

Chapter 1
Institutions for Constitutional Justice in Latin America*

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Forthcoming in

Helmke, Gretchen and Julio Ríos Figueroa (eds.), *Courts in Latin America*, New York:
Cambridge University Press.

*Thanks to John Carey, John Ferejohn, Gretchen Helmke, Aníbal Pérez-Liñán, Andrea Pozas-Loyo, Jeffrey K. Staton, and participants in the CIDE conference, the APSA 2009 Annual Meeting, and the ECPR 2009 General Conference, for their careful reading and valuable comments. Yolanda Lamothe, Judith Nieto, and Jorge Puma provided superb research assistance. I gratefully acknowledge the support of the CONACYT grant “Investigación Científica Básica 2007” for the development of this project.

Constitutional judges consider matters relevant for the protection of rights, political competition, and the exercise of power. Why, however, are there constitutional courts that stand out for their work regarding rights enforcement¹ -while others distinguish themselves for their role in arbitrating disputes between political actors? In Latin America, for instance, the Colombian Constitutional Court or the Costa Rican *Sala Cuarta* have been highly active in the protection of rights (e.g. Uprimny 2006; Wilson 2005), while the Mexican Supreme Court or the Chilean Constitutional Tribunal have not. But the two latter courts have been involved as efficient arbiters regulating political competition in their respective countries (e.g. Magaloni B. 2003; Domingo 2005; Scribner 2004).

Institutions that are thought to impact the independence and power of constitutional judges are often invoked to explain their behavior (e.g. Rosenberg 1991), and are one of the three components of the strategic account of judicial behavior (cf. Epstein and Knight 1998, and the Introduction to this volume). This is the main rationale behind changes in the basic rules designed to insulate judges from undue political pressure (e.g. appointment, tenure, and removal institutions) and to give them power to intervene in policy-making (e.g. their powers of judicial review). More recent institutional arguments point to specific institutional features within the two broad dimensions –independence and power– to explain why and to what extent constitutional judges tend devote relatively more time to arbitrate conflicts between branches and levels of government or to uphold rights.

¹ I mean all rights, economic, social, and political, although it is the defense of social and economic rights that has given some courts such as the Indian Supreme Court or the South African Constitutional Tribunal, worldwide reputation. See the Introduction to this volume for an operationalization of these two roles of constitutional judges for empirical research.

This chapter provides a systematic assessment of the institutional framework under which Latin American constitutional judges work and suggests testable hypotheses on the impact of institutions on judicial behavior. In particular, it presents several arguments that consider an institutional feature to explain the behavior of constitutional judges, and maps the existence or absence of such features in a sample of eighteen Latin American countries from 1945 until 2005. As is shown in the first part, Latin American constitutional judges have experienced increments in their *de jure* independence and power since 1945. The second and third parts of this chapter unpack both dimensions revealing interesting variation in the particularities of the institutional framework that insulates and empowers constitutional judges in the region.

It is important to mention at the outset that in this chapter the institutional framework is taken as given. I present and discuss arguments on the potential consequences of different institutional arrangements and do not attempt to answer what determines the existence of those institutions in the first place.² In addition, whether the institutional features indeed produce certain effects is also beyond the limits of this chapter.³ As discussed in the Introduction to this volume, institutions do not function in a vacuum; their impact is often mediated by the political, social, and ideological contexts. However, the first step to assess whether institutions impact behavior is to clearly specify the institutional

² On this question see Ginsburg 2003; Magaloni 2003; Finkel 2008; Pozas-Loyo and Ríos-Figueroa 2010.

³ This chapter is part of a larger project that explores the consequences of institutional change on the judicial protection of rights in Latin America (see Ríos-Figueroa 2010). On the complexities of gauging institutional effects in general see Przeworski 2007, specifically of judicial institutions see Helmke and Staton and the Introduction (this volume).

framework and the incentives it places on individuals performing their job. This is the objective of this chapter.

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

Institutions that influence independence

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

Practitioners and scholars alike agree that the wave of judicial reforms that swept Latin America in the last two decades of the XX Century generally strengthened the institutions that aim to promote judicial independence, to the point that now some consider that judicial accountability should be taken care of in order to strike a better balance (Hammergren 2007, 207). These reforms have changed the appointment, tenure, and removal mechanisms of constitutional judges in such a way that, at least on paper, Latin

⁴ For a conceptual map and an evaluation of different measures of judicial independence see Ríos-Figueroa and Staton 2009.

American judges should now enjoy a considerably higher insulation from political pressures than they did in the recent past.⁵

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

Appointing procedures range from cooptation of new judges by the sitting judges to direct election by the executive or by the people (as in Bolivia's 2009 Constitution). Between those extremes one finds procedures in which the concurrence of a different set of state and non-state organizations (e.g. the executive, the legislature, the judicial council, bar associations, NGOs) is required to fill a vacant in the constitutional court. It is not trivial to determine which of all the different appointing methods produces more autonomy for judges, nor which one produces a better mix of independence and accountability. But let us consider here a simple distinction between procedures in which the appointment is done by judges themselves⁶ or by at least two different state or non-state organs and procedures in

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

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

which a single organ or organization that does not belong to the judiciary appoints the judges⁷. The former appointment method would guarantee a minimum degree of independence of judges from their appointers, while the latter would not meet even this minimum requirement.

Closely related to appointment is the length of tenure. The appointment process may involve many different organs, but if judges' tenure coincides with that of their appointers or with that of the executive and legislators, there is potential for undue pressures. Thus, let us consider that judges' tenure should be at least longer than that of their appointers. Arguably, as length of tenure increases the appointment method would tend to become irrelevant for influencing independence from the appointers.⁸ However, the particularities of the appointment method such as how many or which organs participate in it would still be important determinants of the type of judges that reach the bench.⁹ The index of de jure independence presented in this chapter considers this relationship between appointment and length of tenure in the following way: I give three points for those countries in which both the appointment procedure and tenure meet the minimum requirements, two for those countries where only the minimum tenure requirement is met, one for countries where only

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

⁸ As Madison argues in Federalist 51, "... the permanent tenure by which the appointments are held in that department [i.e. the judiciary], must soon destroy all sense of dependence on the authority conferring them". Helmke and Staton (this volume) show, however, that lengthening tenure also creates a competing effect on judicial behavior: increasing the value of judges' seats making them more likely to defer to the politicians who can take it away. Recent reforms tend to set term limits for judges in a way that is sufficiently long to promote independence from the appointers but without expanding too much judges' time horizons, which could mitigate the counter-effect pointed out by Helmke and Staton. For instance, Colombian and Mexican constitutional judges stay in their posts eight and fifteen years, respectively.

⁹ This is discussed in the second part of this chapter.

the appointment minimum requirement is met, and zero for countries where neither minimum is met.

Removal proceedings also relate constitutional judges with the elected branches of government. Particularly important is the accusation part of the process because a simple accusation may tarnish a judge's reputation; so the easier it is to accuse, the more likely that the judge be unduly pressured.¹⁰ Let us then distinguish between removal procedures in which the president can start the impeachment or removal process (a value of zero in the index), cases in which a simple majority in Congress or the Court itself can do that (a value of one), and removal procedures that at a minimum require a supermajority of one chamber of Congress to initiate the accusation (a value of two). The last item in the de jure index of judicial independence is whether the number of constitutional judges is specified in the constitution. If this is the case, the supermajorities required for constitutional amendments would make it more difficult for the political branches to pack or unpack the court than if the number of judges is specified in an ordinary statute. Simply adding the different elements just described the index of de jure independence takes values from zero to six.

