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“New Courts for New Democracies:  
The Growth of Judicial Power in Latin America Since 1975”

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**NEW COURTS FOR NEW DEMOCRACIES:  
THE GROWTH OF JUDICIAL POWER IN LATIN AMERICA SINCE 1975**

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**Some parts of this paper are better developed, while other parts are still sketches and notes. Please read it accordingly. We very much look forward to your comments and suggestions.**

## **Introduction**

It has become commonplace to remark on the growing importance of courts in the political arena. Scholars have begun to take seriously their role in setting health care policy, moderating political conflict, defining the boundaries of citizenship and deciding some of the most contentious issues of the day – including, at times, the outcome of elections. We have theories to explain when people turn to courts as their preferred means of mobilization, theories to explain when dictators turn to courts, when courts challenge rulers, and when stronger courts might appear. Most of these theories focus on domestic conditions; some focus exclusively on the role of international actors in promoting judicial reform. Few are systematic and cross-national, and fewer still seek to integrate international and domestic explanations. Moreover, most of these theories conceptualize courts primarily as checks on political power, and thus seek to explain why unchecked politicians might create mechanisms that limit their freedom of action. In this paper, we offer reasons to believe that politicians might create courts in order to wield power more efficiently and effectively – accepting some limitations in the process – and show which domestic factors explain the growth of more powerful courts over the last three or four decades. We do so using new data and a new conceptual framework to understand the potential tradeoffs and compromises of judicial design.

We believe this paper makes three broad contributions:

1) We argue that politicians might create courts in order to wield power more efficiently and effectively (Madison’s Dilemma – the balance between controlling and empowering government, a classic political question – classic Shapiro). The dominant models of judicial creation conceptualize courts principally as checks on political actors, and thus a net negative – a loss of power – for whoever is in charge. We agree that, conditional on design among other

things, courts can be a check on whoever is in charge – that is why minorities and outsiders might prefer them. But we argue that courts are in very important respects also powerful governance mechanisms.

2) Existing conceptualizations of court autonomy are too narrow; a fuller, three-dimensional conceptualization of formal judicial design illustrates that different elements of judicial structure interact, and careful consideration of that interaction and the tradeoffs among the different elements of judicial design leads to a new theory of when we might predict different elements of a court's formal structure). Existing conceptualizations of judicial power (or independence) assume a one-dimensional dependent variable, while we posit three dimensions that, as we show, vary independently or are negatively correlated, and thus might be expected to respond to different influences.

3) Moving from an essentially 1D conceptualization to 3D framework allows us consider how the dimensions might interact (i.e. are more than the sum of their parts) and thus to derive and test new hypotheses about how and when the political actors who design courts make tradeoffs among the dimensions (e.g maximizing a court's autonomy but gutting its authority, or vice versa) to achieve different governance goals; i.e. whether a revolutionary bloc who places their hopes in the power of their court to produce radical social change, a minority who insulates particular political spoils from the wrath of the majority for fear of losing in all arenas of contestation. Our theories should take into account the incentives power holders have for creating powerful courts that can assist them, and the incentives potential outsiders might have for denying this tool to dominant coalitions; in short, political actors' hopes and fears.

As noted, much of the existing literature on the determinants of judicial power (or independence) assumes a one-dimensional dependent variable, while we posit three dimensions

that, as we have seen, vary independently or are negatively correlated, and thus might be expected to respond to different influences. Moreover, the dominant models of judicial creation conceptualize courts principally as checks on political actors, and thus a net negative – a loss of power – for whoever is in charge. We agree that courts can be a check on whoever is in charge – that is why minorities and outsiders might prefer them – but we feel that courts are in very important respects also powerful governance mechanisms. Thus, our theories should take into account the incentives power holders have for creating powerful courts that can assist them, and the incentives potential outsiders might have for denying this tool to dominant coalitions.

### **The Puzzle: When and why empower courts as governance mechanisms?**

Most explanations implicitly or explicitly represent fear as the central motivation for judicial design (whether it describes judicial form, à la Ginsburg, or timing à la Hirschl). We shift focus beyond fear to hope; that is, what might a political majority hope to achieve by outsourcing to courts some routine governance tasks, e.g. social control, monitoring, etc. (Shapiro, Ginsburg et Moustafa) and drawing on the judiciary's institutional legitimacy to channeling some political contestation, conflict, even competition through courts

### **Existing measures of and explanations for judicial empowerment**

A great deal of useful and informative research exists about the causes and consequences of judicial empowerment. Studies on the principal effects of this phenomenon – what some scholars have called the judicialization of politics (Tate and Vallinder 1995b), others the legalization of policy areas (Gauri and Brinks 2008) and juristocracy (Hirschl 2004) – reveal a near-consensus that courts are creating new political dynamics that cannot be ignored. Most of the explanations for changes that empower courts focus on domestic politics: Ginsburg (2003) shows how political uncertainty at the time of transition to democracy impels constitution

makers to delegate more power to courts, and Finkel (2005, 2004) and Bill Chavez (2004) similarly show that electoral uncertainty and domestic political fragmentation effect the creation, design and operation of apex courts. Tate (1995a) similarly argues that the increasing importance of courts is a consequence of rising levels of democracy in many countries around the world. Gloppen, et al. (2004) emphasize the demand side, especially the role of social organization and ease of access. Others point out the potential influence of international forces: Moustafa (2003) argues that even dictators empower courts to protect rights in response to international (economic) pressures, Rodriguez Garavito (2010) discusses the effect of international networks on the spread of “the global neoconstitutional project,” and Domingo and Sieder (2001) document the efforts of international financial institutions to reform courts in Latin America.

Despite scholarly attention to the appearance and effects of these new and reformed courts, however, a puzzle remains: while there is relative convergence on a handful of ‘trademark’ features of judicial design (e.g. adoption of a constitutional or supreme court, constitutional review, and a catalogue of rights provisions) there is yet much unexplained variation on many comparatively subtle institutional features (e.g. whether judges face reappointment incentives, super-majority requirements that impede constitutional review, and the like). These subtler features can play important, and sometimes crucial, roles in a court’s operation (see e.g. Moustafa 2008 on Egypt, or Dargent 2009 on Peru). To the extent that existing explanations for judicial empowerment use a measure of judicial design that is under-specified (e.g. one that includes only the trademark features) or that collapses distinct dimensions of judicial design into a single dimension (e.g. one that reflects a court’s autonomy but not its scope of authority), they do not comprehensively evaluate the effect of domestic political forces on judicial design.

