

**JUDICIAL POLITICS IN DEVELOPING DEMOCRACIES:  
THE INSTITUTIONAL APPROACH RECONSIDERED**

Diana Kapiszewski  
Department of Political Science  
University of California, Irvine

Prepared for presentation at

**The Virtues and Vices of Legalism:  
A Conference to Honor the Work of Robert A. Kagan**

Friday, September 19, 2008

DRAFT

Please do not cite without permission.

Comments (which are most welcome) may be sent to <dianakap@uci.edu>.

## I. INTRODUCTION

Since the mid-20<sup>th</sup> century – in the wake of World War II, decolonization, the fall of fascist governments and military dictatorships, and the collapse of the Soviet Empire (Scheppelle 2003) – courts have been granted more power and have been called upon to do more, and have come to play more important roles, in politics and policymaking in polities around the world. For instance, today courts can facilitate (or complicate) economic governance and crisis management, entrench (or undermine) democratic processes, expand (or contract) individual liberties, and broaden (or narrow) the reach of social policy, to offer just a few examples. As scholars have turned to examine the causes, contours, and consequences of courts’ increasing political relevance, the literature on comparative judicial politics has blossomed.<sup>1</sup>

The comparative judicial politics literature contains several theoretical models to account for why courts decide important disputes as they do and what guides elected leaders’ responses to their rulings. These include models that examine to what degree law (alone or in tandem with other factors) guides judicial behavior and outcomes, that highlight the importance of judges and justices’ attitudes, and that focus on judicial actors’ strategies (in particular vis-à-vis elected leaders). A fourth approach – inspired by the eclectic “new institutionalism” movement in political science – underpins versions of the third model, and arguably the others: the institutional approach.

The adoption of institutionalism by scholars of courts reflects two convictions. First, understanding the political importance of law and courts demands expanding the field’s focus beyond judicial decision-making (the trademark of the behavioralist “revolution” that overtook

---

<sup>1</sup> It is important not to exaggerate when making these claims: in many of contexts courts remain only marginally important to politics and political outcomes. In fact, the argument could be made that to understand the “global expansion of judicial power,” we should pay more attention to contexts in which courts have not been empowered, and judicial power has not expanded.

political science in the 1950s) to consider broader judicial outcomes. Second, courts are political institutions that must be understood from the inside out, and from the outside in. Examining courts' internal rules and features helps us to understand how they decide cases and interact with other powerful actors. By the same token, as courts operate as part of broader political and social systems, we must explore how those systems' political and institutional dynamics – their “norms, structures and processes” – shape and constrain courts' functioning and interactions (Ginsburg and Kagan 2005: 2; Whittington 2000: 608, 617).

As in other areas of study within political science, several sub-branches of new institutionalism are evident in the comparative judicial politics literature.<sup>2</sup> Scholars of courts in less-developed, less-established democracies who adopt an institutionalist model most often employ a rational choice variant (labeled the “strategic” approach by some, e.g., Epstein et al. 2001, Iaryczower et al 2000, Helmke 2005).<sup>3</sup> In a nutshell, rational choice institutionalism emphasizes judges' and justices' instrumental behavior, focusing on how they respond to other “players” and seek to accomplish their goals given the institutional structures, incentives, and constraints within which they operate. Nonetheless, scholars of judicial politics in developing democracies have also begun to examine how “judicial institutions” – internal rules and procedures that guide court functioning – affect judicial outcomes. It is on the expansion and systematization of this type of institutionalist analysis that this paper focuses.

---

<sup>2</sup> Regarding the internal heterogeneity of the “new institutionalism,” see Hall and Taylor 1996, DiMaggio 1998, and Immergut 1998. See also Smith's (1988) call for application of the new institutionalist approach to public law and also for integration of the various sub-approaches.

<sup>3</sup> To offer a point of contrast, in the U.S. public law literature, both rational choice institutionalism and historical institutionalism (which holds that institutions not only structure and constrain, but also *constitute* judicial preferences, roles and behavior, and emphasizes how institutions evolve, often pointing to path dependent processes and unintended consequences) are important (Ginsburg and Kagan 2005: 2; Gillman and Clayton 1999: 6). Two prominent proponents of the former are Lee Epstein and Jack Knight; historical institutionalism is closely associated with Howard Gillman and Ronald Kahn.

As Section II below outlines, like institutionalist work in both the public law and comparative politics sub-fields, studies of the causal effects of judicial institutions in the literature on developing democracies have focused both on *formal* institutions (rules and procedures created, communicated, and enforced through official channels) and *informal* judicial institutions (“unofficial” rules and procedures set in place by practice over time that can complement or contradict those stipulated by law or other formal documents).

