NEW COURTS FOR NEW DEMOCRACIES: REINVENTING COURTS AND CONSTITUTIONS IN LATIN AMERICA SINCE 1975

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Abstract

Update:

We argue that the political actors who design courts have preferences about the scope of power they grant to their high court and the kind of judges they want to exercise that power. We argue that a sensitive, theory-driven measure of the formal features they adopt when they create and amend judicial institutions reveals a great deal about the kind of courts the designers intended to create. To show this, we do three things: we present and defend a reconceptualization of courts that moves beyond the dominant focus on independence and draws on the broader literature on principal agent relationships; we use the framework to develop a systematic, comparative measure of courts' institutional features along three dimensions – ex ante autonomy, ex post autonomy, and scope of authority –; and we use this new multidimensional measure to examine the dominant patterns of judicial empowerment that have emerged since the 1970s, using Latin America as an illustrative case. Our results reveal significantly more diversity in judicial design than existing measures uncover: in contrast to conventional narrative of a slow but near-universal march toward greater independence for judges, we find a trend toward simultaneously empowering judges and limiting their autonomy on the bench, a tradeoff that illustrates important differences in the goals of political actors to design courts as mechanisms of governance.

Old one:

Since the second wave of democratization, scholars have documented the expansion of judicial power and the consequent judicialization of politics. Despite attention to the appearance of new and reformed courts, we do not yet have a crucial first step in evaluating judicial empowerment: a solid conceptual framework to understand the formal institutions that structure the ways in which courts influence and are influenced by their political environments. Without a good understanding and measure of the relevant dimensions of formal judicial empowerment we cannot uncover the political forces that shape the design of particularly strong (or weak) courts; nor can we explore whether and how these formal features shape judicial behavior.

We present and defend an original and comprehensive conceptual framework that includes three dimensions—*ex ante autonomy, ex post autonomy*, and *authority.* We apply the framework in the context of formal institutional changes to courts in Latin American over 35 years, yielding a detailed and dynamic survey of judicial design in Latin America. The multidimensional framework and measure reveals several important insights not captured by other measures of judicial empowerment. Our results reveal significantly more diversity in judicial design than existing measures uncover, including a trend toward limiting the autonomy of sitting judges. We make sense of that diversity by identifying four primary models of legality, reflecting differences in the goals of political actors to design courts as mechanisms of governance.

Introduction

Over the last quarter century, scholars have documented the expansion of judicial power and the consequent judicialization of politics (Tate 1997; Stone Sweet 1999; Tate and Vallinder 1995a). Country after country, especially among emerging democracies, has adopted judicial review of legislation, establishing a constitutional or supreme court equipped with the power to review acts of the legislature and executive. Countries that already had courts with the power of judicial review have reformed them, ostensibly with the goal of creating more independence, more rights protection, more rule of law, more democracy, or all of these combined. No region has been more active in this respect than Latin America (Elkins et al 2009), and billions of dollars in international aid flowed into the region in support of reforms to insulate and strengthen judges (Finkel, cite to article w table of aid $). Today, by most existing measures, judges in the region are more independent and more powerful than ever before (Keith, Feld and Voigt, Ríos Figueroa).

The results of these apparent advances in formal judicial empowerment are decidedly mixed, however. Some high courts in the region—e.g. in Colombia, Brazil, and Argentina—have emerged as pioneering forces at the very center of policy debates in their countries, while others (e.g. in Peru and Haiti) have remained largely on the political sidelines, unwilling or unable to contribute meaningfully to the politics of the day. Most fall somewhere in between: in Ecuador and Bolivia, for example, the country's high courts have exercised a 'majoritarian' political influence by legitimizing the regime's major social and economic policies and helping to eliminate legal and political obstacles to their realization, while their counterparts in Chile and Uruguay have achieved influence in particular domains, appearing somewhat more willing to challenge regime interests but with fewer means to do so.

Such variation has prompted some, including those who advocated judicial reforms, to conclude that such rule change has failed to produce real change in a region long plagued by strong executives and weak formal institutions (Hammergren 2002b; Pásara 2012). Indeed, a recent survey of formal measures of judicial power found that existing *de jure* measures bear virtually no relationship to actual judicial behavior, and concluded that "it is not yet clear that we have identified well the rules (or sets of rules) that produce the incentives we hope to measure" (Ríos Figueroa and Staton 2014: 25). Others have pointed to non-institutional explanations for such unevenness, including entrenched conservative legal/political culture among judges, an unwillingness to upset the status quo in the face of opposition from executives and/or legislatures with the ability to pressure judges or undermine their decisions, the absence of support structures to facilitate legal mobilization, or some combination of all three.

While these three factors undoubtedly shape a court's willingness and ability to affect politics, existing measures of judicial empowerment substantially underestimate the explanatory power of formal institutions because they do not capture the multidimensional structure of formal empowerment and because they overlook components of judicial design that may appear subtle but are critical for exercising judicial power. Thus before we look beyond *de jure* explanations for judicial behavior, we take a closer look at what exactly a court's formal institutional design can show us about the kind of political influence it was designed to exercise.

In this article we argue that a court's formal features reveal distinct preferences on the part of constitution drafters for different kinds and degrees of judicial influence, and that a theory driven measure of formal institutional autonomy and authority can reveal a lot about the kind of court the designers intended to create. To show this, we do three things: in Section 1, we present a reconceptualization of judicial power that moves beyond the dominant focus on

"independence," however defined. We draw on the broader literature on principal agent relationships to identify two primary dimensions of formal empowerment: autonomy (how politics affect a court) and authority (how a court affects politics). We show how the intersection of a court's formal autonomy and authority reveals the kind of influence it was designed to exercise. In Section 2 we unpack the original, multidimensional measure, discussing each component in greater detail. In Section 3 we apply the measure to examine the dominant patterns of judicial empowerment that have emerged since the 1970s, using Latin America as the empirical case, and we provide preliminary evidence that our new measure corresponds closely to the nature and extent of a court's political influence.

Section 1. Reconceptualizing judicial empowerment: more than the sum of its parts

There is near-consensus among scholars that courts globally are creating new political dynamics that cannot be ignored (Kapiszewski et al. 2013). The labels used for judicial empowerment range from the relatively tame "judicialization of politics" (Tate and Vallinder 1995) to the more alarming "juristocracy" (Hirschl 2004). Now, ever more powerful courts have begun to protect a broadening array of human rights (Gauri and Brinks 2008), promote political stability (Cross 1999), and contribute to social order and economic development (Weingast 2008). Despite the consensus that today courts in many countries are more influential than ever before, the ultimate goal of comparative judicial politics—to understand the political origins, operation, and effects of truly consequential courts—is controversial/elusive[1].

[1] (and, conversely, to understand the failure of inconsequential ones). (# how to say this without overstating it: the literature reflects an almost teleological, linear narrative in which courts are moving toward greater political relevance, although some may temporarily lag).

We have theories of the origin of judicial review (Ginsburg 2003; Hirschl 2004), of the social bases of judicialization (Epp 2003; Gauri and Brinks 2008), theories of judicial behavior (Epstein and Knight 1998; Segal and Spaeth 2002), and theories of compliance (Carrubba 2009; Staton 2010). However, compared to the literature for the other two apex institutions – the presidency (see, e.g., Mainwaring and Shugart 1997; Cheibub 2007) and the legislature (a literature too vast to recount here) – the comparative, systematic institutional analysis of courts is scant. Add to this a dizzying array of definitions and measures for judicial power and judicial independence, and it is easy to understand Ginsburg's observation that today, despite a wealth of terminology and empirical examples, we do not yet have agreement on the concept or measurement of judicial power (Ginsburg 2008: 94), much less a settled notion of the relevant dimension and measures with which to anchor a truly comparative analysis of judicial institutions worldwide (cite Staton and RF?).

In order to function as consequential actors in a dynamic political environment, courts (or, more precisely, the judges who sit on them) must be capable of (1) developing and (2) expressing preferences that are substantially distinct (autonomous, in our parlance) from those of a single dominant outside actor; and (3) must have a broad scope of authority, authorized to rule on claims regarding the most important issues of the day, on behalf of anyone affected by a public decision. Of these qualities, the first two are a function of judicial impartiality or autonomy, while the third is quite distinctly about the capacity to intervene effectively. Thus we define formal **autonomy** as the extent to which a particular court is free from control by an identifiable faction or interest outside the court, both *before* the judges are seated, through the formal process of *appointment*, and *after* the judges have been seated, by formal means of

punishing or rewarding judges. We define **authority** as the nature and scope of a court's potential sphere of action: its formal capacity to intervene efficiently and decisively in a broad range of politically significant disputes on behalf of a broad range of actors. In institutional terms, autonomy is comprised of rules that create inclusive and consensual processes for appointing judges and for manipulating (extending or truncating) their terms, while authority includes a court's jurisdictional reach, its accessibility, and the decisiveness of its decisions.

Although elements of all three are often conflated indistinctly in existing measures of judicial independence (Staton and RF 2014), there are good conceptual and empirical reasons to treat these qualities as distinct dimensions. A court with great autonomy but little authority can offer a perspective that is distinct from the political players in its environment but its potential sphere of influence is limited. Likewise, a court with high authority but little autonomy is well equipped to shape politics and policy, but it is unlikely to speak with a different voice than its legislative and executive counterparts (either because the judges are hand-picked ideological allies of the regime or because they fear the consequences of challenging powerful interests). The point is that neither will be as consequential, as a separate political actor, as an autonomous and authoritative court. But it matters where the weakness lies, even if ultimately neither contributes a distinct and important voice to the politics of the country. Highly efficient courts with a broad scope of authority but no autonomy may be powerful instruments of repression and legitimation, as authoritarian courts frequently are. Conversely, highly autonomous courts may remain completely irrelevant if their authority is limited to the mundane and inconsequential, if they are paralyzed by supermajority decision rules, or if they can be accessed only by, as in the

case of Ecuador '95, a few select majoritarian actors.[2] Their distinct constitutional voice and failure to influence politics might lead to simply discrediting constitutional discourse.