To address that puzzle develop a finer and more complete conceptualization of the dependent variable—formal judicial design—that includes three components: autonomy, accountability, and authority. We draw on insights from both domestic and international explanations for judicial empowerment, but we argue that disaggregating judicial design into three components illuminates a more nuanced logic of judicial empowerment. In particular, we test whether existing explanations for judicial empowerment, such as political fragmentation, uncertainty, ideology, and party structure affect different components of judicial design differently (e.g. whether political uncertainty is associated with greater judicial autonomy but decreased judicial authority). Our results show that our three-dimensional conceptualization of judicial design permits this kind of flexibility, and suggest that the calculus of judicial empowerment (i.e. the design choices made by political actors in response to incentives and constraints) reflect not just different institutional forms, but choices about whether and how to harness courts as mechanisms of government.

### **The Dependent Variable: Judicial Structure in 3D**

The relevant dimensions of judicial design depend to a large extent on the theoretical and empirical operation of judicial power. Judicial power is somewhat different than other forms of political power: because most courts lack other forms of legitimate authority (e.g. electoral) their influence depends (arguably) on their perceived institutional legitimacy as neutral mechanism of dispute resolution (Shapiro 1981). To function as consequential actors in a dynamic political environment, courts (or, more precisely, the judges who sit on them) must be capable of (a) developing and (b) expressing preferences that are substantially autonomous from those of any single outside actor. However, courts need to be more than merely neutral; to be influential mechanisms of dispute resolution they must be broadly accessible, and authorized to rule with

some efficiency and efficacy on claims that involve the most important issues of the day. Thus, our conception of judicial power refers to the capacity for action conferred by formal institutional design, and the relevant parameters of design are those that define the capacity of a court to have autonomous input on a broad range of politically significant issues.

Most of the literature on judicial empowerment assumes two things: that the relevant dependent variable is uni-dimensional, and that it relates to the independence of judges (although there is less consensus on how to define it; see e.g. Clark and Staton 2011). We have argued in more detail elsewhere (Blass and Brinks 2011) a comprehensive and theoretically-informed conceptualization of judicial design requires three dimensions: *ex ante* autonomy, *ex post* autonomy, and (scope of) authority. Two are ways of curbing/enhancing the autonomy of courts. The first, which we label **ex ante autonomy**, relates primarily to appointment mechanisms, and determines how closely an outside political actor can control the preferences of the judges on the bench. This dimension assumes that judicial preferences matter, whether we fully subscribe to an attitudinal model of judicial behavior or not.

The second we call **ex post autonomy** (or its converse, **accountability**). This dimension is composed of institutional features that regulate how easily an outside political actor can bring incentives to bear on sitting judges, in order to influence them to rule in a particular way, or to remove them if unhappy with their performance. This dimension takes seriously the insights of the strategic model of judicial behavior, and assumes that at least some of the time, some of the judges will respond to negative and positive incentives to accommodate the desires of outside actors; and, of course, that if they do not, politicians will want to remove them.

The third dimension, **scope of authority**, or **authority** for short, is composed of all those features that make it more or less likely that the court will be able to weigh in authoritatively on

the most important and contentious issues of the day. It is composed of variables that determine what kinds of cases the court can hear, on behalf of whom, and with what legal effect. A court scores higher on scope of authority if it is readily accessible by a broad cross-section of society, is charged with monitoring a long list of substantive rights, and can issue rulings that are broadly binding on other political actors. For a more comprehensive discussion of our coding scheme, see our companion paper (Blass and Brinks 2011; formulas provided in the appendix herein).

### **A New Calculus of Judicial Design: Harnessing Courts as Governance Mechanisms**

Judicial reform is an especially fertile area in which to examine the politics of institutional design. Courts are intimately related to the exercise of power, the ability of political actors to pursue their goals, and to domestic and international legitimacy. Courts – and consequently judicial reforms – have emerged as important arenas for contesting competing visions of the relationship between the state and the market, the way to deal with an authoritarian past, the way to order social assistance and national health care, and often the very nature of the nation itself (see, e.g., Hirschl 2004, especially his discussion of courts and "metapolitics"). Domestic political actors emerging from authoritarianism view courts as crucial components of a new democratic regime (Alfonsín 1993; Aristide 1993), and domestic and international constituencies alike have made “the rule of law,” and by extension courts, a central element of their aid and reform agendas (see e.g. Rodriguez Garavito 2010). Choices affecting courts are not likely to be made casually or without engaging other political actors.

The dominant models of judicial creation conceptualize courts principally as checks on political actors, and thus a net negative – a loss of power – for whoever is in charge. We agree that courts can be a check on whoever is in charge – that is why political minorities and outsiders

might prefer them – but we emphasize that courts are in very important respects also powerful mechanisms of governance, as Shapiro (1981) famously demonstrated. Thus, our theory reflects both the incentives of power holders to create powerful courts that can assist them, and the incentives potential outsiders might have for denying this tool to dominant coalitions.

Courts are attractive to powerful political actors because they can be mobilized to accomplish certain purposes more efficiently or effectively than other tools (see, e.g., the discussion in Shapiro 1981, ch.1; see Brinks and Blass 2011b for a more complete discussion of this issue). They can do so effectively only if they retain their “courtiness:” a semblance of autonomy, respect for what Shapiro called the triadic logic of dispute resolution. We use these two points and the existing explanations of judicial empowerment as a foundation, but we offer a new theory of judicial empowerment that more carefully considers the relationship between the domestic political forces and formal autonomy, accountability, and authority.

We begin with a broad first approximation: does design matter at all, and are designers thinking along the three dimensions we have identified? If it does, and they are, we would expect, on average, trade-off courts: designers that give on one dimension should take back on another. No court – whether in democracy or dictatorship – is likely to be all-powerful and beyond political control, regardless of the pressures brought to bear by international actors, or the need for political insurance. As Shapiro (1981) noted, courts inevitably make law, and therefore no regime will grant them full autonomy.

Control, as we noted, can be exercised either *ex ante*, through the appointment mechanism, or *ex post*, through accountability mechanisms. Thus, we should see a negative relationship between these two dimensions – a court that has more autonomous preferences should be more accountable and one that is more autonomous once seated should be subject to

greater political control in the appointment process. Moreover, assuming the design process is not dominated by an actor who fully expects to be in power over the medium to long term, we should also expect that opposition actors will only be willing to give broad authority to courts if they have depoliticized the appointment process. The broader the court's scope of authority, the more important it is for the opposition to be able to weigh in on appointments. In short, there should be important negative relationships between the various dimensions.

**The influence of fragmentation, veto players, and political uncertainty:**

As noted, prior theories assume that giving the court more authority implies taking authority away from the ruling coalition. The prediction is, therefore, straightforward: those who expect to be in charge will want weaker courts, while those who are uncertain (or who know they will be in opposition at some point, at least) will want stronger courts to protect their interests while they are out of power. But if powerful courts can also be instruments of the ruling coalition, then the expectations are conditional, and more complex, as we will see below.

