing under Brazilian rules. But even supposing the SNTSS were filing in Brazil with no standing of its own in the STF, it might still have been able to turn to political party allies for legal assistance, much as Brazilian civil servants were able to rely on opposition political parties as surrogates in their legal battle against pension reform. In this case, the SNTSS was unable to access the Mexican high court directly on its own and was forced to resort (unsuccessfully) to an \textit{amparo}, just as an individual citizen would have had to. The Mexican centre-left party opposed to the reform, the PRD, was also of no help because it held less than one-third of the seats in either chamber of Congress. In other words, both of these potential Brazilian avenues of access to the high court were unavailable to the SNTSS in Mexico.

To summarise, without getting into the substantive aspects of the two cases, what we see here is that long before any judge became involved in pension reform, institutional rules and structure influenced the patterns of policy contestation in the judiciary. Furthermore, institutional structure influenced the legal-political tactics of policy opponents, and in the Brazilian case, even helped to forge the strategic alliance between civil servants and political parties opposed to reform.

\textit{Altering State Property Ownership}

State ownership of property is always a contentious topic, with concentrated losses among some groups likely at moments of transition away from or toward state ownership. This pair of cases illustrates the effects of court structure at two such moments of transition: the privatisation of mining giant Companhia Vale do Rio Doce (CVRD) in Brazil, where costs were concentrated among its public-sector employees; and the expropriation of sugar mills in Mexico, where costs were highly concentrated amongst private-sector owners. These cases illustrate our second proposition regarding the relationship between bindingness and internal independence.

The privatisation of CVRD engendered strong opposition from a host of public sector unions, political parties and opponents of the Cardoso government who argued that the costs of the privatisation would be borne by broad sectors of the population. They also denounced the fact that the new owners would be allowed to exploit an unknown quantity of ‘national’
mineral resources. The Cardoso administration counter-argued that the public sector and the economy as a whole would gain from the sales revenues, which would reduce levels of debt that cost substantially more than the lacklustre net profits provided by CVRD. The direct and immediate costs, meanwhile, were largely concentrated in the public sector workforce.

Significant judicialisation of the privatisation process ensued almost as soon as the sale was announced, in a sequence one investor described as a ‘tragic comedy.’\(^{39}\) The auction of the voting shares of the federal government was originally set for April 1997, but this was delayed by a flurry of more than 120 suits which flooded the lower courts. While most of the injunction requests in these suits were rejected, at least two were upheld in federal regional courts. Frantic government attempts to call a special court session to suspend the injunctions failed and as a result the auction was postponed indefinitely.

Trying desperately to proceed, the government appealed to the Supremo Tribunal de Justiça (STJ), where 27 pending injunction requests were thrown out and a single federal court was chosen to hear all cases related to the privatisation. Simultaneously, the government was defending itself – ultimately successfully – against a single ADIN filed in the STF by opposition parties. After a number of legal manoeuvres, the sale was rescheduled for 7 May 1997. Seven minutes into the bidding, a new injunction suspended the auction. This injunction was struck down five hours later, and the sale was quickly consummated, fetching R$3.2bn for the government coffers. But even when all this heart-stopping legal action was over, the auction was still not official. A handful of further injunction requests were upheld in the wake of the sale, questioning the legitimacy of the buyers, the legitimacy of a shareholders meeting, and so forth. All have since been resolved, and CVRD is no longer in government hands, but the path to this end was an arduous one.

The Mexican experience was equally arduous, even though the country was moving in an opposite direction on state ownership. In September 2001, President Fox (PAN) signed a decree that expropriated 27 of the 59 Mexican sugar mills. The stated goal was to keep sugar production afloat after a decade of economic complications. This reform directly affected a small group of sugar mill owners (with close ties to PRI politicians).\(^{40}\) According to the government, the expropriation would benefit all Mexicans by reducing production costs.