While evaluating the causal import of *formal* institutions seems logical in cases of institutional stability (for instance, in Western Europe or the United States), at first blush, doing so in developing democracies may seem illogical. How could formal judicial institutions (for instance, rules of standing or formal decision-making procedures) form the basis of strong explanation for judicial outcomes in contexts in which institutions are incipient and weak, and where a vast gap often exists between formal institutions and informal practices (O’Donnell 1996, Helmke 2000: 21, 248)? In fact, several reasons recommend investigating the causal potential of formal judicial institutions in developing democracies. First, whether judicial institutions can form the basis of strong arguments is an empirical question that can only be answered through analysis and comparison of formal judicial institutions and their effect on judicial outcomes. Further, the rules and institutions that political and judicial leaders have designed to regulate courts represent a crucial baseline; investigating them allows us to assess the degree to which actual practice diverges from the behavior that would result if formal rules and institutions were respected. Moreover, while the correspondence between institutionally-mandated behavior and actual practice may not be perfect, there is almost certainly a positive correlation: while institutions do not determine behavior (anywhere), even in developing democracies it seems they must make certain behaviors more probable than others. And finally

from a purely methodological standpoint, the over time flux that characterizes judicial institutions, and the judicial reform that has occurred in many developing democracies (signaling readily identifiable over time variation in judicial institutions), facilitates the generation and testing of institution-based explanations.

Nonetheless, in institutionally insecure developing democracies, consideration of how *informal* judicial institutions affect outcomes such as judicial assertiveness and authority is undeniably crucial. Indeed, scholars of comparative politics in the developing world have increasingly argued that focusing exclusively on formal rules when studying political dynamics “can yield an incomplete – if not wholly inaccurate – picture of how politics works” (Helmke and Levitsky 2004, O’Donnell 2006: 287). Yet as Section II below also suggests, particularly in developing democracies, even if we include informal judicial institutions in our analyses, we will likely continue to miss causally important aspects of judicial reality. In addition, we should examine the causal import of less-routinized “Court-related tactics” – that is, formal and informal strategies that elected leaders and Courts employ to change temporarily the dynamics of the judicial game. Also, it could be helpful to flesh out – as some scholars have begun to do – the effects of certain “Court attributes,” be they mandated in law or the constitution (and thus formal), or developing over time through some practice, or through the composition, rulings, or other behavior of the Court itself (and thus informal).

In sum, examining formal and informal high court institutions, Court-related tactics, and Court attributes constitutes what this paper refers to as “Court-centric analysis.” Section III offers a tentative framework for “Court-centric analysis.” It considers 21 formal and informal high court elements (rules and procedures, Court-related tactics, and Court attributes), organizing them into a typology. Further, it hypothesizes how each element might be important in

explaining high court decision-making on cases in which elected-branch interests are at play (high court assertiveness) and in elected leaders' compliance with Court rulings in developing democracies (high court authority).<sup>4</sup> Section IV evaluates the high courts in two of Latin America's largest democracies, Argentina and Brazil, in light of the suggested framework. While the two countries have followed similar trajectories since their transitions from authoritarian rule in 1983 and 1985, respectively, their high courts have exhibited quite different degrees of assertiveness toward and authority over elected leaders, with the Brazilian high court, in very general terms, being the more assertive and authoritative of the two. The analysis reveals that the two high courts differ significantly on nine of the 21 high court institutional elements introduced in the previous section, suggesting the potential importance of these variables for explaining the contrast in high court assertiveness and authority vis-à-vis elected leaders in the two countries. Importantly, each of the variables on which the two Courts contrast sharply has an informal aspect, pointing up the importance of examining high courts' informal institutions, tactics, and attributes.

In short, this paper argues that in order to grasp why judicial involvement in politics and governance in developing democracies is expanding to different degrees in different ways in different places at different times, it can only be instructive to extend and systematize a "Court-centric" approach to understanding judicial dynamics. Scholars should examine both formal *and informal* judicial institutional elements, and should seek to trace out the relationships among those types of elements. Additional attention should also be paid to how high court institutions, Court-related tactics, and Court attributes (both formal and informal) impact each other, and how they interact to affect the judicial outcomes that interest us. Moreover, the causal import that this

---

<sup>4</sup> I sympathize with the spirit of Martin Shapiro's plea that we study any court *but* Supreme Courts (issued, among other places, in Shapiro 2005: 278). While I develop the hypotheses this paper advances in terms of Supreme Courts, many should be equally applicable to other courts.

analysis ascribes to various informal high court elements recommends that we reconsider how we categorize courts: rather than focusing on particular formal features, for instance whether a Court is a Supreme or Constitutional court or whether it operates in a civil or common-law context, it may make sense to classify courts by their degree of legitimacy, by the content of their docket, or by other informal institutions or attributes that, through future inquiry, emerge as important to explaining why Courts rule, and why elected leaders respond to them, as they do.