The dominant insurance model (Ginsburg 2003),<sup>1</sup> relying on the view of courts as primarily checks on majoritarian power, suggests that increasing fragmentation increases political uncertainty, creating incentives for designers to create more autonomous and powerful courts that can protect them while they are out of power. Under an insurance theory, then, higher levels of fragmentation should be positively associated with higher scores on all three dimensions of judicial power. The more fragmented the political arena, the more independent the court should be, and the more authority the court should have, in order to protect minorities from the tyranny of the majority.

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<sup>1</sup> Ginsburg himself limits the theory to transitional democracies in constitution-writing moments. Others have made the same argument with respect to ordinary judicial reform efforts (Finkel 2005). Our paper is not exactly a test of Ginsburg's claim, as all our courts already have judicial review, which is one of the key elements in his theory.

There is, however, an alternative logic – a veto player logic – by which fragmentation might have a positive impact on autonomy, but not necessarily on authority or ex post accountability. If courts are instruments of governance, then additional (minoritarian) veto players will indeed insist on having a significant role in the appointment process as a condition for approval. They would have to, in order to prevent the dominant actors from appointing a “clone” court that shares majoritarian preferences and becomes an instrument to oppress the minority. At the same time, however, so long as they have a strong role in the appointment of replacement judges, additional veto players might well wish for accountable judges, in order to discipline courts that become problematic. The more fragmented the political arena, the lower the threshold must be, in order to discipline the courts. Under this theory, the presence of more (ideologically diverse) veto players in the design process should lead to more autonomy in the appointment process, but should also lead to lower scores on ex post autonomy (i.e. greater accountability). Conditional on ex ante autonomy, then, fragmentation should be associated with greater accountability.

Moreover, on a veto player theory that views courts as instruments of governance, additional actors could each veto the others’ proposals for greater court authority, resulting in a weaker, not a stronger court, in order to deny the other a policy tool. This theory generates what we call the “Win Set” hypothesis: more veto players produce a narrower win set of policies that the court should enforce, and thus a court with less formal authority. Alternatively, if courts are primarily constraints on policy-making, and additional powers simply make them more constraining, multiple veto players should produce what we could call the “Christmas Tree” phenomenon. In this version of the theory, each player gets to insist on giving the court a particular substantive preference to protect, as a condition of approval – property rights for the

right, social and economic rights for the left, civil and political rights for the classic liberals, and so on. Both the Win Set hypothesis and the Christmas Tree hypothesis are plausible, but the latter suggests that designers do not take seriously the court's potential as powerful actors in their own right and as tools of governance, while the Win Set hypothesis is more congruent with our theory that designers value – and fear – the governance function of courts.

We retain at least one implicit corollary of the insurance theory, however. When we think about the dimensions separately in the context of a court-as-governance model, it also becomes clear that the time horizon of the dominant actors (a function of political certainty) should influence whether actors want high or low ex ante autonomy. Dominant actors who expect to be in power over the medium to long term will prefer a mechanism that enables them to name any replacement justices. In other words, actors with longer time horizons (less uncertainty) will prefer a more majoritarian, less autonomous appointment process. If the drafters do not know who will be in power at replacement time, they will want the appointment process to be more balanced (more autonomous, by our measure). To test this theory separately from the veto player theory discussed above we use a measure that is meant to explicitly capture the degree of political uncertainty political actors may feel: the (natural log of the) sum of vote changes from party to party in the previous two elections.<sup>2</sup> In general, the more volatility in electoral results there has been, the more volatility political actors should expect in the future. If the insurance theory is correct, and if volatility is a better measure of political uncertainty than fragmentation, then this variable should be positive for all three dimensions. We ourselves expect this variable to influence the appointment mechanism, producing more autonomy, but have no strong

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<sup>2</sup> We take the sum of the absolute value of the changes in the vote shares earned by all the parties in the system from one election to the next. We use the log because the simple sum produced a few extreme values, and it seems likely that once political instability exceeds a certain threshold, everyone should feel threatened.

expectations as to its effect on the other two dimensions: ex post autonomy and scope of authority.

**The influence of ideology:** Under a courts-as-governance theory, however, our expectations for the influence of ideology are not conditional at all. Our Authority dimension is composed in part of ease of access and the court's ability to intervene in broad policy issues. One vehicle for the latter is the constitutionalization and judicialization of economic, social and cultural rights, a project we attribute to the political left. In addition, the left should be more interested than the right in expanding access to justice to the less privileged, another element in the court's scope of authority. All else equal, then, the more to the right the balance of political forces, the narrower the court's scope of authority. In addition, as others have argued (e.g., Moustafa 2003), a certain measure of autonomy is necessary if the goal is to protect property rights from appropriation or interference by the government. We test these arguments with the variable *kaopen*, the Chinn-Ito measure of de jure capital account openness {Chinn, 2008 #1639}.<sup>3</sup> This variable, derived from indicators of legislative constraints on foreign investment, thus reflects the market and free trade orientation of the dominant lawmaking coalition, not just the largest party, or the party that controls the executive or a legislative chamber. In sum, *kaopen* should be positive for autonomy, negative for authority, and either negative (on the theory that the right will wish to easily discipline a runaway court) or neutral for accountability.

The premise behind using the appointment mechanism to control how judges will decide once appointed is that judicial ideologies are identifiable, stable, more or less one-dimensional, and relatively comprehensive with respect to any issues that are likely to come up in the future, even if they have not yet been considered. Thus a Republican administration in the US, choosing

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<sup>3</sup> For additional references and a more complete description, see [http://web.pdx.edu/~ito/Chinn-Ito\\_website.htm](http://web.pdx.edu/~ito/Chinn-Ito_website.htm).

a “conservative” jurist, has a relatively good sense of how that jurist might rule on a host of issues, with only minor deviations from what a future Republican administration might prefer. It is only in a context in which political allegiances are clearly identifiable and come with a well-defined and stable portfolio of beliefs about important governance issues that political actors can rely on ideology and appointments to control future judicial behavior. In any other context, politicians should rely more heavily on ex post mechanisms of control.

As a result, we hypothesize that dominant political actors, who expect to be in power, will build in less ex ante autonomy (*i.e.*, be more willing to rely on appointment mechanisms) in a political context in which ideological/programmatic camps are well defined and well institutionalized. Similarly, when there is less programmatic structure to party competition – where parties are personalistic vehicles, political outsiders dominate, and competition is based on candidate appeals, we expect more accountable courts (*i.e.*, greater reliance on ex post mechanisms of control), because ideology matters less and future positions on untested issues are far less predictable. Indeed, a highly professionalized and autonomous judiciary is likely to be an obstacle in such an environment, as outsider governments craft ad hoc solutions and positions, and generally act in more opportunistic and less predictable ways, and therefore dominant actors should prefer a less autonomous appointment mechanism. Menem and Fujimori are excellent examples of this phenomenon, as they changed positions on the most central issues, and required their courts to be equally flexible and open to suasion. To test this hypothesis we use a variable that measures the extent to which parties in the political system compete on programmatic versus other grounds. More programmatic structure in the political arena should thus be positive for both ex ante and ex post autonomy. We take the variable from Luna’s (2010) and Jones’s (2007) analyses of Latin American political parties.