Institutions that influence power

Constitutional judges are in charge of declaring null any law or act of government that contradicts the constitution. As Allan Brewer-Carías points out, the judicial guarantee of constitutional rights and the upholding of constitutional limits can be achieved either through the general procedural regulations that are established to enforce any kind of personal or proprietary rights or interest, or it can also be achieved by means of specific

¹⁰ The outcome of removal or impeachment procedures is usually, but not always, decided by a different organ from the one that accuses.

judicial proceedings established particularly for the protection of the prerogatives, responsibilities, and rights declared in the constitution (2009, 265). While the former solution describes more closely the situation in the United States, the latter can be considered the general trend in Latin America “mainly because the traditional insufficiencies of the general judicial means for granting effective protection of constitutional rights and limits” (Brewer-Carías 2009, 65).

Latin American constitutions explicitly specify a variety of instruments for constitutional adjudication. For instance, the *amparo* suit is a legal instrument to protect the individual constitutional rights from encroachments by public authorities and in some countries also from private actors. In addition to *amparos*, the Latin American constitutions specify other instruments such as *habeas corpus* (to protect the physical integrity of the individual), *habeas data* (to guarantee the right of access to information), actions of unconstitutionality (to challenge the constitutionality of a law or a decree), constitutional controversies (to make valid the prerogatives and responsibilities of political authorities as stipulated in the constitution), and so on.

Interestingly, there is cross-national variation in the number of instruments available for constitutional review. Some countries have created several specific instruments that allow constitutional judges to participate in law and policy-making in many different ways while others restrict the number of instruments for exercising constitutional review. Access to the instruments also varies: some are open to any citizen while others can be used only by public authorities. Moreover, the effects of judge’s decisions vary with each instrument. For instance, in Mexico the effects of decisions in *amparo* cases are valid only for the

parties in the case (i.e. *inter partes*), while the effects of decisions in actions of unconstitutionality are valid for everybody (i.e. *erga omnes*).

In order to give a sense of the empowerment of constitutional judges in the region, I created an index that simply adds the number of different types of instruments for constitutional review specified in the constitution of a country plus whether the instrument has general effects and whether it is available to every citizen. This de jure index of judicial power goes from zero to eight¹¹ and basically captures the number of ways in which constitutional judges can influence the policy and law-making by controlling their constitutionality. This simple index can be a good proxy of the de jure legislative power of constitutional judges.¹²

Figure 1 shows the average regional level of the de jure indexes of independence and legislative power of constitutional judges taking into account the eighteen largest Latin American countries, except Cuba, from 1945 to 2005 (see Figure 1).¹³ Both indexes are

¹¹ As detailed in the third section of this paper, the maximum number of types of instruments is four, but access for some of those is necessarily restricted and the effects of decisions with some instruments is necessarily *inter partes*.

¹² The index, of course, has limitations. One is that countries that have one general procedure establish in the constitution to defend any kind of right or interest would score low in this index of power (such as the United States or Argentina). The index also shares the generic problem of de jure indexes, namely that it does not capture other de facto features that influence judicial power such as the judiciary's legitimacy among the people or the political actors, how often are those instruments used, or how effective are they in terms of producing compliance by other actors.

¹³ Data comes from the author's *Latin American Judicial Institutions Database* (LAJID, in progress). The database includes all national constitutions enacted since 1945 in the eighteen largest Latin American countries (except Cuba) and all the amendments to the articles of the constitutions that specify the institutions of the justice system. The observations in the sample are (*denotes an amendment): Argentina 1853, 1949, 1957*, 1994; Bolivia 1945, 1947, 1961, 1967, 1995, 2002*, 2004*, 2005*; Brazil 1946, 1967, 1988, 1993*, 1997*, 1998*, 2004*; Chile 1925, 1970*, 1980, 1989*, 1991*, 1997*, 1999*, 2000*, 2005*; Colombia 1886, 1945*, 1947*, 1957*, 1968*, 1979*, 1991, 2002*, 2003*; Costa Rica 1949, 1954*, 1956*, 1959*, 1961*, 1963*, 1965*, 1968*, 1975*, 1977*,

normalized to one to facilitate comparisons. It is apparent that both independence and power have been increasing, although not at an impressive rate. It is interesting to note that levels of de jure independence are consistently above levels of de jure power. Notice also that by 2005 the average regional level of independence is well above the middle value of the index but the average regional level de jure power is below it. While the positive trend of both indexes point in the same direction as the evaluations of experts with practical and academic experience in the Latin American judicial reforms of the past three decades (e.g. Vargas 2009; Hammergren 2007; Gargarella 1997), the systematic collection of data suggests caution regarding the real extent of the changes to formal institutions in these two dimensions.

[Figure 1 here]

The annual regional average conceals variation across countries that turns out to be important and interesting. Figure 2 shows the country average of both indexes over the period 1945 to 2005. Notice that there are countries that score higher in independence than in power (such as Argentina, Chile or Mexico), countries that have the opposite configuration (such as Honduras or Panama) and countries that have higher or lower levels of both independence and power (such as Colombia or Costa Rica and Dominican Republic

1982*, 1989*, 2002*, 2003*; Dominican Republic 1966, 1994*, 2002*; Ecuador 1945, 1946, 1967, 1979, 1984*, 1993*, 1996*, 1998; El Salvador 1950, 1962, 1983, 1991*, 1992*, 1996*, 2000*; Guatemala 1945, 1956, 1965, 1985, 1993*; Honduras 1957, 1965, 1982, 1990*, 1998*, 2000*, 2002*, 2003*; Mexico 1917, 1946*, 1951*, 1962*, 1967*, 1974*, 1977*, 1979*, 1982*, 1987*, 1992*, 1993*, 1994*, 1996*, 1999*, 2005*, 2006*; Nicaragua 1948, 1950, 1955*, 1962*, 1966*, 1971*, 1974, 1987, 1995*, 2000*, 2005*; Panama 1946, 1956*, 1963*, 1972, 1978*, 1983*, 2004*; Paraguay 1940, 1967, 1992; Peru 1933, 1939*, 1979, 1993, 1995*, 2004*; Uruguay 1952, 1967, 1996*; Venezuela 1947, 1953, 1961, 1999.

or Venezuela, respectively). There are also interesting differences regarding change across time within countries (not shown here). There are countries in which both indexes increase in a sustained and significant manner, like Guatemala and Venezuela, countries in which independence goes noticeably down and power remains constant at a rather high level like Ecuador, countries in which independence remains constant at a fairly high level but power increases from low to medium levels like Chile, and countries with either ups and downs or constant values in both indexes like Peru or Argentina, respectively.

[Figure 2 here]

Figure 3 shows a classification of Latin American constitutional courts based on the combination of their average score in the de jure indexes of independence and power. Contrasting the placement of countries in this Figure with the placement of countries in Table 1 of the Introduction to this volume, it is interesting to note that Costa Rica is the only country that is above the medium level in both de jure indexes and also where constitutional judges have actively performed their role of rights enforcers and arbiters of interbranch conflicts. Countries like Brazil or Mexico that have been more active as arbiters than as rights enforcers are located above the mid level in the independence but below it in the power indexes. But countries that have at times performed both roles and at times neither, such as Argentina, or countries that used to perform neither role but increasingly are performing both, such as Chile, also score rather high in independence but low in power.