Consider, for example, the Ecuadorian Tribunal of Constitutional Guarantees, as defined in the 1978 Constitution of that country. This court seated justices representing diverse sectors of the state and society, including representatives of both workers and chambers of commerce, the courts, the legislature, and the executive, giving it substantial autonomy from dominant political actors; but it was required to submit its declarations of unconstitutionality for approval to the legislature, thus limiting its authority. Some of the judges in Latin America served terms that were expressly set to be concurrent with the president's, while others are appointed for life; some have mechanisms that give the executive authority to unilaterally appoint judges, while others require the intervention and approval of multiple actors. An adequate account of judicial power, therefore, must offer insight into each of these dimensions of judicial functioning; and an adequate analysis of judicial design must similarly tally the mechanisms that affect each of these three requirements for truly consequential courts.

In this section we illustrate the utility of a multidimensional measure that moves beyond the independence of judges to speak to the relationship between law and politics. The intersection of high and low levels of autonomy and authority yields four stylized models of judicial design, each reflecting a different approach to structuring the relationship between the court and its political environment. In Section 2 below we discuss each dimension in much greater detail: we present the theory that informs the concepts of autonomy and authority, and we discuss the indicators we use to operationalize each concept.

[2] The 1995 amendments to the Ecuadorean constitution limited Constitutional Court access to the President, the legislature (upon a vote by the majority of its members), the Supreme Court (again, on a majority vote), provincial or municipal councils, in limited instances, the Defensor del Pueblo, or on petition by a thousand citizens.

Judicial influence speaks to the dynamic relationship between law and politics more generally. Changes to that relationship in Latin American appear to be broadly representative of global changes in the relationship between law and politics – and demonstrates the utility of expanding our view beyond the independence of judges. Here we are interested in how the autonomy and authority dimensions interact with one another. We create a classic 2x2 table to array high and low levels of formal autonomy and authority granted to constitutional courts, as depicted in Table 1. Each of the four cells represents a different approach to the relationship between law and politics, giving constitutional courts[3] a greater or lesser role in structuring social disputes and public policymaking, and granting the court greater or lesser autonomy from majoritarian political actors in interpreting and applying the constitutional form a country has chosen. These four approaches signal four distinct models of constitutional justice, which describe major changes affecting Latin American constitutionalism over this period. Table 1 identifies the four models, and we discuss them each in turn below.

Table 1: Models of constitutional justice for given levels of formal autonomy and authority

	Low autonomy	High autonomy
Broad authority	Courts with a broad agenda, but closely controlled, reinforce regime goals	Courts arbitrates issues at very center of politics, leading the way at times
Narrow authority	Courts excluded from major issues; used as a regime tool in limited circumstances	Courts monitor/enforce basic procedural & property rights; little substantive agenda

In the mid-1970s, the starting point of our analysis, courts were largely irrelevant to the politics of the day. While they could serve to resolve private disputes, and were sometimes an

[3] We use this label to refer to the apex court regardless of its formal designation as a supreme court, a special constitutional chamber, or otherwise.

important presence in arbitrating between employers and employees in the formal sector, the great distributive and political conflicts that shook the region took place outside the purview of law and courts. The right trusted the military more than constitutional courts to protect its property rights, while the left often took to the jungles and the mountains to fight for its goals rather than working through constitutional means. Repression was largely extra-legal, with some variation (Pereira 2005), and executives routinely violated constitutional strictures. The literature reflects this reality, suggesting, for example, that courts had not only long been ineffective as checks on power, but were likely to continue that way for strong cultural and traditional reasons (Rosenn 1987; Merryman 1985). As Gargarella describes this model, constitutional regimes in Latin America, from the 19th century through most of the 20th century, "were characterized by their exclusionary legal systems, the concentration of powers in the Executive, limited political rights, and the extreme use of the State's coercive powers" (Gargarella 2013: 85) – and not by the importance of their courts or their constitutional guarantees. Courts designed on this model are relegated to the political "side-lines".

In the 1980s, a market-oriented constitutional model began to take hold. It was picked up by second-generation neoliberal reforms, which included strengthening the courts in order to protect property rights and stimulate economic growth. Vast amounts of money poured into the region, seeking to create a particular model of courts – courts insulated from the rough and tumble of democratic politics (including by adopting something like a merit selection process for many judges) but largely limited to protecting property rights and commercial predictability, along with some classic liberal negative freedoms (Domingo and Sieder 2001; Salas 2001; Sarles 2001). Chile 1981 and Guatemala 1985 are classic examples of this, the traditional "Policeman" court. Both courts and constitutions were conceived in the midst of the cold war struggle, under

the tutelage of neoliberal reformers with the nearly complete exclusion of the left. These models should epitomize the Thin Rule of Law constitutions, with high levels of autonomy but narrow judicial-constitutional agendas. They are designed to protect propertied interests and basic civil liberties, but have little role in broader social and economic conflicts, at best creating the space for the market and extra-constitutional politics to do that work.

Competing with this model is another set of constitutions that define a broader constitutional agenda. These Social Rule of Law constitutions were motivated often by disillusionment with the results of neoliberal reform and a quest to democratize societies by promoting social and economic inclusion. They still relied on autonomous courts, but they gave them a much broader agenda, including a long list of social and economic rights, strong mechanisms for claiming individual and collective rights, and more generous provisions for access, designing them to be Pioneers of social change. If second generation constitutions were neoliberal, these social constitutions constitutionalized many erstwhile private interactions and much social and economic state policy, without, however, withdrawing their concern for classic liberal rights (Brinks and Forbath 2014). Brazil's 1988 and Colombia's 1991 documents are typical social constitutions. These constitutions define a more social democratic agenda, with strong courts that can protect and push forward the progressive goals defined in their extensive bills of economic social, and cultural rights.

By the late 1990s, however, the pendulum had swung away from the classic liberal model. Beginning in Venezuela, but continuing in Ecuador in 2007 and Bolivia in 2009 (and with a very recent nearly-successful attempt in the same direction in Argentina), constitutions embodying "Bolivarian socialism" appeared in the region. These constitutional models made no secret of their disdain for old-fashioned representative democracy, and expressly advocate for

law and courts as an instrument of social transformation in line with the demands of the new model (Couso 2013; Brinks 2012). Courts that would meet these requirements must have a broad agenda, somewhat like the social democratic courts, of course. But if they are to advance the correct agenda, and not impose too many constraints on these quasi-revolutionary governments, they must also be closely tied to the preferences of the executive and dominant party.

If we are right about the basic constitutional models adopted by these countries, and if the design of their systems of constitutional justice track with these ideas about the role of law in politics, then we should see some correspondence between the qualitative descriptions laid out above, and our institutional measure of judicial autonomy and authority.

One plausible objection to any focus on institutional arrangements, of course, is that institutional arrangements may be weak or even blatantly misleading indicators of what sort of courts a country might have. We readily concede that judicial power is not simply a function of institutional design, just as presidential power is not purely a function of institutional design. Indeed, the literature that addresses the sources of *de facto* judicial power tends to emphasize one or more of three sets of variables. First, the balance of preferences and power in a court's political environment is thought to influence the degree to which a court can (and is willing to) challenge powerful interests (Epstein and Knight 1998; Bill Chavez 2004a, 2004b; Epstein et al. 2001). Second, scholars point to societal variables, such as the importance of legal mobilization efforts by non-governmental actors, like NGOs and legal organizations (Epp 2009, 1998; Gauri and Brinks 2008) or the lay public through mass public opinion (Staton 2010; Staton 2004; Vanberg 2001; Gibson et al. 1998). Third, many have argued that judges' ideological orientations and policy preferences influence their willingness to take advantage of the tools they

are equipped with and the strategic openings afforded by their political environments, particularly in cases where the law is indeterminate or conflicting (Segal and Spaeth 2002). Thus, the literature suggests that whether and how courts use their formal power is contingent upon at several variables that are beyond the scope of the present analysis.

At the same time, close examination of the foregoing *de facto* explanations for judicial power suggests that they are not independent from institutional design: formal institutions mediate the influence of the contextual variables. Judicial institutional design can minimize or magnify the ability of other political actors to punish defiant justices, for example (Helmke 2005), thus making them more or less sensitive to their political environment. The extent to which social actors are granted standing to assert constitutional claims, and the nature of the claims that can be made, informs the extent to which social groups will see the court as an ally and mobilize to protect it (Wilson 2009; Gauri and Brinks 2008). And appointment mechanisms crucially condition the extent to which judicial preferences can be controlled by dominant political actors (Dahl 1957). Finally, recent analyses suggest that certain institutional features matter to judicial performance (Melton and Ginsburg 2014). In short, our point is not that formal institutional variables necessarily and exclusively explain why any court acts the way it does, but rather to make a more basic, preliminary point: regardless of one's ultimate theoretical inclination, a more systematic comparative analysis of judicial design is a necessary addition to our collective toolkit; and any such analysis must consider both the autonomy and authority dimensions.

Most extant analyses of formal judicial empowerment do not meet these standards; many focus in-depth on a single case, and the few comparative analyses tend to be under-inclusive in

terms of the features they examine.[4] Several insightful single-country case studies trace the origins of conservative or deferential judicial behavior to one or more institutional mechanisms—such as insular mechanisms of appointment, promotion, replacement, or removal—that entrench a durable ideological bias in favor of the hegemonic ruling party, maintain a conservative ideological orientation, or allow relatively efficient executive control of the judiciary (e.g. Law 2009, Hilbink 2003, Pérez-Liñán and Castagnola 2009). Others identify institutional features that make all the difference in a particular case, either because they fail to insulate a court from political pressure—e.g. insecurity of tenure (Helmke 2000)—or because they equip the court to broadly influence law and policy—e.g. ease of access (Wilson 2009)—or for any of a dozen relatively idiosyncratic reasons—(Law 2011 and 2009, Hilbink 2007, Ríos-Figueroa and Taylor 2006, Brinks 2005, Couso 2005, Wilson 2005, Ferreres Comella 2004). Our measures incorporate the insights from these individual studies, but measure them more consistently across cases and over time.