The following table summarizes our expectations for the impact of these variables on each of the dimensions.

**Table 2: Theoretical expectations**

Variable	Ex ante autonomy	Ex post accountability	Scope of Authority
Fragmentation	+	—	— (Winset) or + (Christmas Tree)
Volatility (uncertainty / time horizon)	+	—	Neutral or negative
Right dominance of lawmaking coalition	+	No expectation	—
Programmatically structured political competition	+	—	No expectation

## Data and Methods

To illustrate our three-dimensional dependent variable and test our hypotheses about the calculus of judicial design, we coded the institutional features of courts contained in all the constitutions of Latin America since 1975, and all the amendments to these constitutions. As a starting point we used data generously provided by the Comparative Constitutions Project, led by Tom Ginsburg and Zach Elkins (see [www.comparativeconstitutionsproject.org](http://www.comparativeconstitutionsproject.org) for more details on this project.). We used the CCP codebook as a guide and adopted their coding scheme for many of our variables, but we supplemented their coding (both in terms of level of detail or in available coverage at the time we started coding) in many instances. Finally, to validate our data we gathered and coded ourselves many of Latin America’s key recent constitutional changes – such as the 2008 Ecuador constitution or the 1997 and 2005 amendments to the Chilean

constitution, to take just two important and contrasting examples – and checked their coding against our reading of the same texts.

Our data cover 21 Latin American countries—including Suriname, Guyana, Belize, the Dominican Republic and Haiti, but excluding Cuba—over thirty-five years (from 1975 to the end of 2009). While a longer time period might offer interesting comparisons to a less globalized time, a relatively shorter period allows a closer examination of the fine morphology of courts and more informed coding, as well as more detailed knowledge of domestic political conditions. Latin America is an ideal region for testing the causes of formal judicial empowerment because it offers substantial variation in domestic political conditions, judicial institutions, and in the timing and nature of reforms.

### **The pattern of constitutional change in Latin America**

Latin American countries have been actively engaging with their constitutional texts over the last thirty-five years. In any given year, there are never less than ten percent of the countries making changes, and in some years (e.g. 1995) more than fifty percent adopted some change to their fundamental law. The number of changes peaks in the mid-90s but continues at a high rate after the turn of the millennium. On average, Latin American countries have made about eleven constitutional changes in the thirty-five years we cover, or about one every three years. Brazil and Mexico top the list, with twenty-eight and thirty, respectively. There were twenty-six entirely new constitutions in the region during this period. The two top constitution makers are Haiti, which has made no amendments, but has adopted three different constitutions in thirty-five years, and Ecuador, which has been just as prolific. As we will see in the analysis below, these

constitutional changes had a significant impact on the design of judicial institutions in the region, as well as implications for (formal) judicial autonomy and authority.

### **Results: the politics of judicial design**

We find considerable evidence of the diffusion of high visibility features. Perhaps the most basic distinction among courts is between those that have the power of judicial review – that is, the ability to strike down, render inapplicable or somehow suspend the operation of legislation considered to be unconstitutional – and those that do not. The US Supreme Court is the most famous example of a court with judicial review, while the British system is among the most familiar examples of a judicial body – recent changes notwithstanding – without such authority. Most Latin American courts adopted judicial review very early on in their history, whether explicitly or through judicial interpretation. Like the US Supreme Court in *Marbury v. Madison*, Argentina adopted judicial review by judicial interpretation, in 1867, in a case entitled *Mendoza Domingo c/ Provincia de San Luis*. Most other countries have specified this power in their constitution, some as early as 1844 (Dominican Republic), 1857 (Mexico), or 1891 (Brazil) (Brewer-Carías 2005: 196-211). The two or three countries that did not have judicial review adopted it since the 1970s (e.g., Peru, in 1979, or El Salvador in 1983). But they had always followed the US model: diffuse review in concrete cases, often tempering it by giving the decisions purely *inter partes* effects.

The true change in constitutional adjudication has been the regional trend toward adoption of a special purpose centralized constitutional court (or chamber). Spain adopted such a court in its 1978 constitution, after the transition to democracy, and regulated it in a 1979 organic law. In 1975, only four Latin American countries had a constitutional court. That number has

doubled in the intervening period, to eight (nearly forty percent of the region's countries) – nine if we count Brazil, which has a constitutional court but calls it the Supreme Federal Tribunal. And if to this number we add countries that created a separate Constitutional Chamber within the existing supreme court – Costa Rica, one of the most influential constitutional adjudication bodies in the region, and El Salvador – now over half of all countries have a specialized court for constitutional adjudication. Moreover, whereas none of the old constitutional courts had ancillary powers (for example, overseeing elections, impeaching presidents, or controlling the constitutionality of political parties), by the end of the period, seven of the eight had some ancillary powers that enmeshed them even more in the political process.

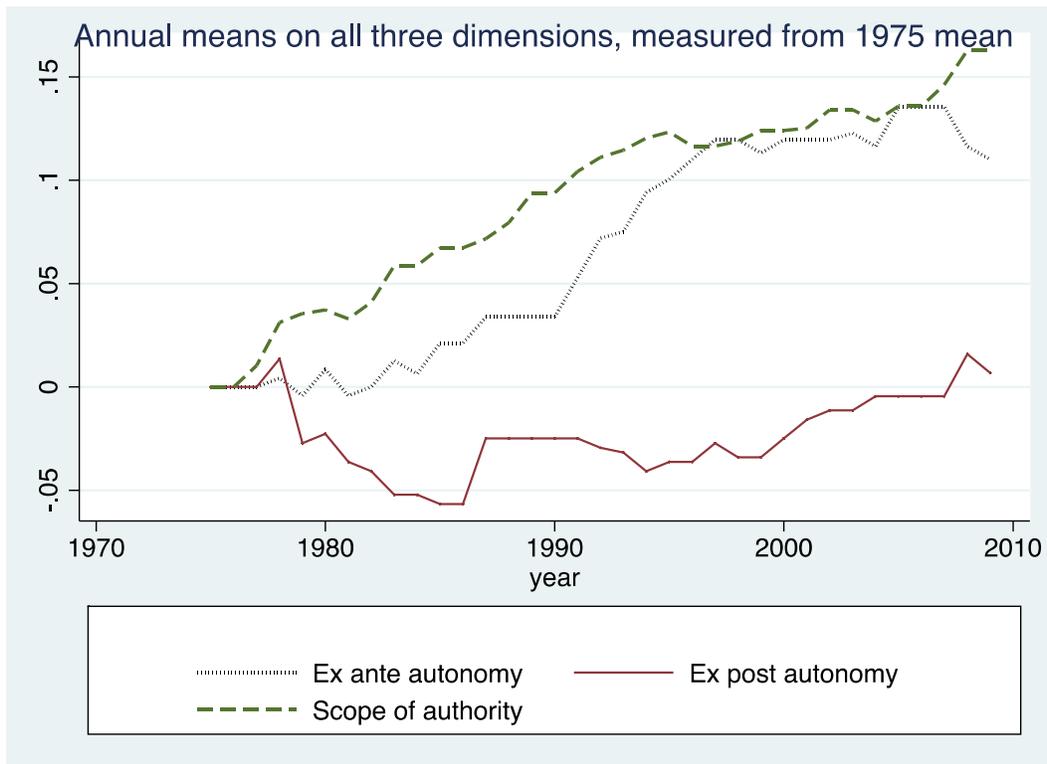
Even those countries that did not add a constitutional court adopted a functional equivalent: they added provisions for concentrated judicial review to existing Supreme Courts (i.e., allowing direct access to the apex court on constitutional questions, bypassing weaker lower courts). Most famously, Costa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