[Figure 3 here]

The (mis)fit in the placement of countries when we contrast the performance of constitutional courts along the two dimensions that guide the empirical focus of this volume

and the institutions that influence the independence and power of those same courts raises the interesting question of the relationship between institutions and behavior. As the Introduction and other chapters in this volume argue, the impact of institutions on behavior is mediated by ideology (see chapters 4, 7, and 9), the political context (see chapters 5, 7 and 8), and the social context (see chapter 6). It may also be that the independence and power indexes combine too many institutions that may be better analyzed separately, since as Wilson argues in chapter 2 of this volume, sometimes one small institutional change produces important behavioral changes (see chapter 2). In the remainder of this chapter, I thus unpack these indexes of independence and power in order to further reveal and appreciate interesting variation in the institutions for constitutional justice in the region.

Unpacking independence

Latin American constitutional judges work nowadays under an institutional framework that intends to give judges a space free of undue pressures to sincerely evaluate the cases that come before them. However, there are variations in the way this independence is created and some of those differences may be consequential. Consider, for instance, Table 1 that shows the value of each variable of the independence index in the year 2005 for all the countries in the sample (see Table 1). Note that there is interesting diversity in the way countries combine these four institutional elements, and also that countries are rather concentrated around the average level 3.78 (the standard deviation is 1.17). The outlier in Table 1 is Peru, where the appointment and tenure of constitutional judges did not meet the minimum requirements set out above. In the rest of the countries, constitutional judges enjoy at least a moderate degree of independence according to this index. Is there an optimal way to design institutions that insulate judges? For instance, consider Uruguay and

Chile, two countries that score four in the independence index. Is it better that a single political organ appoints judges but that the requirements to remove them are harder to meet, as in Uruguay, or rather to have more than one organ participating in the appointment but making it easier to impeach judges, as in Chile? More generally, when politicians bargain in constituent assemblies, do they face a trade-off between appointment and removal mechanisms?

[Table 1 here]

The specifics of the appointment method are also important because they may impact not only the independence of judges but also the type of judges that arrive at the constitutional court. Independent judges would be free to decide according to their own preferences, meaning that judges “decide disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices” (Segal and Spaeth 2007, 86). The type of judge that arrives at the court is, thus, crucial, and not only for the attitudinal model of judicial behavior. For instance, it may be the case that in the American liberal-conservative continuum, more liberal judges tend to be more sympathetic towards enforcing social rights and expanding the role of judges in policy-making whereas more conservative judges would tend to prefer the classic role of the judge as a self-restrained neutral dispute settler. But, what makes a liberal or a conservative judge reach the court in the first place? What institutions may promote having one or the other type of judge? As the literature on the United States clearly shows, the ideological and partisan concerns of the actors involved in the appointment process play an important role in determining who actually reaches the court (e.g., Epstein and Segal 2005). But, of course, who the relevant actors are varies

depending on the institutional setting, such as the institutional location of the constitutional court and the degree of openness of the appointment method.

Institutional Location of the Constitutional Organ

If the constitutional court is located outside the judiciary it becomes easier to appoint respected lawyers with no previous judicial careers, or even respected professionals other than lawyers who are more likely to defend rights and expand the judicial role beyond its traditional dispute settler function. One of the main reasons is that there is the possibility to design a completely different appointing process for constitutional judges than for ordinary career judges. When the constitutional organ is at the same time the apex of the judiciary (e.g. the Supreme Court or a chamber of it) it is also the pinnacle of the judicial career and there is more pressure from career judges to fill its vacancies from among their best and brightest. But career judges are selected by exams at an early age and climb up the judicial ladder based on seniority and civil service career incentives and punishments. Thus, they tend to share the values of civil service such as long tenure, respect for the rules, technical capabilities and they are more likely to favor a more traditional role of the judge (*cfr.* Guarnieri and Pederzoli 1999, 65).

Alternatively, according to Ferejohn and Pasquino, the inherent political nature of constitutional adjudication calls for politically appointed judges, better drawn from people particularly competent at making abstract comparisons among texts, and with the capacity to deliberate about norms and explain decisions and not necessarily from those with judicial experience (Ferejohn and Pasquino 2003, 251-252. See also Ferreres 2004). Thus, constitutional judges may be chosen by the parliament, with executive approval, from a pool of judges, law professors and politicians. They may also be chosen with the

participation of civil society organizations and other state organs, such as Human Rights Commissions (more on this below).

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

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

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

Open versus Closed Appointment Procedures

Appointment procedures vary wildly (see, e.g., Malleson and Russell 2006) but let us consider here a simple distinction between more open processes in which civil society organizations participate and less open processes that restrict participation to political organs such as the executive, the legislature, or the judicial council. “Civil society” participation includes, for instance, non-governmental organizations, bar associations, law schools, women and minority organizations, and unions. The active participation of civil society organizations in the appointment process may impact the type of judges that arrive at the constitutional court. In particular, the more open the appointment procedure the more likely that less traditional judges will arrive at the constitutional court. This is the case because the participation of these organizations would tend to widen the pool of candidates, since they prefer judges who represent them better, who don’t come from predominantly affluent and conservative backgrounds, and whose views are more expansive and in favor of enforcing social and economic collective rights (cf. Russell 2006, 433). At the same time, this more democratic appointment process probably makes constitutional judges less worried about defying the legislature and participating in the policy-making process (Ferrerres 2004, 1726).

Notice, however, that simply increasing the number of organs participating in the appointment process, per the logic of the standard veto player model, may actually decrease the set of viable candidates instead of widening the pool of acceptable candidates. Thus it is important to distinguish procedures in which the cooperation of many organs is required to appoint a judge from procedures in which different organs directly elect a number of judges in a collegial court (see Ginsburg 2003). It is the latter appointment procedure that would

clearly widen the pool of candidates, while cooperative appointment procedures may actually produce more mainstream judges (see Brinks' chapter in this volume).

The actors that can participate in the appointment of constitutional judges include the president, Congress, the courts, judicial council, organized civil society (broadly understood to include all the organizations mentioned in the above paragraph), and, of course, the people, as in the current Bolivian constitution. These actors can participate in different ways that include nominating a judge from a pool presented by another actor, configuring a list of judges from which another actor will nominate one, or directly electing at least one constitutional judge. In Latin America, while the average number of organs participating in the appointment of constitutional judges has been increasing since the mid 1970s it is still just above the traditional two (i.e. executive and legislative). The countries in which the number of participating organs is more than two are: Guatemala , four organs since 1985; Honduras, three organs since 2000; Nicaragua, three organs since 2000; Chile three organs since 1980; Colombia three organs since 1991; Ecuador, four organs in 1945, three organs from 1967 to 1978, four organs from 1979 to 1983, three organs from 1984 to 1992, and six organs since 1993; Paraguay, three organs since 1992; and Peru, three organs from 1979 to 1992.

Of the countries listed above, those in which “civil society” (broadly understood) participates in the appointment process are: Guatemala since 1985, Honduras since 2000, Ecuador in 1945 and then again since 1979 and until 2005,¹⁵ and Peru from 1979 to 1992.