Those studies that do offer a comparative analysis of institutional design tend to emphasize ex ante autonomy (and sometimes ex post autonomy) at the expense of authority.[5] Pérez-Liñán and Castagnola (2009), for example, present a comparative institutional measure of the relative ease of executive court packing via appointment and replacement but do not develop a complementary authority measure that might reflect the relative costs and benefits of packing courts with more or less authority. Their sole concession to the authority dimension is to posit that constitutional courts will be subject to greater pressures than non-constitutional ones. In contrast, Epstein et al (2002) explicitly choose only variables that affect what we call ex post

[4] For evidence on this point, see Pérez-Liñán and Castagnola (2009) or Kapiszewski and Taylor (2008). For examples of single-country studies of the effect of institutional design on judicial behavior, see Law (2009) on Japan, Hilbink (2007) on Chile, or Chavez (2004) on Argentina.

[5] A notable exception to this is Ginsburg and Elkins' (2009) analysis of the ancillary powers of courts.

autonomy, since they consider that a court's potential agency cost is a function of tenure insecurity, not appointment mechanisms. By contrast, we measure both ex ante and ex post controls, and we keep them separate; this allows us to test whether (and when) the strategic logic dominates justices' ex ante preferences, rather than simply assuming that it does.[6] ***[we need to include a discussion of Melton and Ginsburg 2014 here].

Section 2. Unpacking formal autonomy and authority

If the more helpful "background concept" (Seawright and Collier 2014: 114) of judicial power is not "independence" but our two-dimensional analysis of autonomy and authority, how do we move from this relatively abstract discussion to a "systematized concept" (id.)? In this section we present our measure in much greater detail. We discuss existing concepts and measures for judicial power and distinguish ours,

Judicial autonomy: The traditional variable to describe judiciaries, "independence," has considerable affinity with what we have called autonomy. But it is very often limited to a judge's freedom to decide according to his or her own sense of what the law requires [cites]. That is, it is usually understood to mean a judge's ability to rule sincerely, without fear of punishment or hope of reward. To differentiate our own measure from this more limited one, we use the label "autonomy" and, as we will see, adopt a conceptualization that ties it to the ultimate value that judicial independence is meant to secure: impartiality.

We split our autonomy variable into two sub-dimensions, each with deep theoretical roots. These two dimensions address the two basic concerns of principals who decide to

[6] There are a number of existing systematic cross-national measures of judicial independence. We compare these to our own measures in Appendix B, finding some interesting patterns but not much correspondence between our measure and these others.

empower an agent: ex ante controls seek to minimize the risk of adverse selection, while ex post controls seek to address moral hazard, once the agent is appointed. Not coincidentally, the same two dimensions capture the two dominant strands in the classic judicial behavior literature: ex ante controls offer ways to select judges with particular attitudes and preferences (cf., Dahl 1957; Graber 1993), while ex post controls seek to induce strategic behavior on the part of judges, to reduce the agency costs of delegating power to courts (cf., Epstein and Knight 1998).

The literature abounds with references to each of these mechanisms of control. As Whittington (2005: 583) observes in connection with the United States Supreme Court, "most routinely, the political appointments process creates regular opportunities for elected officials to bring the Court into line with political preferences. " Rosenberg similarly notes, "the appointment process, of course, limits judicial independence. ... Clearly, changing court personnel can bring court decisions into line with prevailing political opinion" (Rosenberg 1991). The more rationalist literature, on the other hand, emphasizes features of judicial design that expose judges, once they are seated and regardless of their sincere preferences, to more or less pressure from political actors: "In the case of judicial selection and retention institutions, the greater the accountability established in the institution, the higher the opportunity costs for judges to act sincerely and thus, the more extensive strategic behavior will be" (Epstein et al. 2002: 195 citations omitted). In the one case, the court is held close to the preferences of the dominant actor by the shared, sincere preferences of the agent; in the other, the court is held close by the threat of sanction or the promise of reward.

For both conceptual and theoretical reasons, then, it is important to distinguish ex ante from ex post mechanisms of control. Intuitively, both seem important; and theoretically, each works very differently. Existing theories of judicial behavior disagree on the extent to which

each of these is effective. Defining and measuring them separately allows us, eventually, to determine which mechanisms are more effective, under what circumstances. So which institutional arrangements should be seen as increasing ex ante or ex post autonomy? We define ex ante autonomy as the extent to which a particular court is free from control by an identifiable faction or interest outside the court before the judges are seated, through the process of *appointment*; and we define ex post autonomy as the extent to which a particular court is free from pressures by an identifiable faction or interest outside the court *after* the judges have been seated.

Note that the crucial parameter is not the absence of control, but the absence of *unilateral* control. This approach is consistent with classic views of judicial impartiality but does not depend on some extra-political standard of impartiality. As Holmes notes, in real politics "the balance of many partialities is the closest we can come to impartiality" (Holmes 2003: 50). This is the same logic to which Madison appeals, in Federalist 51 (Hamilton et al. 1961: 323-24), as a safeguard against the tyranny of the majority. He calls not for the creation of "an interest independent of the majority" but rather for a government that is responsive to "so many parts, interests and classes of citizens" that oppression of any one part becomes unlikely. In the same way, courts subject to multiple overlapping influences are less likely to be biased in favor of (or against) any one partisan faction; they are less likely to be subject to fear of punishment by any one faction. Eugenio Zaffaroni, one of the key participants in Argentina's 1994 Constituent Assembly, and later a Supreme Court Justice, made this point very clearly in debating mechanisms of judicial appointment: "You cannot secure impartiality by putting someone above what is human. If someone thinks he is above human frailty, more than a candidate for judge he

is a candidate for therapy. In a democracy, impartiality is secured through a guarantee of institutional pluralism."[7] That institutional pluralism is what we look for in defining autonomy.

Importantly, this definition does not unrealistically require courts to be completely unmoored from their political and social surroundings, but still speaks to the notion that courts exist to serve as neutral, impartial third parties to resolve disputes (Shapiro 1981; Stone Sweet 1999) – the more judges are free from dependence on or control by any single individual, institution or interest, the more likely they are to be impartial, especially in disputes involving that interest. This is, essentially, the goal which independence is typically sought to serve.

In developing indicators for autonomy, then, we assign higher values to institutional designs that bring more (diverse) veto players into the process of appointment or discipline, in order to produce "the balance of many partialities." Conversely, the greater the influence of any single actor on the *ex ante* and *ex post* mechanisms of control of the court, the lower the court's autonomy score. In other words, we score mechanisms of selection and removal that increase and diversify participation and representation in the process as positive for autonomy, on the theory that they produce more impartial justices who are less tied to the preferences of any single powerful actor, and more free to follow their preferences.[8] We also increase the score if the decision rule for appointments and removals specifies a super-majority requirement, because we consider that such a rule is more likely to require consultation and negotiation with a minority interest, and thus is more likely to lead to broadly consensual decisions.

Specifically, the intervention of more actors in appointments should lead to broadly consensual justices with more mainstream preferences and strong technical qualifications. The

[7] Statements made in the course of debates in the 1994 Argentine Constituent Assembly. Transcripts of Debates, Vol.4, p.3254 (copy on file with authors).

[8] See also Ginsburg (2002) for a brief discussion of this logic.

presence of multiple veto players in the appointment process should tend to narrow and center the range of possible outcomes, eliminating unqualified, out-of-the-mainstream or transparently biased candidates, and leaving only those who fit broadly shared definitions of what it means to be an acceptable justice with acceptable preferences. In contrast, justices appointed by executive decree, for example, are more likely to faithfully reflect the executive's preferences, to be unconditional allies, and thus to articulate views that are less distinct from those of the executive. In summary, the score for ex ante autonomy is a function of a count of the number of actors involved in the nomination and confirmation process, plus a bonus for supermajoritarian consensus requirements, and another for the participation of extra-political actors in that process.[9]

Similarly, in the case of *ex post* control, the presence of more veto players who must coordinate in order to punish or reward judges makes it harder to affect a judge's incentive structure, leaving the judge more free to express his or her sincere preferences. Courts subject to broadly consensual mechanisms of ex post control may not be entirely free to "reflect their preferences in their decisions without facing retaliation measures" (Iaryczower, Spiller, and Tommasi 2002: 699), but at least retaliation will have to be based on a broad-based consensus that they have exceeded the proper bounds of conduct for a judge, and the cooperation of multiple actors.[10] In our scoring, a justice who is subject to removal on the sole decision of the president is less autonomous than one who can only be removed after a positive vote by each

[9] We only increase the score for participation of an outside actor, if that outside actor has a function other than simply nominating justices. If a nomination committee is simply composed of Presidential nominees selected for that purpose, for example (as in Venezuela), then we consider it to be merely an administrative device to communicate executive preferences. On the other hand, if a majority on the committee is made up of civil society actors who have other functions, like law school deans (as in Guatemala), then we consider that it adds another actor to the process.

[10] Note that this is very nearly the opposite of the logic suggested by Epstein et al (2002), who essentially assume that any single actor involved in the removal process can punish or reward, thus increasing the constraints on judges' ex post autonomy.

chamber of the legislature. And if the legislature must act by a two-thirds vote we increase the score again. More veto players in the removal process equals more ex post autonomy.

Thoroughly evaluating how insulated sitting judges are from outside pressures, however, requires us to consider several factors in addition to the formal disciplinary process. The first, of course, is the length of judicial tenure. Life terms (or at least very long ones) are frequently considered necessary for judicial autonomy because they free judges from the need to curry favor with outside actors. Appointment for life conditional only on good behavior, Hamilton famously wrote, "is the best expedient that can be devised in any government to secure a steady, upright and impartial administration of the laws" (Federalist No.78). Since we are coding institutional features according to the expectations of judicial designers, and since the conventional wisdom appears to be that longer terms are conducive to autonomy, we code term length as positive for ex post autonomy. Short non-renewable terms moderately decrease ex post autonomy scores (because they create incentives to please powerful people in order to secure post-term jobs), while short terms *with* reappointment are coded as most substantially decreasing autonomy, because they encourage judges to curry favor with the politicians who could reappoint them. By the same logic, we code a young mandatory retirement age as negative, as judges looking forward to a second career are more likely to favor powerful outside actors who might be future employers.