Mill owners quickly began legal proceedings, relying largely on amparos intended to delay and/or suspend the expropriations.\(^{41}\) In addition, largely at

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the owners’ behest, PRI senators created a special congressional committee to analyse and monitor the expropriation process. The committee concluded that the major problem facing the sugar industry was the unfavourable trade conditions Mexico had accepted in negotiating the North American Free Trade Agreement.

In response, in December 2001, Congress imposed a value-added tax on high-fructose corn syrup (HFCS) products, forcing the consumption of Mexican sugar. Besides protecting national industry, the objective of the special tax was to force the government to re-initiate negotiations with the USA on its protected sugar market. The tax was implemented in the face of vigorous objections from the executive branch.

In March of 2002, President Fox tried to revoke the legislative decision by issuing an executive order that voided the special HFCS tax. This motivated PRI legislators to file a constitutional controversy suit against the executive arguing that it was encroaching on Congress. In June the Supreme Court ruled that the executive does not have the constitutional privilege to exempt or create taxes via executive order.

Two years after the expropriation, as sugar production failed to meet demand, the original sugar mill owners re-launched their legal battle against the government, relying again mainly on the amparo suit. Circuit courts have decided in favour of the mill owners in more than half of the cases. At the time of writing, out of the twenty-seven expropriated sugar mills, only thirteen remain in the hands of the government. Fourteen sugar mills have been lost by the government in amparo cases that were first decided by district judges, then affirmed by circuit courts, and finally upheld by the Supreme Court after the Attorney General himself, in a losing gamble, asked the Court to rule on the remaining amparos.

These two cases differ both in the direction of state ownership transformation and in the use of lower courts by policy opponents. In the Brazilian case, use of the lower courts was a tactical recognition of the fact that the government had insulated the privatisation process quite well against legal challenge, and that the STF would not be sympathetic to constitutional challenges in light of the growing jurisprudential support for privatisation. In contrast to the scepticism of senior judges about pension reform, the STF had already failed to overturn past privatisations. In light of the signs that high court legal tactics were unlikely to succeed, the opposition instead adopted political-legal tactics aimed at slowing privatisation and casting privatisation results in doubt, rather than halting sales permanently.

These tactics were devised to take advantage of the internal independence of judges at the lower levels of the judiciary. Moreover, the high number of suits filed was part of a numbers’ game, aimed at distributing suits as widely as possible in the hopes of hitting on at least a few sympathetic judges. In other words, rather than risk a defeat in the STF, the opposition preferred to use the ‘atomisation’ of decision-making at the lower end of the judicial pyramid to sow uncertainty for as long as possible, conscious of the fact that these suits would probably be overturned as they rose up the judicial ladder.

A few differences are immediately evident in the use of the Mexican courts. With low internal independence and moderate to high bindingness, the possibility of hitting on sympathetic low court judges in a broad-based legal campaign waged by mill owners and their allies was unlikely to succeed. As a result, the residual strategy was to turn to the high court for a definitive decision as often as possible. While the mill owners’ absence of standing prevented a direct appeal, as soon as the opportunity presented itself in the executive tax decree, the mill owners enlisted the PRI to file a direct high court challenge. While this succeeded, it represented only a very partial victory for the mill owners who were forced to continue the considerably lengthier and less certain battle of _amparos_ higher up the judicial hierarchy in order to overturn the expropriation. The ongoing legal battle over the expropriations continues to be fought by the old mill owners, who are now on their own in the lower courts, without the direct legal support of political parties. Although the mill owners seem to be advancing their case before the courts, what is evident from these examples is that Mexico’s judicial rules tend to provide fewer centripetal forces that ally individual constituent interests to political parties who can act as plaintiffs in the courts. This contrasts with the strong bonds that existed between the losers in both pension reform and privatisation there, and political actors with standing in Brazil’s high court, such as unions and political parties.