More strikingly perhaps, and again following the Spanish example and the international model, the number of countries with some sort of judicial council rose from two to twelve (representing more than half the countries of the region) over the last thirty years. Following other elements of the international model, the number of constitutions explicitly protecting judicial independence rose from about seventy percent to about ninety percent. We also coded a

list of thirty-one different rights that could be present in constitutions, including negative and positive rights, classic civil liberties and social and economic rights. One of the most striking changes in constitutional practice in Latin America is the dramatic expansion in the number of rights expressly guaranteed in the constitution. In 1975 only five countries had three quarters or more of these rights in their constitutions, and by 2009 twelve of them did.

Clearly, then, many elements of the international model have entered into the region's constitutions, especially those elements that mirror the Spanish experience. We have seen an increase in abstract, concentrated judicial review, an expansion in the roster of protected rights, the adoption of judicial councils, and special provisions for the protection of constitutional rights from infringement by governmental actors. The question is, then, do these institutional changes add up to more powerful, more autonomous courts that might be up to the task apparently being assigned to them? The following graph, showing the annual regional means on each of the three dimensions, suggests that the courts have not moved equally on all dimensions.

**Figure 1: Annual Means for Ex Ante and Ex Post Autonomy, and Scope of Authority, as a difference from the 1975 regional mean – Latin America, 1975-2009**



Overall, our data support the common wisdom that Latin American countries have been engaged in a process of judicial reform and in creating courts with increasing authority. Moreover, many of these courts appear to follow the Spanish model and the prescriptions of actors like the World Bank, USAID and the IDB for the creation of constitutional courts and judicial councils. One consequence of these institutional changes is an increase in ex ante autonomy – increasing the inclusiveness of the appointment mechanisms for judges of the highest courts in the region. At the same time, a look at the finer details suggests that, at least from an institutional design perspective, many of these courts continue to include features limiting their autonomy, primarily through the ability to punish and reward sitting judges. There is, in effect, a clear movement toward the internationally preferred judicial model; but there is an equally clear tendency to maintain unchanged, or to increase, the level of accountability of sitting

justices, especially, as we will see, if they have considerable power. It appears, then, that political actors remain wary of creating truly autonomous courts, beyond their control, suggesting a role for domestic conditions as well. In the following section we carry out a multivariate analysis to explore whether domestic conditions can account for much of this variation.

A series of variables that could more closely measure diffusion did not behave as expected, and have been excluded from the analysis. We explored the effect, for example, of the regional mean at  $t-1$  of each dimension (not including the country in question), and of the mean changes on each dimension at  $t-1$ , but did not find evidence of diffusion with these variables. At least until we find a better way to measure diffusion, therefore, this suggests that when we do a close measure of autonomy and authority, diffusion effects, beyond the high visibility features discussed above, are dominated by the domestic politics of design. We did, however, include a time marker, to control for purely secular changes that may or may not be attributable to diffusion. Finally, to account for the panel structure of our cross-sectional time series data we use panel-corrected standard errors.<sup>4</sup>

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<sup>4</sup> We use only those years in which there has been a change to the constitution, rather than all years; the unit of analysis, therefore, is the constitutional document, rather than the country year. As a result, we have 18 unbalanced panels (we lose Surinam, Belize and Guyana, for missing data), and an N of 158. The minimum number of observations per country is 1, the maximum 26, with an average of not quite nine observations per country.

**Table 3: Regression Results**

<b>Dep. Variable</b>	<b>Ex ante autonomy</b>	<b>Ex post autonomy</b>	<b>Scope of authority</b>
Ex ante autonomy		-0.208 ** <i>0.003</i>	0.731 *** <i>0.001</i>
Ex post autonomy	-0.270 ** <i>0.006</i>		-1.064 *** <i>0.000</i>
Scope of authority	0.124 *** <i>0.001</i>	-0.139 *** <i>0.000</i>	
Effective number of electoral parties at t-1	1.313 *** <i>0.000</i>	0.586 <i>0.062</i>	-1.799 ** <i>0.010</i>
Volatility in previous two elections	0.171 <i>0.365</i>	-0.452 ** <i>0.003</i>	-1.291 ** <i>0.008</i>
Capital account openness at t-1 (Left-Right orientation)	-0.052 <i>0.627</i>	-0.081 <i>0.400</i>	-0.756 *** <i>0.001</i>
Programmatically structured party system	0.267 *** <i>0.000</i>	0.076 <i>0.207</i>	-0.603 *** <i>0.000</i>
Year	0.029 <i>0.110</i>	0.027 <i>0.114</i>	0.250 *** <i>0.000</i>
GDP per capita	2.82E-04 *** <i>0.001</i>	4.227E-04 *** <i>0.000</i>	-5.550E-05 <i>0.836</i>
Constant	-58.563 <i>0.105</i>	-46.317 *** <i>0.164</i>	-476.038 *** <i>0.000</i>
R <sup>2</sup>	0.404	0.507	0.539

\* .05 \*\* .01 \*\*\*.001

The analysis strongly supports our claim that designers will think about tradeoffs in judicial design. Courts with more ex ante autonomy have less ex post autonomy (i.e. are more accountable) and vice versa. Courts with greater authority tend to have less politicized appointment procedures, but a higher level of ex post accountability to political actors. The results are highly significant, and robust to a number of specifications of the model (not shown). As discussed above, many measures of formal or institutional independence either conflate or aggregate features that contribute to what we have called scope of authority with features that contribute to autonomy, either ex post or ex ante. Since these features are, as seen here, negatively correlated, it is not surprising that de jure measures that fail to distinguish across the

various dimensions often fail to produce significant results when used to predict actual judicial behavior.