Finally, we consider a number of ways – legal and extralegal – in which political actors have historically sought to pressure judges into rendering favorable decisions. Court packing, jurisdiction stripping and monetary pressures on the court and the judges are common and well-known schemes. As a result, some constitutional designers have made it more difficult to generate these pressures with constitutional provisions fixing the number of judges to reduce the

threat of court-packing schemes, salary protections to shield judges from monetary pressures, and so on. Where these controls are left to ordinary law or the discretion of other actors, they are open to manipulation. We increase the score for ex post autonomy for each one of these parameters that is constitutionally protected. Table A1, in Appendix A, summarizes all these indicators and their effect on the final score.

Judicial authority: Still, the most autonomous and unaccountable court in the world will not be an influential political force if it is difficult to access or lacks the tools to act decisively on a wide range of issues. The authority dimension—which refers to the nature and scope of the court's potential sphere of action—captures this component of formal judicial power. We define a court's scope of authority as its ability to intervene efficiently and decisively in a broad range of politically significant disputes on behalf of a broad range of actors.

In design terms, this requires us to evaluate judicial features along four separate subcomponents. The first includes all the elements that define the scope of the court's jurisdiction – the nature and number of rights it is charged with enforcing, as well as any ancillary powers it might have beyond deciding cases, such as impeaching presidents or supervising elections. The second relates to the nature and number of actors that are empowered to bring cases before the court. Some constitutional courts are limited to hearing complaints brought by elected officials, others are more generally accessible, while still others have expedited procedures and lowered barriers. This generally captures what has been labeled access to justice, at least for constitutional claims. The third component relates to the effect of a court's decision – essentially whether the court is empowered to make decisions with generally binding effects, or whether its decisions are binding only on the parties before the court; whether it can invalidate a law for unconstitutionality or must be content with the right not to apply the law in a

particular case. Finally, we examine whether the court is hamstrung by a supermajority decision rule, requiring a high degree of consensus before ruling on the unconstitutionality of a law or action. Since 2005, the Chilean Constitutional Court, for instance, has needed the vote of eight out of its ten members to find a law unconstitutional. Such a rule in the United States might have rendered the Supreme Court completely powerless to decide a large number of the constitutional issues that polarize the country.

There are, of course, existing institutional measures of judicial independence, and Appendix B explores in more detail the empirical relationship between our measures and extant quantitative measures of independence. Keith (2002), for example, simply sums certain formal features of a nation's constitution, giving a court additional points for each of seven distinct constitutional provisions, including formal guarantees of tenure, judicial finality, protection of jurisdictional scope, and the presence of military courts. Note that some of these features affect what we have called authority, while others affect autonomy. Ríos-Figueroa (2011) defines independence and power dimensions, but collapses them into a single aggregate measure. Others, like Cingranelli and Richards (2008) mix formal institutions and behavioral criteria. But no existing institutional measure uses what we know about the wellsprings of judicial behavior to create comprehensive measures for both judicial autonomy and authority, paying careful attention to how the various features within and across dimensions interact with each other, and treating each separately to permit scholars to test whether and how each dimension shapes judicial behavior.

Next we illustrate the utility of our multidimensional measure of judicial power. We apply it in the context of 35 years of changes to the formal institutional design of Latin American courts and discuss the results and their implications below.

Section 3. Applying the measure: judicial power in Latin America

To illustrate the utility of our multidimensional measure and test the expectations in section 1 about the relationship between a court's formal autonomy and authority and its ultimate behavior, we applied our coding scheme to all constitutional events (all new constitutions and all constitutional amendments) in Latin America from 1975 to 2009.[11] We employed research assistants to code the constitutional texts in their original language, and then checked their coding ourselves against the text of the constitutions in question. The full dataset, reporting annual scores for all the courts in Latin America on all dimensions, is available online as both a Stata dataset and an Excel spreadsheet.

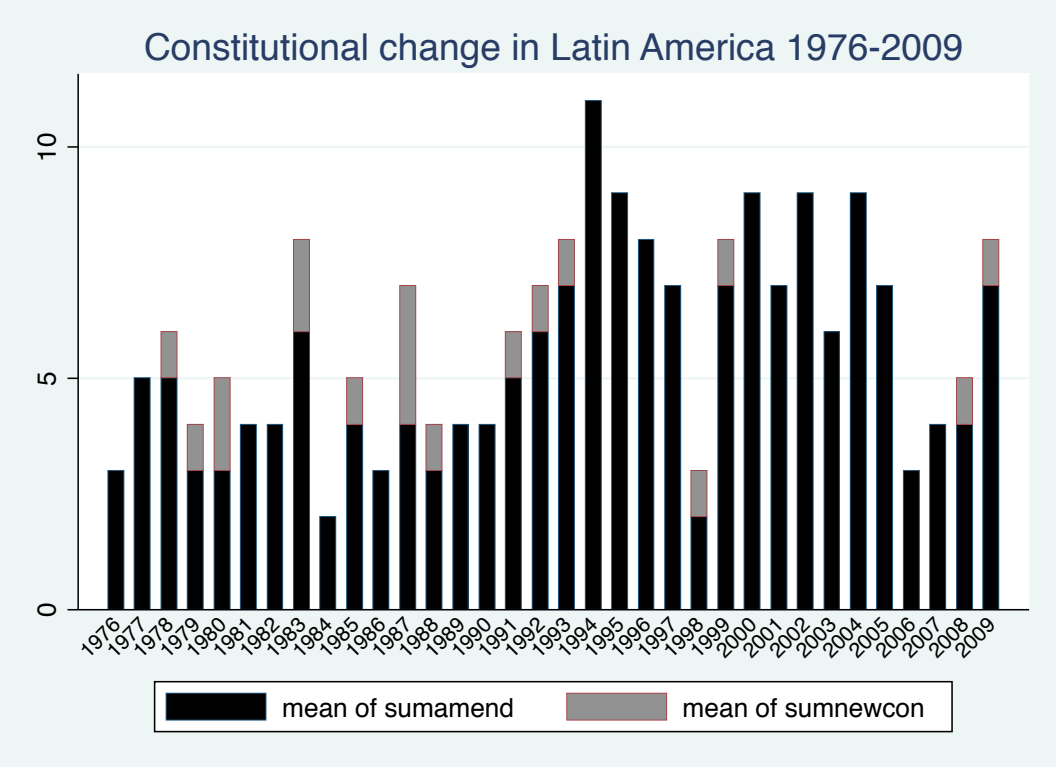
We test our measure on Latin American courts in the period from 1975 to the present for methodological and substantive reasons. There is considerable institutional variation on all these dimensions in the courts of the region during the period, and it captures crucial political and legal changes that are representative of such movements across the world. In the 1970s, Latin American was nearly all under authoritarian rule; since then, it has become nearly uniformly democratic (Mainwaring et al. 2001). Moreover, the change to greater judicial relevance is widely acknowledged to have taken place over this same time period (Tate and Vallinder 1995; Couso et al. 2010; Hirschl 2008; Sieder et al. 2005; Shapiro and Stone Sweet 2002; Stone Sweet 1999). Finally, Latin America is one of the areas with the most active constitutional experimentation in the world (Elkins et al. 2009). This region and time period, therefore, should capture the major changes in constitutional legality observable over the last few decades, and

[11] Wherever possible we used the same variables developed by the Comparative Constitutions Project, led by Tom Ginsburg and Zach Elkins, but supplemented those as needed for our coding. For more details on this project, see www.comparativeconstitutionsproject.org.

permits us to test whether our multidimensional framework illuminates that variation and uncovers patterns that existing measures miss.

While one might expect constitutional features to be relatively invariant over time, Latin American countries have been engaged in frequent constitutional change over the last thirty years. Figure 1 presents the number of countries making constitutional changes, whether by amendment or by writing a new constitution, by year in all the countries of Latin America. The number of changes peaks in the mid-90s but is otherwise relatively constant, affecting about one quarter of the roughly twenty countries every year.

Figure 1: Constitutional Change by year in Latin America, 1975-2009



On average, each Latin American country has enacted approximately ten constitutional reforms (each of which might amend dozens of articles in the constitution) in the thirty-five years we covered, or about one every three years. Brazil and Mexico top the list, with twenty-eight and thirty, respectively. Haiti has made no amendments, but has had three different

constitutions in that period, as has Ecuador. Not all these changes affect judicial design, of course, but as we will see in the analysis below, these changes had a significant impact on the design of judicial institutions in the region, as well as implications for formal judicial ex ante autonomy, ex post autonomy, and authority. The question is, first, does the general trajectory match the conventional view of linear, if uneven, empowerment and gradual convergence, or is it better described by the multidimensional approach we advocate here? And second, what can we learn about these courts by looking at the features that affect their autonomy and authority?

As a preliminary matter, the way in which the three dimensions relate to each other offers support for a multidimensional framework: they are only modestly (and in some cases negatively) associated, suggesting that they are not simply redundant or collapsible. The measures of ex post and ex ante autonomy are negatively though insignificantly related, but each has a positive and significant association with a court's scope of authority, suggesting that designers may be seeking ways to fine tune a court's power, through trade-offs across dimensions.

Table 2: Correlation among key variables (significance level)[12]

	Ex ante	Ex post
Ex post	-0.06 (0.3485)	
Authority	0.25 (0.0003)	0.21 (0.0024)

Figure 2 traces the changes in the regional mean for each dimension of formal court design. Whereas the conventional account of judicial empowerment suggests (with very few exceptions) a slow but inexorable movement toward greater formal independence for judges,

[12] This analysis is done using the unique document as the case. There are 215 unique documents and 75 unique courts (that is, counting only constitutional reforms that change the court's score) in our data set. We could do the same analysis for all country years (correlations are similar but slightly lower and equally significant), or only for unique courts (correlations are similar but slightly higher, with lower levels of significance given a smaller n).

Figure 2 reveals a more complicated story and provides further support for a measure that disaggregates the two components of independence (what we call autonomy)[13].