Of course, institutional factors are not the causal “be all and end all.” In any context, a range of considerations relating to the cases courts decide and the context in which they operate influence judicial decisions, and perhaps an even broader range of factors (other policy goals, electoral constituencies, budgetary constraints, how much leaders anticipate needing courts to legitimate their decisions in the future) guide elected leaders’ choices about abiding by judicial rulings. Nonetheless, Courts’ rules and procedures, Court-related tactics, and Court attributes may well influence cross-national and over time variation in judicial assertiveness and authority. And it seems indisputable that it is via refraction through just such high court elements that justices’ attitudes and the extra-judicial institutional context and dynamics to which the attitudinal and strategic accounts point influence how courts perform and interact in politics.

## **II. EXPLAINING JUDICIAL OUTCOMES IN DEVELOPING DEMOCRACIES: EXPANDING AND SYSTEMATIZING THE “COURT-CENTRIC” APPROACH**

Today most political scientists would agree that political institutions are important in accounting for a variety of political, economic, and social outcomes from the stability of democracy, to economic growth and development, to the formation and evolution of social movements. As the first part of this section suggests, the two sub-fields at the confluence of which comparative judicial politics sits – public law and comparative politics – have both taken up the mantle of institutionalism. In particular, institutionalist analysis that focuses on the causal impact of

specific *judicial* institutions has emerged as important within the public law sub-field. Perhaps inspired by those bodies of work, as the second part below suggests, some of the work on courts in developing democracies has also begun to engage in institutionalist analysis, and has also begun to focus some attention on how *judicial* institutions – both formal and informal – help to explain why high some high courts have begun to flex their muscles by ruling against the interests of elected leaders while Courts in many other contexts continue to be submissive – and why those Courts that are willing to assert their authority do so only in particular cases.<sup>5</sup>

To be clear, in this paper, the term “institutions” refers to rules and procedures. *Formal* institutions are understood to be “rules and procedures that are created, communicated, and enforced through channels that are widely accepted to be official” (Helmke and Levitsky 2006: 5) – that is, that are codified in law, the constitution, or other written, official documents.<sup>6</sup>

*Informal* institutions, by contrast, are understood to be the norms and processes that have become routinized through time and practice (rather than having been established through official channels).<sup>7</sup> Including both formal and informal judicial institutions in analyses of judicial decision-making and compliance with judicial decisions allows us to capture many dynamics and factors that would escape us were we to focus exclusively on formal institutions. Further, as several scholars have highlighted, formal and informal institutions interact in a variety of ways: they can reinforce, negate, accommodate, substitute for, or compete with each other, to name just

---

<sup>5</sup> In focusing narrowly on *judicial* institutions, this study brackets analysis of a range of other institutions to which insufficient attention has also been paid in the comparative judicial politics literature on developing democracies and that may well be important for explaining the judicial outcomes of interest. To offer just one example, aspects of the constitution (length, content, degree of detail, longevity) and, more generally, certain features of a country’s legal structure (for instance, its complexity, the frequency with which it changes, its internal inconsistencies) can doubtless affect justices’ knowledge of the statutes and constitutional clauses they are charged with applying and their investment in ensuring adherence to those rules (and their own willingness to abide by them), thus influencing high-court behavior and interactions.

<sup>6</sup> Like North (1990) and Helmke and Levitsky (2006: 7), I believe we should distinguish between entities or organizations on the one hand, and rules or procedures on the other; I only consider the latter duo to be institutions.

<sup>7</sup> Note that there is no agreed-upon definition of informal institutional in the literature.



a few possibilities (see, e.g., Helmke and Levitsky 2004, 2006; Lauth 2005; Tsai 2006).

Analyzing them in tandem allows us to identify and trace patterns in their interactions.

Yet as the third part of this section observes, focusing solely on formal and informal judicial institutions will not allow us to capture all of the institutional reality that might affect the outcomes that interest us. In the case of high court decision-making and compliance with Court rulings, at least two other “Court-centric” factors demand our attention. First, formal and informal “Court-related tactics” – temporary strategies and tools employed by elected leaders and Courts themselves – can change the judicial playing field, affecting Courts’ rulings and responses thereto. Second, certain formal and informal “Court attributes” (for instance, the position of the Court with respect to lower judicial instances, or its legitimacy, or institutional cohesion) may also affect how Courts rule, and the degree and speed to which elected leaders abide by those decisions. Together, a focus on formal and informal judicial institutions, on Court-related tactics, and on Court attributes constitute what this paper refers to as a “Court-centric approach” to accounting for judicial outcomes.

***Influences: institutional analysis in the U.S. public law and comparative politics literatures***

The U.S. public law literature and the comparative politics literature, perhaps the strongest intellectual influences on the literature on comparative judicial politics, both feature analysis that points to the causal import of institutions to a variety of outcomes. While both literatures emphasize *formal* institutions, a sub-set of each body of work has sought to determine the causal influence of *informal* institutions (again, defined as practices that were established over time through repetition, rather than via official channels or codification).