The results for political fragmentation tend to support the Win-Set variant of the veto player model. The greater the number of parties in the run up to the new constitution or amendment, the more ex ante autonomy the resulting court will have, but also the less authority. The number of parties appears to be positive for ex post autonomy as well, but we cannot be confident of the results, as they just miss the .05 level of significance. These results challenge at least some of the assumptions of the insurance model of judicial empowerment. Once we control for the level of fragmentation, electoral volatility, which is meant to more closely test the insurance model, does not have the expected positive effect on ex ante autonomy. And, as expected, it has a negative and highly significant effect on ex post autonomy and on the court's scope of authority. These results in particular, especially coupled with the fact that the presence of more veto players results in a court with fewer powers, suggest that designers who are uncertain about their political future are more likely to be fearful of a court as a mechanism of control, than to invest their hopes in it as a mechanism of countermajoritarian protection.

Our indicator of the Left-Right orientation of the party system works as expected for authority only. The Latin American Right, as expected, has a preference for less robust courts, but is not significantly different from its more leftist counterparts when it comes to judicial autonomy. These results contradict previous findings, based primarily on case studies {see, e.g., Moustafa, 2003 #521}, that suggested attracting foreign investment was a strong inducement to creating more autonomous courts. It does suggest, however, in line with the discussion of Colombia in Rodriguez Garavito {, 2010 #1101} that foreign investors and/or the governments

that seek to attract them tend to create constitutional courts with a more limited scope of authority.

Contrary to our expectations, countries with ideologically structured party systems have courts with more ex ante autonomy. They also show less authority, but are indistinguishable in terms of ex post control. This suggests that designers in these contexts fear the appointment of judges with a clear ideological profile, so they make the appointment mechanism more broadly representative. In a context in which parties have clearly identified platforms and programmatic offerings, they also prefer to limit the court's scope of action, reserving more authority for representative political actors.

What do these results mean for real courts in real countries? In this section, we take our findings a bit further, to explore what these new models of courts might mean for democracy in Latin America. It is not unreasonable to take the level of autonomy granted to the highest court as a proxy for the model of state legality chosen. Countries with more autonomous courts are more likely to enforce some version of the rule of law; they are promoting the sort of neutral, impartial model of legal decision-making that is central to most definitions of the rule of law. The scope of authority of the court, meanwhile, is suggestive of how much social conflict is meant to be structured by law and channeled into legal mechanisms – easily accessible courts with a broad portfolio and powerful decision-making tools suggest a model in which many disputes are intended to be resolved through legal mechanisms (whether impartial or not). If the courts are also autonomous, then that resolution is more likely to follow preexisting rules, whereas if the court is an instrument of the executive, the courts will simply be used to legalize/legitimize and carry out ad hoc political decisions.

Combining the two dimensions, we can create another 2x2 table to identify four ideal types of “estados de derecho,” or states-as-law. At the high end of autonomy we might find countries that are embracing either a thin version of the rule of law – as the more market-oriented states have chosen, as we will see – or a thick one, as the more social democratic ones have chosen (see Rodriguez Garavito 2010, for a discussion of this distinction in the context of Colombia). In countries where the courts have a broad scope of authority but very low levels of autonomy, we might find that the governments are simply using the courts to give a veneer of legality to political decision making, and to advance the projects of the current dominant coalition. Where the courts have neither authority nor autonomy, on the other hand, the courts – and by extension, the law – are relatively tangential to policy making and implementation.

**Table 4: Legal characteristics of states, depending on levels of authority and autonomy granted to their judiciaries**

	Low autonomy	High autonomy
Broad authority	Politicized legalism; <i>estado de derecho político</i>	Thick rule of law; <i>estado social de derecho</i>
Narrow authority	Extra-legal policy making and implementation; <i>estado político</i>	Thin rule of law; <i>estado liberal de derecho</i>

While the labels are not perfect, one can modify the term “estado de derecho” with adjectives to denote the type of state legality chosen. Colombia and various other countries have borrowed from the German term “soziale Rechtsstaat,” labeling their state an “estado social de derecho,” meaning to denote approximately what we call a Thick Rule of Law state. The Thin RoL state might then be labeled an “estado liberal de derecho,” while a state with highly

politicized legalism<sup>5</sup> might be an “estado de derecho político.” The last category is simply an “estado político,” a state that is not acting through law and legal mechanisms to the same extent as the others, if it is acting at all. Note that these are relative terms. As suggested in the opening paragraphs of this paper, we expect that all rulers will act through law to a significant extent.

The thick RoL states subject more social, economic and political decisions to legal and constitutional standards, while the thin RoL states leave more policy outcomes to be determined by the market or currently dominant social and political forces. Countries that opt for tightly controlled judiciaries are signaling that law and courts are instruments of the current government. In the final category, rulers are neither using the courts to project power, nor subjecting that power to the discipline of the law. In these cases, we would expect more power to be exercised either through para-state means, or through less accountable state agents – the armed forces, for example, which tend to be less subject to judicial oversight.

How then, do the results of our regression analyses line up with our intuitions regarding the kinds of political conditions that should lead to these different legal modalities? In this section we use the regression results to identify the types of regimes that have chosen different modes of “estado de derecho.”<sup>6</sup> Looking at the results for the two dimensions in combination gives us an idea of the political determinants of state strengthening in the area of the judiciary and the rule of law, and can help us map the various types of states-as-law that different political projects envision.

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<sup>5</sup> I do not mean to suggest that law is not always political, in some sense. By “highly politicized” I simply mean that legal mechanisms are put to the service of immediate political projects even at the cost of sacrificing the minimal level of coherence and continuity that is implicit in our ordinary understanding of how the rule of law operates – e.g., by failing to appoint neutral judges, or to apply preexisting rules (even granting all the imprecision that is attendant on these concepts).

<sup>6</sup> The regression results are from a slightly different model, not reported in this paper but included in the Appendix, which includes a dummy for the “Bolivarian” courts – those framed by the most recent constitutions of Venezuela, Bolivia and Ecuador.