Figure 2: Regional average levels of ex ante autonomy, ex post autonomy, and authority in Latin America, 1975-2009

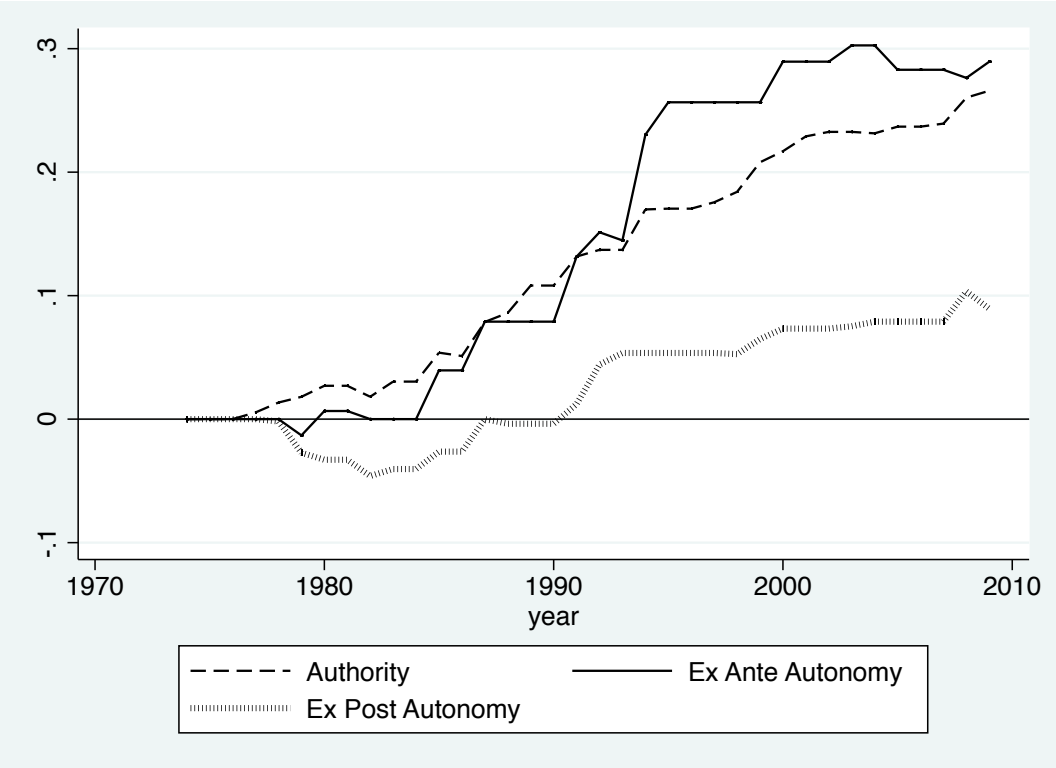


Figure 2 shows (a) an expansion of judicial authority, coupled with (b) increased ex ante autonomy (that is, increased pluralism in the appointments process), but with (c) a much more modest (average) increase in the insulation of judges once on the bench. Indeed there is a decrease in the annual average level of ex post autonomy in the region in the early 1980s that is as important as the subsequent increase. The overall trend, as we will see, hides the fact that there is considerable diversity in this measure by the end of the period. In other words, compared to thirty-five years ago, courts in Latin America on average have a broader mandate, and judges

[13] To produce Figure 2 we mean-centered the values of the three variables by subtracting the 1975 regional mean for each one; any movement up or down in the demeaned variables simply reflects changes from the 1975 regional mean.

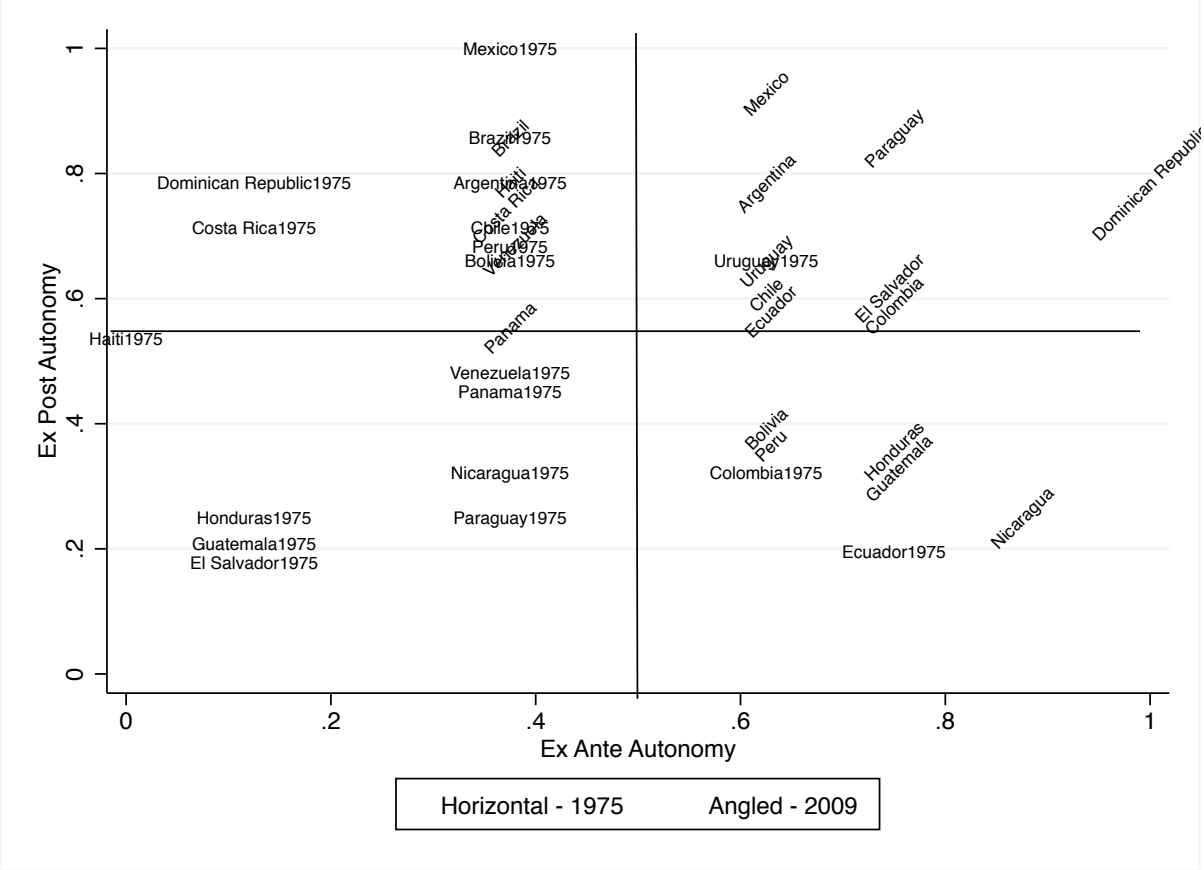
are the product of more inclusive, less partisan appointments, but may remain subject to some political control once seated.

What does this mean for the dominant logic of judicial design in Latin America? Given what we know about ex post and ex ante mechanisms of control, the picture suggests an interesting shift in the locus of political control over courts in the region. The more the number of actors in the appointment process is restricted, the more the process usually becomes dominated by the executive. Low ex ante autonomy, therefore, indicates a court controlled by the executive, perhaps with the support of a single majority party or coalition. Ex post control, on the other hand, is usually exercised by the legislature, through impeachments and reappointment powers, court packing schemes, etc., with little or no direct role for the executive. Low ex post autonomy thus indicates a court accountable to a legislature, again acting by simple majority. When autonomy is low, therefore, both ex ante and ex post control should tend to produce largely majoritarian judiciaries, unlikely to significantly challenge dominant preferences over constitutional meaning. But ex ante control is typically exercised in more dominant fashion by a unitary actor, the executive, while ex post control must be channeled through a legislature (which may or may not be a rubber stamp for the executive, depending on the configuration of power in a country at any given time).

A scatterplot of courts in 1975 and 2009, Figure 3, below, shows this temporal shift quite dramatically. Except for Uruguay's, all the courts in the upper right quadrant, with high autonomy both ex ante and ex post, are 2009 courts, while we find only 1975 courts in the lower left quadrant. With only two exceptions, all the courts in the lower right – which deny the executive unilateral appointment control, but make sitting judges more accountable to the legislature – are also from 2009. The upper left quadrant is mixed, but twice as many early courts

as late ones give the executive more control over appointments and then insulate the resulting judges from pressure.

Figure 3: Political control of courts in Latin America, 1975 and 2009



The overall pattern indicates that as courts were given increasing rights to enforce, more tools to intervene in policy disputes, and more decisiveness, constitution-makers also pluralized and diversified the appointments process (recall that authority and ex ante autonomy are positively correlated). Less uniformly, they also protected judges from undue interference; we see five different courts experiencing a decline in ex post autonomy over this period, compared to only one for which ex ante autonomy declined. By the end of the period, then, the dominant approach had limited the executive's control over appointments, while showing a great deal more diversity in the degree to which courts are insulated from control by the legislature, shifting

political control over the courts from the executive to the legislature. Interestingly, this divergence suggests constitutional designers are (implicitly or explicitly) distinguishing between the effects of the strategic and attitudinal models of judicial behavior: the changes appear to express a preference for depoliticizing the mechanism of choosing who sits on the bench (and therefore, what judicial preferences are present) while simultaneously maintaining, at least formally, some degree of pro-majoritarian ability to discipline or remove judges once they are seated.

Next we present the results of a test of our expectations in Section 1 regarding the model of constitutional justice chosen and a court's behavior. Figure 4, below, is arranged to match the conceptual space described in Table 1. We divide the scatterplot into four quadrants that correspond to the categories (high and low autonomy, narrow and broad authority) in Table 1.[14] We plot the locations of all the countries of Latin America on our measures of authority and autonomy (the autonomy measure is the mean of ex ante and ex post autonomy) at the beginning and at the end of the period of analysis –1975 and 2009. Notably, all the courts have varied their institutional design, at least by a small amount; just as notably, all the courts have moved in the direction of greater autonomy and/or greater authority.

[14] The quadrants are defined by the means for authority and autonomy of all the distinct documents of the region for this period.