**Conclusion**

While we agree with studies that argue judicial independence is a necessary condition for effective judicial review, we attempt to go further by identifying the particular ways in which judicial independence and judicial review structures interact and shape patterns of policy judicialisation in Brazil and Mexico. We have shown here that the patterns by which the judiciary becomes involved in policy reform depend on the structure of judicial independence, the structure of judicial review, and the relation between the two.
This article has illustrated how courts have had concrete policy effects in the two largest countries in Latin America and, as a result, why it is important to incorporate courts into mainstream accounts of politics and policy reform in the region. Our brief case studies suggest that patterns of judicialisation can be compared to illustrate the effects of different structures of judicial independence and judicial review on policymaking and, in particular, to illustrate how institutional structure may shape political actors’ strategies and their legal and political tactics. The degree of internal independence of lower court judges from high court judges, the breadth of original jurisdiction in the high courts, and the degree of bindingness of higher court decisions all play a determinative role in patterns of judicial involvement in policy reforms in Brazil and Mexico, through their effect on policy actors’ legal tactics.

The article also aimed to highlight an important consequence of the increasing participation of courts in the policy debate; namely, the shift in the kinds of deliberative justifications that go into choosing between policies. We have argued broadly that patterns of judicial involvement in policy change depend on the number of different ways the same issue can reach the courts; these avenues of access also influence the justifications presented for any policy. In the case of the expropriation of the Mexican sugar mills, for example, the deliberative justifications surrounding the policy were expanded by policy contestation in the courts. These took place via numerous legal mechanisms including the amparo suit, a constitutional controversy and an action of unconstitutionality. Each one of these legal instruments implied different deliberative justifications: amparo suits brought with them discussion of individual rights (property rights, in this case); the constitutional controversy engendered a public discussion on the appropriate roles of different branches of government; and the action of unconstitutionality raised the broader topic of the correct mix of incentives for agro-industry. One single policy, the mill’s expropriation, challenged with three different legal instruments, thus produced multiple deliberative justifications that went beyond those offered in the legislative debate over the policy.

A third contribution here is the recognition that the wider the range of judicial review channels available, the greater the likelihood that judicial review will be used as a policy tactic. In such cases, the judicialisation of policy deliberations may be less likely to lead to the efficient resolution of policy debates, because courts will be activated in multiple ways to decide on the same issue. This is especially clear in our Brazilian examples, where the ‘atomisation’ of judicial decision-making meant that the same policy was contested in an almost unlimited gamut of judicial venues, leading to delays in establishing the legality of policy choices and the remarkable challenge – seen in the privatisation case – of trying to find out where in the court
system policy was being challenged. In such an environment, access to the high court becomes an even stronger potential policy instrument in the hands of those actors privileged with access to the STF’s mechanisms of original jurisdiction.

Finally, our research raises two important questions about the relationship between courts and democratic development which should be added to the growing research agenda on Latin American courts. First, the increasing displacement of policy conflicts from their traditional arenas in the executive and legislative branches to the judiciary can produce healthy public deliberation on issues surrounding important public policies, but also delays and inefficiency in resolving pressing public needs. Is the judiciary’s role in the increased public deliberation of policy choices desirable from the standpoint of democratic regime stability? Second, we did not have space here to touch on the vitally important mirror concept of the judicialisation of policy: namely, the ‘politicisation of the judiciary’, or the notion that as the courts’ power expands, groups seeking particular policy outcomes may attempt to place politically friendly judges on the courts or otherwise influence court behaviour to further their political objectives. As a result of the growing emphasis on the judiciary as a vital deliberative site, the stakes surrounding judicial nominations, rule changes and other forms of external influence are likely to increase. As the judiciary is increasingly politicised, the key question will be how new democracies can strike the right balance between judicial independence and accountability. This politicisation of the judiciary thus points also to the need for more research on the outcomes of our analysis, and not only on the process itself: in particular, how do judicial rules and judicial behaviour affect broader public decisions on governance, distribution, and access to justice? What are the implications of courts’ increasing policy role for the political system as a whole? These questions suggest the need for further cross-national study of the patterns of interaction between judicial institutions and political actors. Such research, in turn, promises to increase our understanding of the role of courts in shaping policy outcomes, political legitimacy and regime sustainability in Latin America’s fledgling democracies.