¹⁵ The Ecuadorean case is interesting. In 1945 the constitution specified that a representative of the workers participated in the appointment of constitutional judges. This lasted only one year, and it is not until the Constitution of 1979 that another organ is added in the appointment process, but this time it is the president of the Electoral Tribunal. The

According to the argument, this last set of countries would be more likely to display a different kind of constitutional judges because of their open appointment process and the involvement of civil society in the election of a number of judges. However, in no country the organizations of civil society mentioned above directly designate at least one constitutional judge. Countries that have the no-cooperative, direct designation, mode of appointment, such as Chile and Ecuador, allow only state institutions such as the Executive, the Congress, or the Security Council to directly elect constitutional judges. As Couso and Hilbink argue (this volume), however, even this somewhat restricted direct designation procedure has allowed that less orthodox judges arrive at the Chilean Constitutional Tribunal.

It is possible to combine the two arguments made above and ask whether countries with an autonomous constitutional tribunal, which can have more open appointment procedures, are more likely to include civil society organizations in the appointment process. The answer, for the countries in our sample, is no. There are only two countries that have both a constitutional tribunal outside the judiciary and civil society participation in the appointment process: Guatemala and Ecuador. In these two countries, the combined presumed effects of having an autonomous constitutional tribunal and a more open appointment procedure should be more evident on the type of judges. In Guatemala, for instance, there is some evidence that the constitutional judges are more liberal than the rest of the members of the judiciary if we look at some decisions to uphold indigenous peoples' rights, although they are still subject to pressures from the executive in politically salient cases (cf. Sieder 2007, 223-224). In the case of Ecuador, a study that measured the

military coup of 1978 and the heat of the Cold War probably explain why the worker's representative was replaced by the president of the Electoral Tribunal.

ideological position of constitutional judges in a left-right scale from 1999 to 2003 showed that only two judges out of nine included in the sample were on the left side of the spectrum, which means that they favor a more active role for the state in the conduction of the economy (Basabe 2008, 166-168).¹⁶ Moreover, arguments about institutional effects should be taken with special caution in cases with a history of institutional stability, such as Guatemala and Ecuador.

The previous hypotheses of the impact of the institutional location of the constitutional organ and the appointment procedure on the type of judges can be further refined. For instance, the measurement of civil society participation is problematic if taken from the constitutional text since it may be the case that it is either regulated in an organic law or simply a common practice that is not regulated. This is the case in Argentina where appointments to the Supreme Court after 2002 were made with an important participation of organizations such as the *Asociación de Derechos Civiles* (ADC) and the *Centro de Estudios Legales y Sociales* (CELS) demanding transparency and active involvement in judicial appointments. Observers agree that the result was that first-level judges were appointed to the Supreme Court (see Ruibal 2007), and in 2003 a statutory reform created greater demands for transparency and publicity in the appointment procedure.

Unpacking the Powers of Constitutional Judges

¹⁶ This data is only suggestive. The relevant comparison to test the stated hypothesis is between judges of the constitutional court and those of other courts in the same country, for instance, the Supreme Court.

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

The first three characteristics –type, timing, and jurisdiction- allow us to identify four different kinds of legal instruments for constitutional control (Navia and Rios-Figueroa 2005). Technically, with these three features there could be eight different kinds of legal instruments. However, four of those combinations are either impossible or not observed because they are unappealing for practical reasons.¹⁷ For instance, notice that while abstract review might occur *a priori* or *a posteriori*, concrete review can only occur *a posteriori*. There cannot be concrete adjudication *a priori*, because ‘concrete’ requires the review to occur after the law has entered into effect. Also, logically, when there is *a priori* review,

¹⁷ I thank Matt Golder for pointing out this clarification.

jurisdiction cannot be decentralized because the law hasn't even been enacted. Similarly, although it is possible to imagine abstract review with decentralized jurisdiction, this combination is not observed because it is unappealing for practical reasons. That is, if every judge in the country could declare a law, in the abstract, unconstitutional, this would create not only extraordinary legal uncertainty¹⁸ but it would also make lower court judges extremely powerful and create a necessity for a system of automatic appeals that would have to be resolved quickly in order to give stability to the legal framework. For these reasons, we are left with four different kinds of instruments of constitutional review: 1) concrete centralized *a posteriori*, 2) concrete decentralized *a posteriori*, 3) abstract centralized *a priori*, and 4) abstract centralized *a posteriori*. This discussion is summarized in Table 2.¹⁹

[Table 2 here]

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

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

¹⁹ These are four kinds of instruments, a given country may have none, one, or many instruments of the same kind.

to this instrument can be open to all citizens or restricted to public authorities. But now take the second instrument, i.e. concrete-decentralized-*a posteriori*, which corresponds to the Mexican *amparo*, the Colombian *tutela*, the Brazilian *mandado de segurança*, or the Anglo-Saxon *habeas corpus*. Since these instruments can be heard by any judge, the legal processes that use this instrument typically start in the lower courts and thus decisions in these cases generally have *inter partes* effects. If these decisions are appealed and reach the last court of appeals or the constitutional court then they may acquire general effects.²⁰ At the same time, this instrument is supposed to alleviate constitutional infractions of individual rights, thus, restricting access to this instrument, although imaginable, would be completely unappealing.²¹

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

²⁰ The Colombian *tutela* can reach the Constitutional Court and has explicit *inter partes* effects. However, this Court has argued that in some situations the *tutela* points to “unconstitutional states of affairs” and give general validity to its rulings (see Cepeda, 2005).

²¹ Brewer-Carías (2009) describes further variations across countries regarding legal standing in *amparo*-like suits. For instance, the Mexican *amparo* can be filed only against public authorities but not against rights violations committed by private actors. The same instrument can be utilized only by someone who has a direct interest in the case, i.e. when his or her rights have been violated, but not by someone else who may have a legitimate interest in the case but who is only indirectly affected. Moreover, other aspects of access beyond legal standing may be relevant, such as the cost to use the instrument or the requirement to be helped by a professional lawyer.

inconstitucionalidad, implies literally deleting a law or a part of it from the codes, and thus it is impossible for decisions in these cases to have effects only for those who filed the suit. At the same time, access to this instrument can be open to all citizens or restricted to public authorities. This discussion is summarized in Table 3.

[Table 3 here]

I can now present arguments that link legal instruments for constitutional adjudication to judicial behavior. I focus on two arguments: (i) the ‘abstract’ and ‘restricted access’ characteristics of instrument four make it a good instrument for settling political disputes but not that good for enforcing rights, and (ii) instruments that are ‘concrete’ are better for enforcing rights.

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

clarification and enforcement” (Epp 1998, 18).²² That is, constitutional judges give meaning to the abstract clauses of the Constitution on a case by case basis, taking into account the complexity of the contextual situation in which those cases occur. This does not make abstract review a good instrument for enforcing rights: it is a saw for a job that requires a scalpel.²³

In this connection, the abstract-centralized *-a posteriori* instrument may be better to arbitrate political conflicts, especially if access to this instrument is restricted to public authorities. In Mexico, for instance, the Supreme Court has been arbitrating partisan conflicts and leveling the playing field by nullifying biased state electoral laws (Finkel 2003; Ansolabehere 2007). Notice also that centralized/abstract instruments are, in addition to other characteristics, more immediate: it is generally the case that with this instrument judges have to strike down decisions made by a current administration and government. In contrast, concrete/decentralized instruments may take cases to court in which legislation passed by a previous administration is being challenged.²⁴

In sum, the ‘abstract’ and ‘restricted access’ characteristics of instrument four make it a good instrument for settling political disputes but not that good for enforcing rights. At the same time, following the previous arguments, instruments that are ‘concrete’ are better for enforcing rights. ‘Concrete’ instruments not only allow judges to make incremental

²² Carruba (2009) develops a model showing that once courts have been empowered they gradually generate compliance through a series of small, prudent decisions.