Figure 4: Autonomy and authority of Latin American Courts, 1975 & 2009

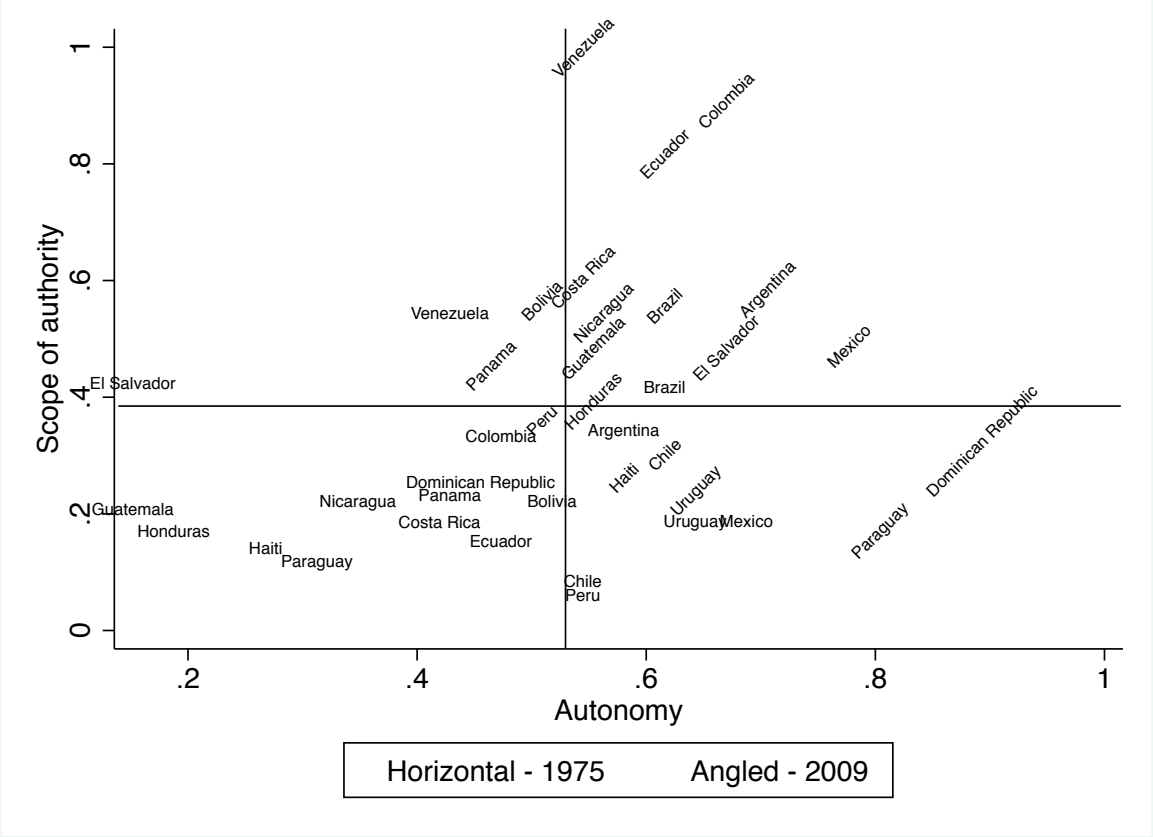


Figure 4 shows that our institutional measure, used to generate four stylized models of judicial influence that map onto the four quadrants shown above, tracks reasonably well with what we know about the behavior and influence of courts in Latin America. There is not enough space here to discuss each case in great detail, but we present preliminary evidence to substantiate the relationship for several well-known cases in the region. In particular, the majority of constitutions in place in 1975 (shown as horizontal names in Figure 4 above) established courts designed to sit on the Sidelines: courts with little autonomy – executives largely dominated appointments – and very little authority. Guatemala, Honduras, Haiti, and Paraguay are especially good examples of courts that failed to constrain politics in any significant way, and they score among the lowest on both dimensions of our measure. Even Costa Rica, which was a long-standing democracy with a reputation for the rule of law, had a

court that was completely dormant until the 1990 reform that produced the court we see in 2009 (Wilson et al. 2004). Notably, the upper right quadrant—judicial 'Pioneers', in our terms—reflects effectively no courts from the 1975 period (Brazil's STF is just barely above the boundary for each dimension). At the end of the period, only Peru's court remains in this category, and it is nearly at the boundary for both dimensions. To be clear, the argument here is not that the institutional arrangements are completely exogenous to politics and single-handedly cause judicial weakness. The point is, rather, that the institutional arrangements reflect the dominant preferences in that time period for relatively weak and controlled judiciaries. It might be that no institutional arrangement could have overcome that preference, but it is no less true that these institutions worked the way they were designed.

Next we consider the lower right quadrant, where we expect to see traditional 'Policeman' courts: those that are autonomous enough to police and protect basic neo-liberal guarantees, but that lack the broad scope of authority that would allow them to reshape the political landscape across several domains. As expected, the Pinochet-designed Chilean Constitutional Court is squarely in this quadrant. Similarly, the court contemplated in Guatemala's 1985 constitution – designed under a military regime, with the guerrilla still in the jungle, and with everyone to the left of the Christian Democratic party still in exile – and the Salvadoran court, designed under similar circumstances, are well below the mean for the later period and just escape the cut off. Uruguay's court through the entire period also falls in this quadrant. It has, as many have noted, a high degree of autonomy, but it has never been a significant player in the politics of that country except to guarantee compliance with the basic rules of the game (Skaar). All the countries that (at least until recently) were dominated by right

wing parties after the transition to democracy – El Salvador, Honduras, and Paraguay – also fall in this quadrant.

In the northeast quadrant of Figure 4 we expect to see judicial Pioneers: courts designed to be political trailblazers, enabled by their relative insulation from political pressure, their accessibility, and a broad toolkit across many domains. As excpected, Brazil's 1988 constitutional court (the Supremo Tribunal Federal), Argentina's court after the 1994 reforms, and Colombia's 1991 court all fall squarely in this quadrant of the graph. Colombia, by most accounts the country with the most active and consequential court in the entire region, has the court with the highest degree of authority among this group. Nicaragua, the one Central American country where the left won the violent struggles of the 1980s, and has had a consistently strong leftist party, is within this quadrant as well. The Mexican constitution, long recognized as one of the first to incorporate social and economic rights, also brought its constitutional enforcement mechanisms more into line with this impulse. With a series of reforms, including the ability to strike down a law in the abstract for unconstitutionality, the addition of indigenous rights, stronger non-discrimination provisions and so on, the Mexican court moved up in authority while preserving a design that seemed intended to insulate it from the political realm.[15]

Finally, in the northwest quadrant we expect courts that behave as Regime Allies: courts with comparatively broad authority but only limited autonomy from majoritarian political actors. Far from 'rubber stamps' to a regime, these courts are equipped with an enviable toolkit, including a broad agenda, open access, and decisive rule-making authority, making them a

[15] Of course, Mexico was dominated by a hegemonic party that responded quite directly to the President for many years, so the Executive had considerable authority in spite of its formal weakness. By the same token, institutional protections had limited consequence in a context in which one party dominated the Executive, the national legislature, and all state legislatures.

valuable means to project and extend power while harnessing the relative legitimacy of judges and the rule of law. The Bolivarian courts – Venezuela, Ecuador and Bolivia – roughly track with our expectations for courts designed on this twenty-first century socialist model. All three are ranked among the top five courts in levels of authority, with Venezuela and Ecuador scoring particularly high. They are also, broadly speaking, low in autonomy. Venezuela and Bolivia are, respectively, right above and right below the overall mean. Ecuador breaks the pattern somewhat: although it is quite low for the period in which it was designed and among the lowest in this quadrant, it shows levels of autonomy that are not all that different from the courts defined in more social democratic countries. In practice, of course, all three of these courts have been less autonomous than even their design would suggest. In the Venezuelan case, the courts have been extensively manipulated in extralegal, extra-constitutional ways, and have become powerful tools of repression and social and political control (Inter-American Commission on Human Rights 2009; Pérez Perdomo 2003; Weyland 2013). In Ecuador and Bolivia, the country's high courts have also become identified with the ruling regime, and have served a similar purpose (Weyland 2013). They legitimize and give constitutional blessing to the major social and economic transformations proposed by the regime, and help eliminate legal and political obstacles to their realization. Even more than their institutional design suggests, then, these courts have acted in the way suggested by our formal measure, pushing them into northwest quadrant.

In sum, the data demonstrate clear variation in the levels of authority and autonomy designed into the newly reformed courts of Latin America. The systematic variation in institutional design contradicts the notion of a clear-cut, region-wide (if still incomplete) movement toward a liberal constitutionalist, rights-based model of democratic politics achieved

through the creation of powerful and autonomous courts. In matters of institutional design at least, constitution drafters built into their courts different mechanisms of political control that are more or less inclusive, and gave their courts more or less authority to intervene in the weightiest matters of the day.

Conclusions

The framework developed above and its application to judiciaries in Latin America over 35 years has several important implications for our understanding of judicial empowerment, judicial behavior, and institutional design more generally. Our analysis of judicial autonomy and authority yields three primary insights for our study of courts and their interaction with other political actors. First, the results support our multi-dimensional conceptual framework and measurement strategy. *De jure* judicial power, like *de facto* judicial power, is a complex concept and measuring it takes considerable care. It is comprised of many institutional features, some of them quite subtle, and its distinct dimensions cannot be accurately represented by a collapsed, additive index of judicial independence or any cognate concept. Moreover, the autonomy dimension, as our theoretical debates about the wellsprings of judicial behavior suggest, must also be disaggregated to specify the particular mechanisms of political control (*ex ante* or *ex post*) being used to reduce the agency costs of each court.

Second, our analysis suggests that the conventional, somewhat teleological narrative of, eventually, near-universal increases in independences and power for judges might be misleading. Our theoretical discussion of the goals of court designers highlighted why we should not expect across-the-board increases in formal autonomy and authority, and our empirical results bore out that expectation. Those who design courts must resolve the classic principal-agent puzzle: how to delegate authority to another actor but retain the ability to shape that actor's behavior. The

application of our framework to Latin American courts suggests that institutional designers in the region understood the tradeoff between judicial autonomy and accountability and have chosen different ways to resolve the tension by emphasizing either ex ante autonomy or ex post accountability – or, at times, neither. Compared to historic patterns, the chosen resolution often shifts influence over the judiciary from the executive to the legislature. These related points account for our finding that while overall levels of judicial power have increased, qualitatively different models of legality have emerged in different places at different times, with important implications for existing accounts of the emergence and behavior of powerful courts.