The results demonstrate that the conditions under which institutional designers have typically granted courts more authority are not the same as those under which they have granted them more autonomy.<sup>7</sup> From these results, we find two main political determinants of greater autonomy. The first is more political fragmentation, as measured by a higher effective number of electoral parties at the time of the constitutional drafting or amendment. The second is a party system that relies more on programmatic linkages with citizens, rather than on clientelistic ones.<sup>8</sup> In other words, those Latin American countries that have developed more pluralistic and less clientelistic party systems have come to rely more and more on autonomous courts – and, by implication, on universal rules – to project power, rather than relying on personalistic extra-legal exchanges.<sup>9</sup>

The predictors of courts with a broad scope of authority are similar, but not identical, and in some cases run in the opposite direction. Once we control for the level of autonomy of the court, countries with a more neoliberal orientation (as measured by openness to foreign investment), have opted for courts with a narrower scope of action. This variable is not significant when predicting autonomy, suggesting, against much of the literature, that once we control for other factors, market-friendly governments have not created more autonomous courts. The exception is among what we might call the nationalist-left regimes of Venezuela, Ecuador

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<sup>7</sup> The regression results also suggest that designers, especially toward the end of the period, have clearly conditioned a grant of more authority on greater autonomy. Interestingly, with more autonomy and authority designers have also typically required more accountability, although these results are weaker. The overall result of the typical tradeoff, then, is that courts that have become less an appendage of the executive, have grown in authority, but remain to some extent accountable.

<sup>8</sup> This measure is taken from Juan Pablo Luna's and Mark Jones' work on Latin American parties and party systems [add citations to this and the Kitschelt et al volume].

<sup>9</sup> Note that our dependent variable is a purely institutional one – an annual coding of the features of each of the high courts in the region, taken from the various constitutions, as amended. We believe we have, by coding not only for high visibility features, but also for what we have elsewhere called the “engine room” features, captured the sincere intentions of the designers. From there to actual functioning is, of course, yet another step, although impressionistic accounts suggest our institutional measure matches up in many cases to the expected judicial behavior.

and Bolivia, in their most recent constitutions. As expected, the constitutions associated with “twenty-first century socialism” – Venezuela, Bolivia and Ecuador – define courts with less autonomy *and* more authority, a classic “estado de derecho político.” Finally, against the expectations from much of the literature, countries with more electoral volatility and countries with a more programmatic party system have also chosen courts with a narrower agenda.

The following graph locates the predicted values of judicial autonomy and authority for some idealized political regimes, in a graph that follows conceptual framework of the 2x2 in Table 1, above.<sup>10</sup> Since the marker representing non-Bolivarian regimes represents the mean for all the countries of the region other than those three, we use that dot as the cut point for the 2x2, above. This is purely for convenience in exposition, of course, since the variables and the results are self-evidently continuous.

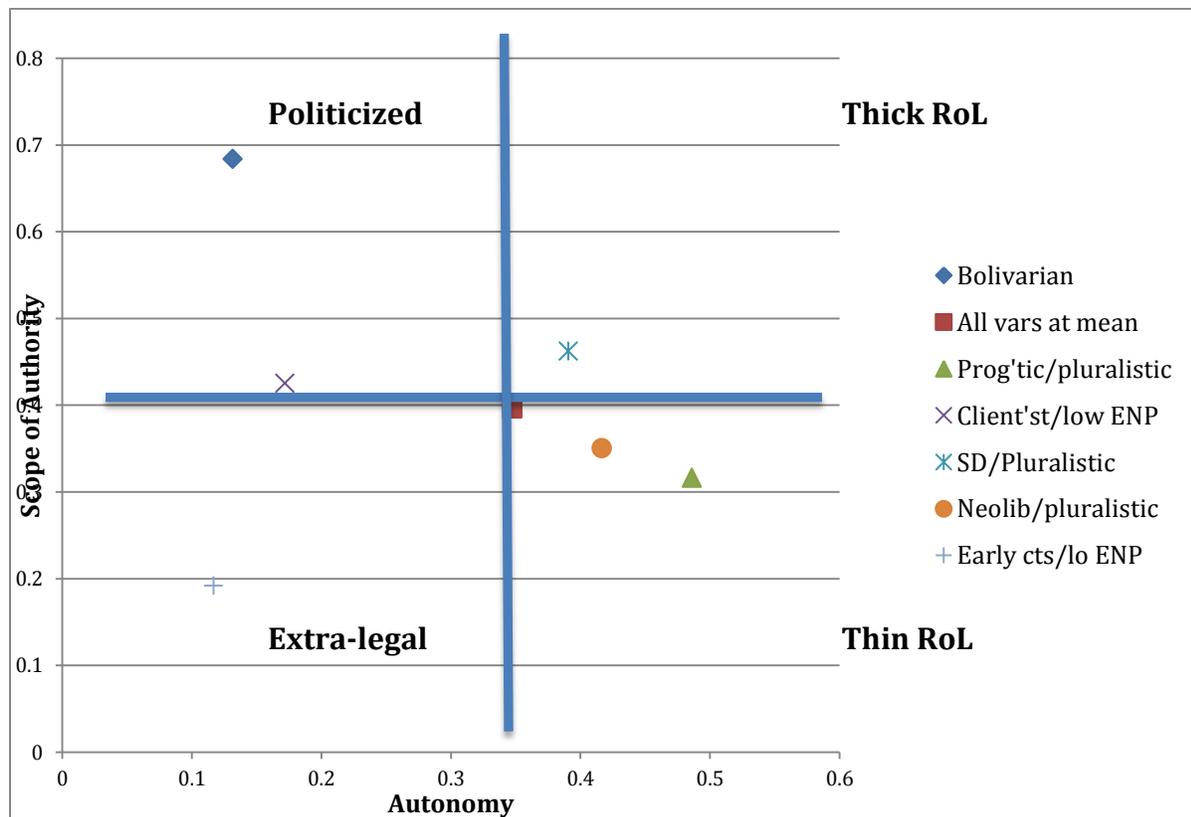
The countries following the Bolivarian model have in fact created courts that allow for a more politicized legalism, in which the courts are powerful policy instruments but placed at the service of the executive – Venezuela, with its legalized persecution of the political opposition, exemplifies this model. Countries with a pluralistic party system characterized by programmatic parties tend to fall in the Thin RoL quadrant – perhaps because programmatic parties do not wish to delegate that much policymaking authority to the courts. On the other hand, countries with a low number of highly clientelistic political parties tend to have courts that are pure and powerful instruments of whoever is in government – the Menem high court in Argentina is a prime

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<sup>10</sup> The values are derived from a very crude simulation, using the results of the regressions included in the Appendix, in a simple equation. For the comparisons across idealized political regimes we replaced the maximum/minimum value(s) for the variable(s) that defines the regime, and set all others at their mean. For example, for the neoliberal/social democratic comparison, we use the maximum and minimum values, respectively, of the Capital Account Openness variable, which measures openness to foreign direct investment. For the Bolivarian/nonBolivarian comparison, we varied the value of the Bolivarian dummy 0-1 and set all other values at the mean.

example – falling in the politicized legalism quadrant, although closer to extra-legality than the Bolivarian regimes. Regimes that have not fully embraced the neoliberal model (labeled SD, in the graph below),<sup>11</sup> and have pluralistic party systems, fall in the Thick RoL quadrant. In contrast, more neoliberal regimes with the same level of fragmentation fall in the Thin RoL corner. Finally, early in the period most courts tended to have both low authority and low autonomy – it is at this time, as most accounts of the period would suggest, that we would expect policy-making and implementation to be carried out without much interference by the courts.