²³ As Tocqueville (2000, 101) argued: “When a judge, in a given case, attacks a law relative to that case, he stretches the sphere of his influence but does not go beyond it, for he was, in a sense, bound to judge the law in order to decide a case. But if he pronounces upon a law without reference to a particular case, he steps right beyond his sphere and invades that of the legislature.”

²⁴ Thanks to Pilar Domingo for pointing this out.

decisions and allow judges to consider the contextual richness of the case at hand (see Magaloni 2007) , they also increase the Court’s visibility and public awareness since they “bring the human drama associated to specific cases” (Hilbink and Couso this volume). A systematic test of the previous arguments has yet to be done, but Rodríguez-Raga’s chapter in this volume provides relative support to the differential behavior of the Colombian Constitutional Court depending on the type of instrument that is being used. As Rodríguez Raga points out, the Colombian Court enjoys its well deserve reputation as an active rights enforcer mainly because of its decisions on *tutela* cases (a ‘concrete’ instrument) while the same Court when deciding ‘abstract’ actions of constitutionality tends to be deferent to a popular executive.²⁵

Assuming, for the sake of the argument, that ‘concrete’ instruments are better for rights enforcement, would it be best if it is combined with a ‘centralized’ (instrument one) or a ‘decentralized’ (instrument two) characteristic? Gerald Rosenberg’s and Charles Epp’s arguments seem to imply that for enforcing rights, it is better the concrete-decentralized type, which is the U.S. style judicial review. However, the German and Spanish “individual complaints” that are concrete-centralized instruments seem to have also worked rather well for enforcing rights (cf. Stone Sweet 2000, 107-112).²⁶ Notice, moreover, that ‘decentralized’ instruments generally come with open access, while ‘centralized’ instruments may come with either open or restricted access. This is important because

²⁵ As Rodrigo Uprimmy pointed out, however, abstract instruments have been good in the defense of some rights such as those of sexual minorities and that concrete instruments (i.e. *tutelas*) have not been an efficient instrument for the protection of some rights, such as health rights (personal communication).

²⁶ It should be noted that, in both Germany and Spain, this instrument has general effects so, as we will see below, it is not quite similar to many Latin American instruments of this type.

scholars have shown that open access to constitutional justice is crucial for a court to be more active in the defense of rights (Wilson and Rodriguez-Cordero 2006; Smulovitz and Peruzzotti 2000).²⁷ In sum, the hypothesis would be that instruments that are ‘concrete’ are better for rights protection, with instrument two (concrete-decentralized-*a posteriori*) being the best suited tool for this task. However, it remains an empirical question to determine if this is actually the case in cross-national comparisons, and if a centralized/concrete instrument can be as good.²⁸

Another argument that links the legal framework with constitutional judges more willing to enforce rights is simply that the more rights are specified in the Constitution, the more likely judges will enforce some of them (Rosenberg 1991, 11. See also Kapiszewski, this volume). Some explanations of why the Colombian Constitutional Court has been so active in rights enforcement is the more extensive catalogue of rights included in the 1991 Constitution as compared to the previous Constitution (Uprimny 2006). In general, however, as Siri Gloppen argues, “rights are now incorporated into the legal frameworks of most countries, either in national constitutions, or in the form of human rights provisions in customary international law and legally binding treaties” (Gloppen 2006, 40). Thus, in the contemporary world, it wouldn’t be difficult for judges to find valid legal sources to sustain their rights-enforcement behavior, although the legitimacy of that move certainly varies across countries.²⁹

²⁷ Ríos Figueroa and Taylor (2006) show that who has access to courts is also important for a general involvement in policy-making. See also Kapiszewski’s chapter in this volume

²⁸ Instrument three, abstract-centralized *-a priori*, does not seem to favor a particular kind of judicial behavior.

²⁹ Scholars have also pointed out that if courts have the power to choose the cases they will decide, then they will choose more cases to enforce rights. In Latin America, only the

Turning to the data on our sample of Latin American countries, Figures 4 and 5 show the proportion of countries that have each one of the four instruments of constitutional control previously identified. There are several interesting things to note, but I want to single out the following: the proportion of countries with instruments that are concrete, either centralized or decentralized, has been more or less constant around 70% since 1945. These instruments are the different varieties of what can be generically called the Latin American *amparo* (see Brewer-Carías 2009), which is present in one form or another in almost all Latin American constitutions.³⁰ But there are interesting differences regarding both ‘concrete’ instruments: when ‘concrete’ is combined with ‘decentralized’ (i.e. instrument two, Figure 5 left panel) access is by definition open, but when ‘concrete’ is combined with ‘centralized’ (i.e. instrument one, Figure 4 left panel) access to it varies across countries and across time. The tendency to open access to concrete-centralized instruments was reversed in the beginning of the 1990s³¹ and very few countries allow for general effects with this kind of instrument (see Figure 4, left panel, solid, long-dashed line and short-dashed line, respectively). Variation in access to these instruments, thus, may be

Mexican Constitution specifies something similar but not exactly the same to the writ or *certiorari*, which is the faculty to attract cases. Ana Laura Magaloni (2007) has argued that the Mexican Supreme Court should actively use this power to engage more actively in rights enforcement. Similar prerogatives exist in other Latin American countries (e.g. *per saltum* in Argentina) but they are not specified in constitutional texts (see Brewer-Carías 2009).

³⁰ The Dominican Republic does not have the *amparo* instrument in its constitution, but the Supreme Court in that country actually created the instrument jurisprudentially. The Argentinean Supreme Court had done something similar in 1957 (Brewer Carías 2009, 52, 93).

³¹ This downturn is explained by the cases of Ecuador, Peru, and Venezuela. Ecuador restricted access to this instrument since 1996. Peru created this instrument in the 1993 constitution, but it was born with restricted access, and the same is true for Venezuela and its 1999 constitution.

an important explanatory variable to why some constitutional judges are more prone to enforce rights.

[Figure 4 and Figure 5 here]

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

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

one and two, which share the characteristic that they are ‘concrete’ and thus more suitable for enforcing rights, are present in several countries. Half of the countries that have instrument one restrict access to it, and only three countries (Bolivia, Honduras and Mexico) allow for *erga omnes* effects with this instrument.³²

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

[Table 4 and Table 5 here]

In general, Latin American countries have quite a diversified portfolio of legal instruments of constitutional control. Some instruments have been pointed out as being better tools for litigants to fight for rights, i.e. those that have open access, and also for judges to enforce those rights, i.e. those that are designed to solve concrete disputes and controversies. Some other instruments have been signaled out as being better for judges and political actors to settle disputes between them, i.e. those that are abstract and with restricted access. We can find these types of instruments in many countries, and most of the time more than two types in the same country. However, while there are multiple

³² In Mexico decisions need to be made by a supermajority of eight justices (out of eleven) to produce *erga omnes* effects.

instruments in each country what seems to be lacking is access to them: in the two type of instruments for which access can be opened or restricted (one and four) a majority of countries have chosen to make them available only for public authorities and not for all citizens.