This variation invites questions for future research. In particular, we might want to know which set of factors better explains, and which actors prefer, the use of ex ante versus ex post controls. We can also use this framework to more systematically explore why some countries choose autonomous courts with minimal authority, or vice versa. Some have suggested that authoritarian regimes, like Franco's in Spain or Pinochet's in Chile, prefer autonomous courts with limited authority. That may be true in those cases, but in Latin America it is clear that authoritarian regimes by and large preferred courts with neither a great deal of authority or autonomy, while more recent regimes with authoritarian tendencies, like the Venezuelan one, have opted for courts with greater authority but less autonomy. A more systematic analysis is needed to go beyond anecdotal findings.

Moreover, using the framework as an independent variable to explore the differential effect of autonomy and authority on judicial behavior would almost certainly yield new insights into judicial decisionmaking. The disaggregation of ex ante and ex post autonomy and authority allows scholars to explore how the dimensions interact, and with what (if any) effect on judicial behavior. Using our framework we identified four distinct models of constitutional justice and

we developed expectations about the behavior of courts for each model. We hypothesized that courts with low levels of both autonomy and authority were institutionally 'crippled' and relegated to stand on the political sidelines, while the opposite was true of courts with high levels on both dimensions. For the 'mixed' models, we posited that each dimension contributes a distinct influence, such that courts with high autonomy but low authority, for example, behave quite differently than their counterparts low autonomy but high authority. We presented preliminary evidence to support these expectations, but our results invite finer tests across time and space of whether and how different models of constitutional justice affect judicial decisionmaking.

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 qualified 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. Even a state that drapes a veneer of legality over essentially political repression is bound to be more constrained than the extra-legally repressive regimes of the 1970s, and opposition actors might find useful spaces within the law even if the courts respond quite closely to the executive. At the same time, of course, the law is a powerful instrument of social control and legitimation, so we should not underestimate its potential for oppression.

Our historical exercise, as necessarily superficial as it was, highlights the utility of our new, three-dimensional measure of judicial power. It is unrealistic, of course, to expect a perfect congruence between the dominant political project and formal constitutional provisions. The politics of constitution making and constitutional change necessarily produce some slippage

between the preferences of dominant actors and the constitutional outcome – this and related issues need to be explored in further research on the determinants of judicial design. But the remarkable coincidence between our measures of constitutional legality and the evocative descriptions of the regimes in question suggests our new variables capture important aspects of judicial and constitutional reality. Moreover, none of the one-dimensional measures that have dominated the literature so far can capture the full range of movement and the interesting variation exhibited by the actual courts of Latin America over the last thirty-five years. It is clear that conceptualizing autonomy as pluralism in appointment and tenure-related processes, and splitting judicial power into its component dimensions, is necessary for understanding the evolution of law and politics in Latin America since redemocratization in the late 1970s.

Finally, the conceptual framework presented above is not limited to courts, but could be adapted and applied to many other state institutions. Central banks, regulatory agencies, prosecutors' offices, ombudsmen's offices, police and military forces, all can be analyzed along the same three dimensions. Some are explicitly meant to be subordinated to political authority while others are not, and the mechanisms of control can similarly vary and be classified into ex ante and ex post mechanisms. Each has distinct substantive areas of operation, but the importance of their role within these areas can vary in terms of the scope of their authority. Central bankers can have longer or shorter terms and be more or less insulated from removal pressures. They can be given more or less expansive agendas – they might be charged merely with controlling inflation or also with producing more employment, and so on. Appointment, removal, and the various other design features we examine here, vary across these agencies, over time and across countries. Designers have approached and solved these problems in very different ways, depending on the institution in question, but the same general principles apply.

Appendix A: Components of, and formulae for the dimensions of judicial design

Ex ante autonomy

Ex ante autonomy is a function of the number of veto players required for appointment – capped at 3 – plus:

+.5 if collective actor included (i.e. legislature)

+.5 if the vote of one or more outside actors (e.g., judiciary or civil society actors, such as Bar Associations or Law Schools) is necessary for appointment of a majority of court

+1 if a supermajority requirement at any stage affects appointment of a majority of the court

Descriptives for Ex ante autonomy: Range 0-1; mean=.4806287, s.d.=.2475896

Ex Post Autonomy

Ex post autonomy is a function of term length and provisions for periodic reappointment of justices, conditioned by impeachment mechanisms, and the extent to which institutional features that might be used to pressure the court are protected in the constitution.

1) Term length (0-4): 0 if at will; 1 if <5 yrs.; 2 if 5-7 yrs; 3 if 8-10 yrs; 4 if >10 including life.
2) Score for term length is cut in half if judges with fixed terms are subject to reappointment
3) Plus a bonus ranging from 0-2 for difficulty of removal, conditional on ease of impeachment and length of term (see below for calculation of the bonus). Essentially, the idea is that impeachment of a justice is always a costly event (this is why we restrict the range to 0-2 rather than 0-4), even if the procedure is fairly efficient, and a very short term makes the possibility of impeachment somewhat superfluous. So tightening procedures for removal of justices will matter more when justices have longer terms; or to put it differently, difficult impeachment procedures add more security to longer terms than to short ones.
4) Plus a 1 point bonus for each of two pressure points protected in constitution: number of judges and salary

Bonus for difficulty of removal=(.5*difficulty of removal)*term

difficulty of removal =
total number actors required to impeach (range: 0-3)
+1 if supermajority requirement =
Bonus for difficulty of removal:

Difficulty of removal	Length of term				
	0 (at will)	1 (<5)	2 (5-7)	3 (8-10)	4 (>10, inc. life)
0	0	0	0	0	0
0.125	n/a	0.125	0.25	0.375	0.5
0.25	n/a	0.25	0.5	0.75	1
0.375	n/a	0.375	0.75	1.125	1.5
0.5	n/a	0.5	1	1.5	2

Descriptives for Ex Post Autonomy: Range 0-1; mean=.5576702, s.d.=.2443265

Authority

A court's scope of authority is a function of its jurisdictional reach (the breadth of issues entrusted to its protection), multiplied by its accessibility and decisional capacity.

1) Jurisdictional Reach:

Rights (domestic civil & political, domestic social & economic, international) are counted so we have 1-3 ordinal categories for each of Economic, Social and Cultural Rights and for traditional Civil and Political Rights, then each class is transformed so it runs 0-1. ESCR count 1.5 as much as CPR because they more directly affect questions of public policy, and give courts a broader platform for intervening in a broad range of substantive disputes. Incorporation of international treaties counts for one additional point.

*gen rights=(cprcut/3) + ((escrcut/3)*1.5)+(docincorp)*

The theoretical range is 0-3.5; the empirical range is .83-3.5

Plus ancillary powers (range 0-2, for impeachment of president, supervision of elections or neither)

Minus a penalty for military courts that limit jurisdiction (.5)

jurscope=rights+courtancil-(militcourt/2)

2) Who can bring claims (access) and with what effect for each kind of access (effect) captured by *standeffect* (an ordinal ranking with range of 1-5). We create an aggregated ordinal ranking for standing and effect, because access is typically tied to the type of action being brought.

Standeffect is coded as follows:
1 = no ability to declare any act or law unconstitutional (basically, Guatemala and Nicaragua, during periods of exception),
2 = inter partes effects only is specified in the text (as in many early courts, including Mexico), or the text gives the courts an "action of inapplicability" only, with no *erga omnes* effects specified (e.g., Ecuador can only declare a law inapplicable in a particular case, can't strike a

law, Chile's Supreme Court, from 1975-80 when there's no Constitutional Court, can only delcare that a law is inapplicable for unconstitutionality in a particular case),
3 = no abstract review, but court has either amparo only, as in Brazil pre-1964, or concrete review but nothing is specified regarding the effect of a decision (e.g., Argentina),
4 = court has some version of abstract review in addition to amparo or concrete review, but access to abstract review is closed (either only for the President to refer a bill for unconstitutionality, or enumerated majoritarian actors, like the legislature)(examples include Peru, Panama until '09, Bolivia '94, Brazil through '88),
5 = text specifies that decisions of unconstitutionality have binding effect on all public authorities, or the court has abstract review or its equivalent, as when the text specifies that the result of a decision is the nullity of the law found unconstitutional, and the actions that produce these effects are open to the general population (Colombia, after 1945, Ecuador 2008).
We think provisions related to standing and effect of decisions should be viewed as interacting with the scope of a court's authority, to produce an effect, rather than as merely additive. Therefore, standeffect is used to create a multiplier that limits the power of the court's jurisdictional reach if access is restricted and the effect of the decision is narrow, and amplifies it if access is open and the effects of the court's decisions are broad.

gen standeffectmult=.
replace standeffectmult=.5 if standeffect==1
replace standeffectmult=.85 if standeffect==2
replace standeffectmult=1 if standeffect==3
replace standeffectmult=1.15 if standeffect==4
replace standeffectmult=1.5 if standeffect==5

3) Decisive capacity: the court is penalized by demoting it one level in standeffect if it has the nominal capacity to emit broadly binding decisions on behalf of a broad range of actors, but has internal decision rules that limit its ability to make those decisions – primarily, in our cases, a supermajority vote required to strike down legislation

replace standeffectmult=.85 if revsupermaj==1 & standeffect<5 & standeffect>1
replace standeffectmult=1.15 if revsupermaj==1 & standeffect==5

Then authority is simply a function of the court's jurisdictional scope times its decision-making capacity:
*gen authority=jurscope*standeffectmult*

Descriptives for Scope of Authority: Range 0-1; mean=.3627134, s.d.=.186226

Appendix B:

In this Appendix we compare our measure with other systematic and comprehensive efforts to characterize judicial institutional design.[16] Many analyses of courts aggregate de jure measures of "independence" and de facto measures of "influence," making it difficult to evaluate the contribution of formal features relative to other factors,[17] and even those that do measure them separately tend to collapse them in their analyses or fail to consider how different elements of judicial design might affect each other (e.g. Navia and Ríos Figueroa 2005). Still, all the measures discussed in this section have been advanced as quantitative, cross-national measures of judicial independence. We are grateful to Jeffrey Staton, who has made these data available on his website (http://userwww.service.emory.edu/~jkstato/page3/index.html) and to his collaborators, Julio Ríos Figueroa and Drew Linzer, for sharing their data on the various measures. The excellent review of these indicators by Ríos-Figueroa and Staton (forthcoming, 2014) demonstrates that many are meant to measure very different things.[18] Some are de facto, while others are de jure; for some, the definition of independence is tied to a notion of autonomy, while for others the definition has more to do with influence (possibly closer to what we have called authority, although it is meant to include actual compliance). Finally, some are based on expert surveys (whether in the field or performed by staff), while others are based on observed

[16] See also Ríos Figueroa (2011) for similar attention to the autonomy/authority distinction and an entirely institutional framework to assess levels of independence and power (akin to our autonomy and authority) over time, but whose findings are largely consistent with the "near-universal empowerment" narrative despite country-specific variation.