**Figure 2: Predicted values of judicial autonomy and scope of authority, for regimes with various characteristics**



<sup>11</sup> We labeled them SD, or Social Democratic, simply for convenience, although many states that have not fully opened their markets to foreign investment might not necessarily fit that model.

The discussion thus far is subject to an important caveat – it is based on a purely institutional measure. We have not addressed the question of compliance either with the institutional form or with the decisions of the courts defined in the various constitutions. To some extent, we have argued that these institutional forms can be viewed as a proxy for the intent of the constitutional designers and amenders of the last thirty-five years in Latin America. But there still remains work to be done to explore the conditions under which compliance with that apparent intent is more likely. In any event, however, this exercise suggests that different political conditions in Latin America, perhaps in a global context in which both international and domestic actors increasingly frown upon purely extra-legal action, are leading to different types of states-as-law.

Some countries – those with a more social democratic agenda, and a more pluralistic and programmatic party system – are building a more robust “estado social de derecho,” while others, with a stronger market orientation, are opting for a leaner “estado liberal de derecho.” Meanwhile, some of the countries in the region are building powerful judiciaries that are vehicles for a partial, executive-dominated style of legalized political decision making – an “estado de derecho político.” More and more, it seems, countries are abandoning the old model, in which courts and law were relatively tangential to the exercise of political power. This should be good news, even with the important caveat that law is, and always has been, a friend of the powerful. A state based on law, with autonomous courts, can reduce arbitrary action, impose a certain discipline and predictability, and create openings even for the least powerful in a society. Such a state is, in its legal dimension at least, a stronger state than one that is simply bypassed whenever the powerful want to pursue their interests without constraint.

## **Conclusion**

More work remains to be done, of course, to complete our analysis. The preliminary results, however, are encouraging. The data demonstrate a clear tendency to adjust values of authority and autonomy among the newly reformed courts of Latin America to domestic conditions. Moreover, despite a clear tendency toward apparent convergence in institutional design, drafters tinker with the less visible features of courts to produce courts that vary significantly in their expected operation, and they do so in predictable response to domestic political conditions. Clearly, simple-minded, wholesale imitation is not taking place. Latin American constitution makers have learned at least this lesson from the law and development movement of the 1970s: slavish imitation of foreign legal models is dangerous, or at best unhelpful.

It seems clear that judicial developments in Latin America were a response to international pressures, but were significantly tempered by political realism. Moreover, there is simply too much variation in the final outcome to present this as a clear-cut, region-wide movement toward a constitutionalist, rights-based model of democratic politics achieved through the creation of powerful and autonomous courts. This is not to say that there has not been a diffusion-driven sea-change in Latin American judicial culture, as Couso and Hilbink (Couso 2007; Couso and Hilbink forthcoming) might argue. It suggests, rather, that this movement has been more successful in some countries than in others; and conversely that, in matters of institutional design at least, self-interested politicians were often able to slip in some measures meant to ease the task of reining in their newly empowered judges.

Finally, our results suggest that designers tend to view courts as tools of governance at least as much as they consider them effective mechanisms of insurance. When they can influence

judicial design, additional veto players seek to deny the executive unilateral authority to appoint justices, but also seek to limit their overall scope of operation, and do not insist on more insulated judges. Volatility and uncertainty in the party system tends also to produce courts that are more limited in their authority, and is associated with judges who are more easily disciplined, once on the bench.

## Appendix

Multivariate regression models for each dimension used for the simulation reflected in Figure 1. Prais-Winsten panel corrected standard errors, with heteroskedastic panels – no contemporaneous cross-panel correlations.

	<b>DEPENDENT VARIABLE</b>		
	<b>Ex ante autonomy</b>	<b>Ex post autonomy</b>	<b>Scope of Authority</b>
Ex ante autonomy		-0.165 * <i>0.018</i>	0.860 *** <i>0.000</i>
Ex post autonomy (account'ity)	-0.182 * <i>0.041</i>		-0.880 *** <i>0.000</i>
Scope of authority	0.154 *** <i>0.000</i>	-0.117 *** <i>0.000</i>	
Effective number of electoral parties at t-1	1.280 *** <i>0.000</i>	0.537 <i>0.088</i>	-1.963 ** <i>0.004</i>
Volatility in previous two elections	0.305 <i>0.110</i>	-0.398 ** <i>0.005</i>	-1.055 * <i>0.032</i>
Capital account openness at t-1	0.122 <i>0.217</i>	0.021 <i>0.818</i>	-0.492 * <i>0.032</i>
Programmatically structured party system	0.252 *** <i>0.000</i>	0.081 <i>0.163</i>	-0.530 *** <i>0.000</i>
Bolivarian constitution	-2.887 ** <i>0.028</i>	0.447 <i>0.814</i>	8.179 * <i>0.046</i>
Avg value of d.v. in other countries in region at t-1	-2.157 ** <i>0.002</i>	-1.634 ** <i>0.013</i>	-1.597 * <i>0.016</i>
Period (1=75-85; 2=86-95; 3=96-09)	1.511 ** <i>0.002</i>	0.123 <i>0.495</i>	3.691 *** <i>0.000</i>
GDP per capita	2.294E-04 ** <i>0.006</i>	0.000 *** <i>0.000</i>	0.000 <i>0.556</i>
Constant	2.835 <i>0.071</i>	14.199 *** <i>0.000</i>	26.997 *** <i>0.000</i>
R <sup>2</sup>	0.4525	0.515	0.558

Formulae for the three dimensions of judicial design:

<b>Dimension</b>	<b>Formula</b>
Ex ante autonomy	(total number of actors required for nomination and approval + 1 if judicial council involved in appointment) * 1.5 if supermajority consensus and 1 otherwise
Ex post autonomy	(protected tenure + fixed salary + fixed jurisdiction + fixed number of judges + hard to remove) <sup>12</sup>
Authority	Open access + total number of ancillary powers of supreme and constitutional courts + proportion of 31 fundamental rights + binding precedent + amparo + (total number of actors involved in amendment process/2) * 1 if judicial review, .5 otherwise

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<sup>12</sup> where protected tenure = combination of length of tenure and nonrenewable terms; hard to remove = total number of actors required to remove a judge, supermajority consensus required, and meaningful reason required for removal (i.e. not “at will”)

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