Of course, these instruments are part of the de jure index of judicial power. It is important to distinguish between the availability of an instrument and its actual use. In one country the bulk of legal activity may involve a particular instrument even though litigants have different options.³³ It is also important to keep in mind that even if instruments are available and used, there is still the problem of compliance with judicial decisions which in some case may invalidate the most creative and original pro-rights decision made by constitutional judges. Even if judges do have the legal power to, for instance, remove a public authority for non-compliance this capacity may actually backfire and make compliance harder to achieve (see Staton 2010).

Conclusions

The impressive activity in reforming the judicial branch of government throughout Latin America over the last three decades signals that at least some of those involved in the reform processes (e.g. politicians, donors, consulting experts) believe that change in

³³ For instance, it may be that lawyers are used to one particular instrument that serves their goals and do not want to invest resources in exploring others. This seems to be the case of the Amparo suit in Mexico that is not only the legal instrument most commonly used but also, according to Mexican Justice José Ramón Cossío, lawyers file their *amparos* in the vast majority of cases recurring to ready-made time-tested arguments based on highly technical details of the due process clause in the Mexican Constitution. This would hamper the ability of the Justices to construct the meaning of the constitution because they don't get good inputs for making novel arguments and if they do it is clear that they are acting in an expansive, *interpretivist* way.

behavior can start with institutional change. This chapter presented several arguments in which the institutional framework, or a certain feature thereof, is invoked to explain the behavior of constitutional judges. In particular, I discussed arguments related to two crucial dimensions of constitutional judges: their independence and legislative power. A de jure index of each dimension, and its unpacking, provide an institutional map of constitutional justice in a sample of eighteen Latin American countries from 1945 through 2005. Two general facts stand out from this map. First, although both de jure independence and legislative power of constitutional judges have been increasing, there is still room for improvements, particularly regarding the expansion of access for the citizens to the instruments of constitutional justice that allow judges to participate in the law and policy-making process.

Second, a closer look at the components of both indexes reveals much interesting variation in the institutional framework under which Latin American constitutional judges work. This institutional diversity within countries that belong to the same civil law tradition, calls for lowering the level of abstraction in comparative research on legal systems from all-encompassing legal traditions to actual institutional configurations of the judicial system. As Shugart and Carey showed (1992) not all presidential systems are alike and the institutional differences in, for instance, presidential vetoes may be consequential (see also Alemán and Schwartz 2006). Similarly, institutional differences in the way countries attempt to insulate and empower constitutional judges may produce different effects on the behavior of judges.

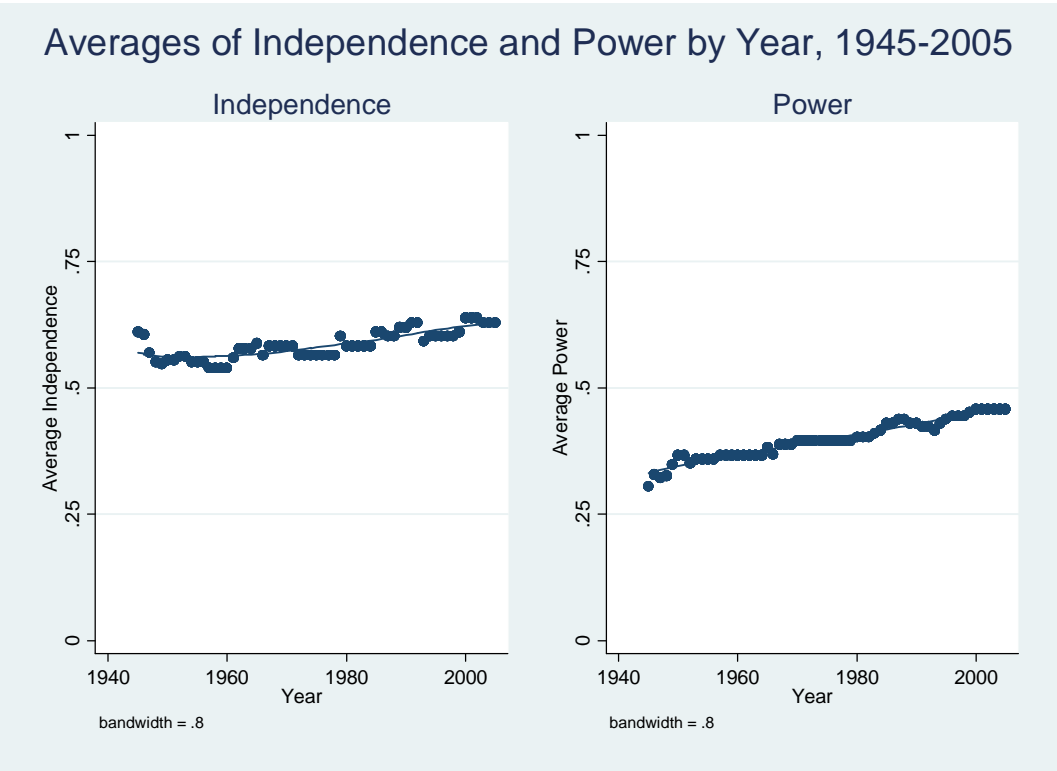
Why some countries have some institutions but not others, and whether those institutional features indeed produce a specific behavior are crucial and long standing

questions that lie beyond the limits of this chapter. However, this chapter sheds some light on these questions. I want to single out two considerations to assess the effects of institutions that follow from the chapter. First, it is important to consider the set of institutions that together create a system of incentives for a particular intended behavior, and not treat institutions in an isolated way. For example, appointment, tenure, and removal mechanisms combine to generate (or not) incentives for judges to decide according to their sincere preferences. In this example, if tenure or removal mechanisms are considered independently the incentive structure set by the institutional framework may be biased or incomplete as well as the assessment of their effects. This would be the case specially when some institutions of the same set, for instance appointment and tenure, create incentives for independent behavior but others, for instance removal mechanisms, point in the other direction. A complete institutional map would then be necessary to establish the system of incentives that the institutional framework imposes on judges and then test for their effects.

Second, it is also important to take into account that that the same institutions may serve different goals. For instance, the appointment procedure coupled with the length of tenure is part of the institutional complex that may affect the independence of judges. But this institutional complex may also impact the type of judges that arrive at the bench. As discussed in the second part of this chapter, some appointment procedures may increase the probability that more expansionists, less traditional, judges arrive at the bench while others may have the opposite effect. In turn, judges with a more expansionist judicial philosophy may use their institutionally protected independence to the extreme, while more orthodox or “legalist” judges may actually under-utilize it.