[17] See for example Ríos Figueroa and Taylor (2006) who develop a framework that includes both de jure and de facto indicators to explain variation in policy outcomes in Brazil and Mexico.

[18] Given how exhaustive their analysis is, we will not repeat it here, but refer the reader to their paper for fuller descriptions of these variables. Here, we give only as much information as is required to evaluate their relationship to our measure. Full references and sources for these variables are in Appendix B.

behavior – sometimes including the behavior of courts themselves in salient cases, otherwise, the behavior of other actors who are thought to be influenced by the quality of courts.

As Ríos Figueroa and Staton point out, none of the variables directly measure the behavioral independence of judges. The de jure measures, like ours, measure institutional arrangements that are expected (by the researchers) to produce independent courts. The expert surveys, of course, measure outsiders' perceptions of the behavior of judges. The ones that are based on State Department reports measure observations about legal outcomes – the extent to which the population of a particular country experiences rights violations, for example – that are understood to depend at least in part on judicial independence. CIM, a measure of "contract intensive money," seeks to infer judicial independence from the confidence in the security of legal agreements denoted by the use of non-cash forms of money. LJI, the measure developed by Linzer and Staton, is meant to uncover the latent variable – judicial independence – that underlies all these other measures, and so is meant to approximate the actual judicial behavior that produces all these different perceptions and behaviors.

Our variables bear some relationship to all these other variables but are not identical to any. They are closest in spirit, of course, to the de jure variables, but since our primary interest at this point is in exploring the politics of judicial design, ours are actually meant to measure the institutional arrangements that would have been expected *by constitution-makers* (implicitly or explicitly) to produce impartial/autonomous courts with a broad scope of authority. We are officially agnostic, at this point, as to whether and how they actually do produce such courts; unofficially, of course, it seems likely that institutional arrangements do bear some relationship to judicial behavior, as suggested by the discussion in the body of this article.

In any event, our variables and the de jure variables are meant to measure the same thing – institutional arrangements – and so any correspondence between the two is a function of whether we are taking into account the same institutional elements, weighting them similarly, and using a similar aggregation rule. A correspondence between our variable and the de facto variables suggests something else – a correlation at least, if not a causal relationship, between institutional arrangements and actual behavior, or reputations for behavior. In Table 3, therefore, we separate out (A) the de jure measures from (B) the de facto ones, and among the latter, (B.1) the ones that aim at autonomy from (B.2) the ones, more numerous, that look for "influence," according to Staton and Ríos Figueroa. Finally, among the "influence" variables, we distinguish among those (B.2.a) meant to capture perceptions of judicial behavior directly and (B.2.b) those that capture perceptions of (or actual) societal outcomes that are thought to depend on judicial independence.

Ríos Figueroa and Staton find that the existing de jure measures bear virtually no relationship to existing behavioral measures. Using simple correlations with our disaggregated measure of judicial design, we do find some relationship between our (de jure) measures and the other de jure ones, as well as some interesting correspondence between some of the elements of our measure and one or another of the behavioral measures. The first of these findings suggests convergent validation of our disaggregated measure, while the latter findings offer support for its construct validity.

Table B1: Comparing existing quantitative measures of judicial independence to our measures of ex ante and ex post autonomy, and authority

		Ex Ante	Ex Post	Authority
A. Institutional/**de jure** measures				
Feld & Voigt de jure		0.029	0.388	0.256
	sig	0.908	0.112	0.306
	N	18	18	18

Keith		**0.333**	**0.181**	**0.155**
	sig	0.000	0.001	0.003
	N	359	359	359
La Porta, et al.		0.163	-0.235	-0.203
	sig	0.613	0.462	0.528
	N	12	12	12
B. Behavioral measures				
1) Measure aimed at **autonomy**				
Howard & Carey		-0.160	0.103	0.113
	sig	0.049	0.208	0.166
	N	152	152	152
2) Measures aimed at **influence**				
(a) Reputation-based measures (expert survey or staff coding):				
Bertelsman T Index		-0.098	0.222	-0.270
	sig	0.559	0.180	0.101
	N	38	38	38
Feld & Voigt de facto		-0.233	0.454	0.093
	sig	0.404	0.089	0.743
	N	15	15	15
Fraser (GCR)		-0.091	**0.275**	-0.103
	sig	0.339	0.003	0.280
	N	112	112	112
Law & order (PRS)		**0.115**	**0.154**	-0.011
	sig	0.012	0.001	0.819
	N	475	475	475
Polity (xconst2)		**0.302**	**0.092**	**0.300**
	sig	0.000	0.021	0.000
	N	628	628	628
Henisz		0.017	**0.126**	-0.029
	sig	0.713	0.006	0.531
	N	475	475	475
(b) Behavior-based measures & latent measure				
Tate & Keith[19] (SD)		-0.083	**0.288**	**0.162**
	sig	0.164	0.000	0.006
	N	285	285	285
CIRI (SD)		**-0.129**	0.080	**-0.113**
	sig	0.002	0.062	0.008
	N	551	551	551

[19] Tate and Keith classify judiciaries into "non-independent," "somewhat independent," and "independent." For this analysis we converted that classification into a 1-3 scale, in that order.

CIM		**0.299**	**0.230**	**0.292**
	sig	0.000	0.000	0.000
	N	466	466	466
LJI		**0.186**	**0.161**	**0.218**
	sig	0.000	0.000	0.000
	N	630	630	630

Observations are country-years. (SD) indicates the measure is based on US State Department reports. Bolded coefficients are significant beyond .05 level.

The results for the comparison of the various measures support the decision to disaggregate judicial design into three dimensions. While many of the correlations between our measures and the others are significant (at least when there is a sufficient number of observations), the coefficients vary dramatically across the three dimensions, depending on which measure is being compared, sometimes even reversing sign. Moreover, behavioral measures that use different sources and evaluate different behavior are associated with distinct elements in our measure. Tate and Keith's measure, which relies on coding State Department human rights reports, is positively and significantly associated with ex post autonomy and authority, but negatively (though insignificantly) associated with ex ante authority. Meanwhile CIRI, which is also based on coding State Department reports, is negatively and significantly associated with ex ante autonomy and authority, in our cases.

On the other hand, the Polity measure, which looks at constraints on the executive, and CIM, which gauges how much faith society places in property rights protections, are, in simple bivariate correlations, more positively and significantly associated with ex ante autonomy and authority. The relationship between our variables and Linzer and Staton's LJI is similar to the one with CIM, though attenuated. These results suggest that different combinations of judicial attributes may be associated with very different outcomes – more protection of economic rights, more protection of human rights, greater constraints on the executive, and so on.

The conceptual relationships among all these variables are complicated and we do not attempt to parse them fully here. Some (e.g., LJI or Henisz) are derived from other variables in this table, others attempt, at least, to include identical information, still others are based on independent codings of the same sources, sometimes with different conceptual ends. Please refer to Ríos Figueroa and Staton's (2012) analysis for an exhaustive evaluation of all these relationships.

The original sources of all these variables are listed here (as taken from Jeffrey Staton's website, http://userwww.service.emory.edu/~jkstato/page3/index.html):

- Polity IV "Constraints on the Executive" ("xconst2")
  - See: http://www.systemicpeace.org/polity/polity4.htm
- Contract Intensive Money Measure ("CIM")
  - Clague, Christopher, Philip Keefer, Stephen Knack and Mancur Olson. 1999. "Contract-Intensive Money: Contract Enforcement, Property Rights, and Economic Performance." Journal of Economic Growth 4(2):185-211.
- Wittold Henisz's measure of "judicial independence" ("Henisz")
  - Henisz, Witold J. 2002. "The institutional environment for infrastructure investment." Industrial and Corporate Change 11(2):355-389.
- Political Risk Services "Law & Order" measure ("PRS")
  - See: http://www.prsgroup.com/ICRG_Methodology.aspx
- Tate & Keith measure of judicial independence ("tatekeith")
  - Tate, C. Neal and Linda Camp Keith. 2009. "Conceptualizing and Operationalizing Judicial Independence Globally. " working paper.
- Cingranelli & Richards measure of judicial independence ("CIRI")
  - See: http://ciri.binghamton.edu/documentation/ciri_coding_guide.pdf
- Howard & Carey measure of judicial independence ("howardcarey")
  - Howard, Robert M. and Henry F. Carey. 2004. "Is an Independent Judiciary Necessary for Democracy?" Judicature 87(6):284-290.
- Feld & Voigt de jure and de facto measures of judicial independence ("feldvoigt defacto" and "feldvoigt dejure")
  - Feld, Lars P. and Stefan Voigt. 2003. "Economic Growth and Judicial Independence: Cross-country Evidence Using a New Set of Indicators." European Journal of Political Economy 19(3):497-527.
- Global Competitiveness Report's measure of "judicial independence" ("Fraser")
  - See: http://www.weforum.org/en/initiatives/gcp/index.htm
- Bertelsmann Transformation Index of Judicial Independence ("BTI")
  - See: http://www.bertelsmann-transformation-index.de
- Apodaca-Keith Scale of de jure judicial independence ("Keith")
  - Apodaca, Clair. 2004. "The Rule of Law and Human Rights." Judicature 87(6):292-299.

    - Keith, Linda Camp. 2002. “Judicial Independence and Human Rights Protection Around the World.” Judicature 85(4):195-200.
- La Porta et al de jure measure of judicial independence (“Laporta”)
    - La Porta, Rafael, Florencio López de Silanes, Cristian Pop-Eleches and Andrei Shleifer. 2004. “Judicial Checks and Balances.” Journal of Political Economy 112(2):445-470.

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