Figures and Tables

Figure 1



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

Figure 2

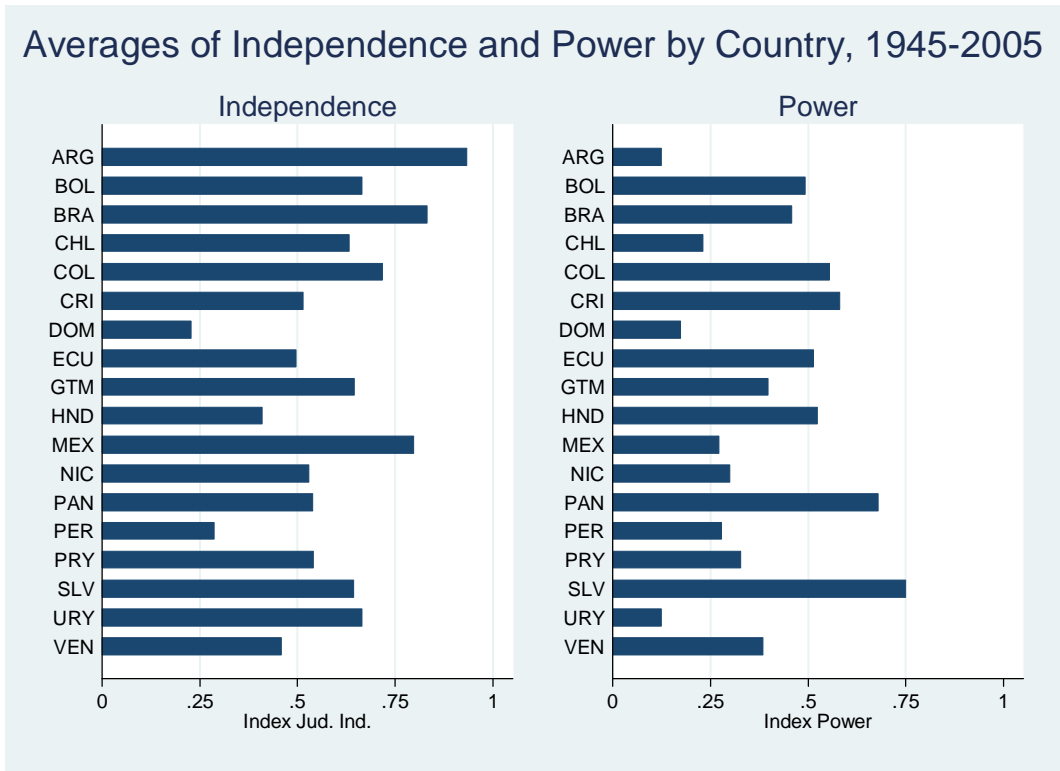


Figure 3. Independence and Power of Latin American Constitutional Judges

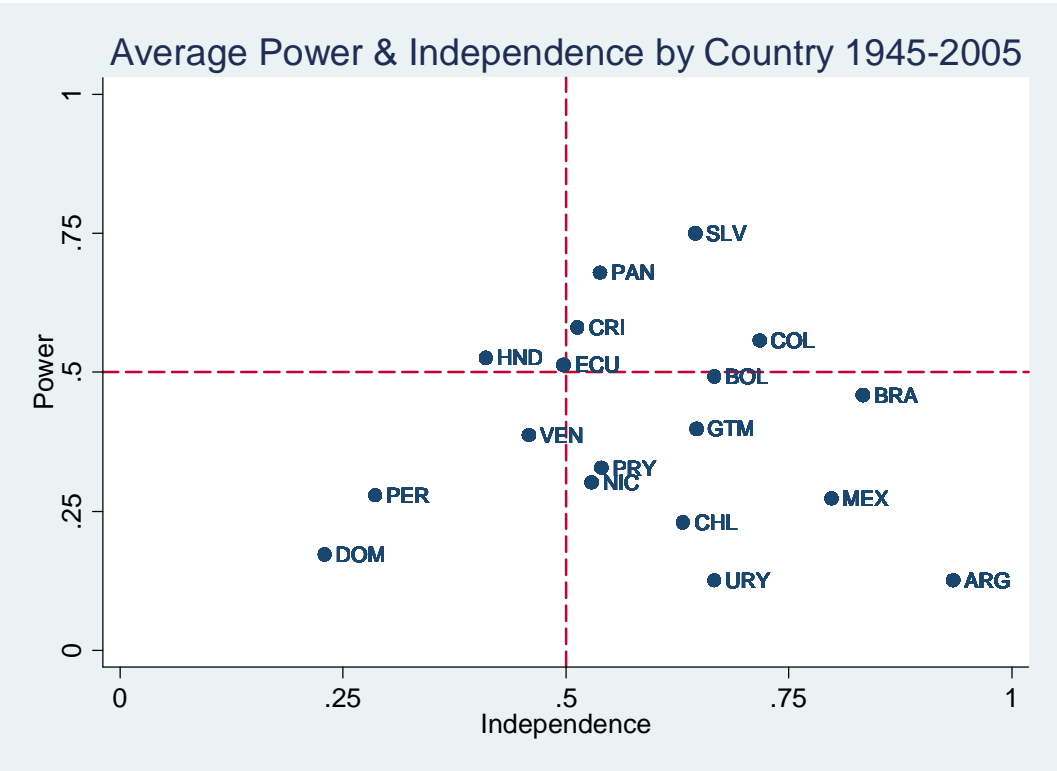


Table 1. Unpacked index of de jure judicial independence in the year 2005

Country	Appointment	Tenure	App & Tenure	Impeachment	Number	Total*
Guatemala	1	1	3	2	1	6
Argentina	1	1	3	2	0	5
Brazil	1	1	3	1	1	5
Mexico	1	1	3	1	1	5
Bolivia	0	1	2	1	1	4
Chile	1	1	3	0	1	4
Colombia	1	1	3	1	0	4
El Salvador	1	1	3	1	0	4
Honduras	1	1	3	0	1	4
Paraguay	1	0	1	2	1	4
Uruguay	0	1	2	1	1	4
Venezuela	0	1	2	2	0	4
Costa Rica	0	1	2	1	0	3
Ecuador	1	0	1	1	1	3
Nicaragua	1	0	1	1	1	3
Panama	1	1	3	0	0	3
Dom. Rep.	0	0	0	2	0	2
Peru	0	0	0	1	0	1
AVERAGE						3.78

*Total = App & Tenure + Impeachment + Number

Table 2. Legal instruments for constitutional control according to type, timing, and jurisdiction

	Concrete		Abstract	
Jurisdiction/ Timing	A priori	A posteriori	A priori	A posteriori
Centralized	Not possible	Yes	Yes	Yes
Decentralized	Not possible	Yes	Not possible	Not observed

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

Table 3. Effects and access for different legal instruments of constitutional control

	Effects		Access	
	Erga Omnes	Inter Partes	Open	Restricted
Instrument 1	Yes	Yes	Yes	Yes
Instrument 2	Not observed	Yes	Yes	Not observed
Instrument 3	Yes	Not possible	Not observed	Yes
Instrument 4	Yes	Not possible	Yes	Yes

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

Instrument 1: Concrete / centralized / a posteriori

Instrument 2: Concrete / decentralized / a posteriori

Instrument 3: Abstract / centralized / a priori

Instrument 4: Abstract / centralized / a posteriori

Figure 4. Proportion of countries that have instruments one and four, 1945-2005

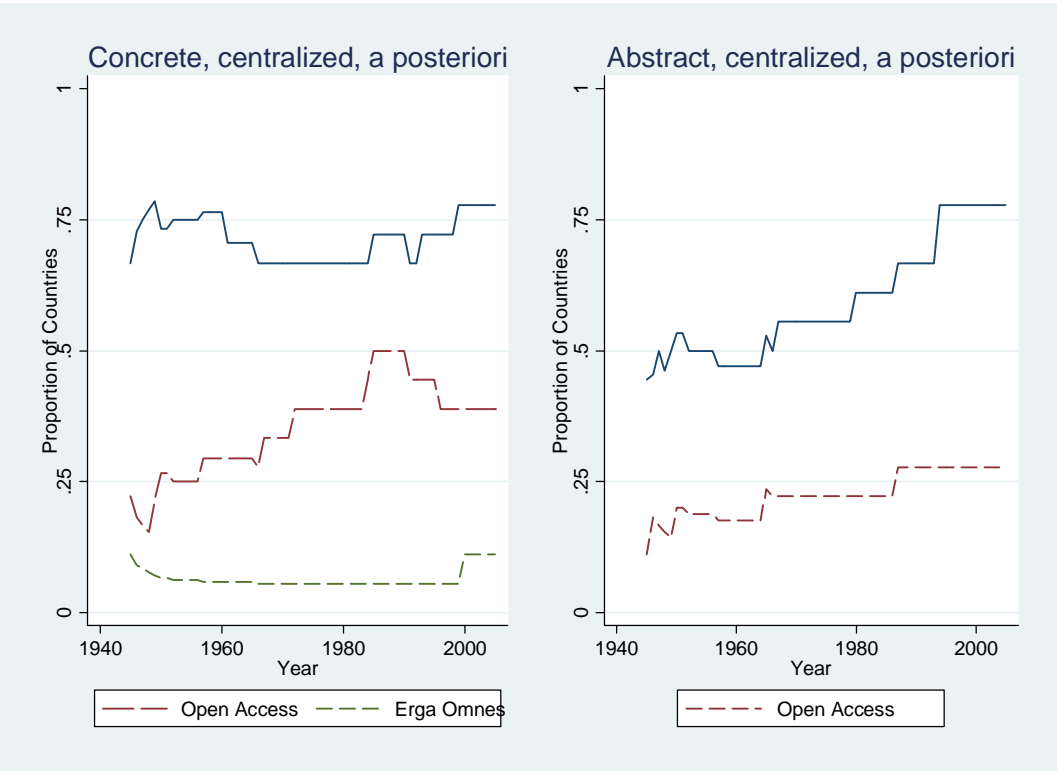


Figure 5. Proportion of countries that have instruments two and three, 1945-2005

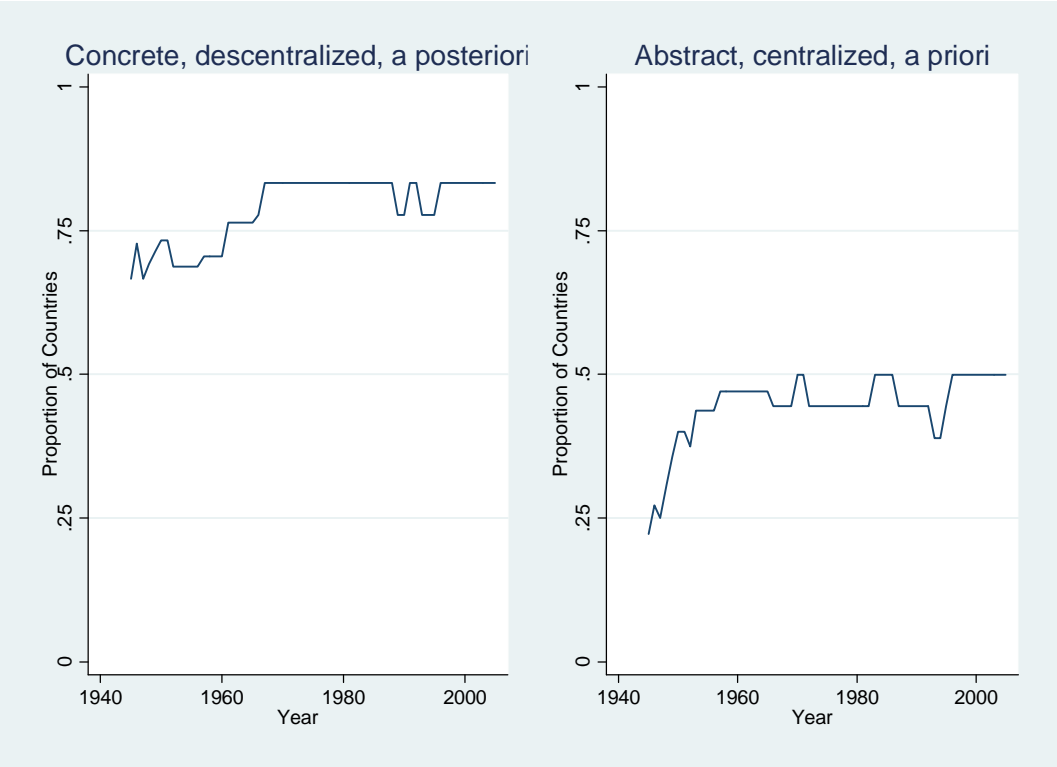


Table 4. Legal instruments of constitutional control in Latin America, year 2005

Concrete & A posteriori		Abstract & Centralized	
Centralized	Decentralized	A priori	A posteriori
<u>Instrument 1</u>	<u>Instrument 2</u>	<u>Instrument 3</u>	<u>Instrument 4</u>
Bolivia Brazil Chile Costa Rica Ecuador El Salvador Guatemala Honduras Mexico Panama Paraguay Peru Uruguay Venezuela	Argentina Bolivia Brazil Colombia Ecuador El Salvador Guatemala Honduras Mexico Panama Paraguay Nicaragua Panama Peru Venezuela	Bolivia Chile Colombia Costa Rica Ecuador El Salvador Honduras Panama Venezuela	Bolivia Brazil Chile Colombia Costa Rica Dominican Republic Ecuador El Salvador Guatemala Mexico Nicaragua Panama Peru Venezuela

Table 5. Effects and Access of instruments of constitutional control, year 2005

Type of Instrument	Effects		Access	
	Erga Omnes	Inter Partes	Open	Restricted
Concrete / Centralized / A posteriori	Honduras Bolivia Mexico*	Brazil Chile Costa Rica Dom. Republic El Salvador Guatemala Panama Paraguay Peru Uruguay Venezuela	Brazil Costa Rica El Salvador Guatemala Honduras Panama Paraguay	Bolivia Chile Ecuador Mexico Peru Uruguay Venezuela
Concrete / Decentralized / A posteriori		Argentina Bolivia Brazil Colombia Ecuador El Salvador Guatemala Honduras Mexico Panama Paraguay Nicaragua Panama Peru Venezuela	Argentina Bolivia Brazil Colombia Ecuador El Salvador Guatemala Honduras Mexico Panama Paraguay Nicaragua Panama Peru Venezuela	Not observed
Abstract / Centralized / A priori	Bolivia Chile Colombia Costa Rica Ecuador El Salvador Honduras Panama Venezuela	Not possible	Not observed	Bolivia Chile Colombia Costa Rica Ecuador El Salvador Honduras Panama Venezuela
Abstract / Centralized / A posteriori	Bolivia Brazil Chile Colombia Costa Rica Dom. Republic Ecuador El Salvador Guatemala Mexico* Nicaragua Panama Peru Venezuela	Not possible	Colombia El Salvador Guatemala Nicaragua Panama	Bolivia Brazil Chile Costa Rica Dom. Republic Ecuador Mexico Peru Venezuela

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

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