*Institutional analysis in the U.S. public law literature.* The “institutionalist” approach in the U.S. public law literature is eclectic. The subset of that work that is of interest here are those

studies that seek to flesh out how particular *judicial* institutions (i.e. formal and informal rules and procedures that guide how courts operate, rather than other extra-judicial institutions, or other Court-related tactics or Court attributes) account for judicial decision-making.<sup>8</sup>

Most such work has focused on the importance of *formal* institutions to explaining judicial behavior (and in particular judicial assertiveness with respect to the elected branches). To mention just two examples regarding the Supreme Court, Atiyah and Summers ascribe the greater frequency with which the U.S. Supreme Court (in comparison to the court of last resort in Britain) “exercises the law-making function” to (among other factors) the constitutional position of the U.S. Supreme Court, the Court’s case selection procedures, and its lesser reliance on arguments from the bar (1987: 268). Further, Bussiere (1999: 157) has described how the U.S. Supreme Court’s strong attachment to existing doctrine “doomed to oblivion the notion of a constitutionally based right to welfare;” Kahn (1999: 177) has highlighted how the Court’s “institutional norms, including the following of precedent... and concerns for institutional legitimacy” influence its decision-making; and Epstein and Knight (1998) have focused on the effects of the institution of *amicus curiae*. Descending from the high court, Gillman (2005) and Melnick (2005) both point to how different aspects of the law outlining the jurisdiction of U.S. federal courts explain the role that those courts play in the United States.

Nonetheless, some U.S. public law scholars have begun to consider how informal judicial institutions shape judicial decision-making.<sup>9</sup> For instance, a recent study of the U.S. Supreme Court by Richards and Kritzer argues that it justice-made “jurisprudential regimes” (law-based institutional constructs that “identify relevant case factors and/or set the level of scrutiny or

---

<sup>8</sup> This review is far from exhaustive; it simply aims to illustrate a few representative explanations focusing on judicial institutions that have been offered in the U.S. public law literature. Further, my abbreviated review of the literature suggests that formal and informal judicial institutions are infrequently used to account for elected-branch *compliance* with judicial decisions in the public law literature.

<sup>9</sup> I thank Jeb Barnes for offering several examples of public law scholarship that evokes informal institutions.

balancing that justices will use”) guide the Court’s rulings (2002: 305). Another sub-set of work seems to advance the notion that norms, especially those regarding what constitutes "good" legal reasoning and "appropriate" judicial action, shape judicial decisions. Baum (2006), for instance, suggests that judges who seek the esteem of certain audiences develop informal decision-making practices that they use routinely in hopes of molding rulings that will earn that esteem. Finally, Feeley and Rubin (1998), in their discussion of courts’ involvement in prison reform in the U.S., can be understood to argue that policy-seeking judges must issue rulings that are consistent with the norms of the rule of law, if for no other reason, to increase the likelihood that other judges will be guided by their opinions.<sup>10</sup>

Finally, some work on the U.S. Supreme Court has combined analysis of how formal and informal institutions guide the Court’s decision-making. Maltzman et al. for instance, in much the same vein as Epstein and Knight (1998), point out that justices’ decision-making is constrained by an array of formal and informal “institutional rules, procedures and norms that are internal to the Court,” including “the *certiorari* process, opinion assignments, opinion-drafting, accommodation among the justices” (1999: 60), that lead justices to act strategically when ruling (1999: 51; 60).<sup>11</sup>

*Institutional analysis in the comparative politics literature.* The literature on comparative politics has also adopted institutionalism, focusing both on formal and informal institutions to explain a variety of political outcomes. To name just a few examples that focus on the importance of formal institutions, Katzenstein (1985) has argued that the adoption of an institutional structure that he calls “democratic corporatism” fomented political and policy

---

<sup>10</sup> More from a law and society perspective, Carter and Burke (2004) also can be understood to analyze how the norms of "good" judicial reasoning impact the judicial decision-making process.

<sup>11</sup> In addition, some of the features to which Maltzman et al. point, for instance, “collegiality,” would be categorized as high court “attributes” in this study.

flexibility, allowing various countries in Europe to respond quickly to changes in the international economy. In addition, a lively debate emerged in the 1990s regarding the optimum formulation for political institutions in post-communist democracies (see, e.g. Crawford and Lijphart 1995, Lijphart and Waisman eds. 1996, and Elster et al. 1998), and in particular, scholars of new democracies (in Latin America especially) have engaged in an intense discussion regarding the relative merits, for regime quality and stability, of presidentialism vs. parliamentarism (see, e.g., Linz 1990, Mainwaring 1993, and Valenzuela 1993).<sup>12</sup>

On the other hand, scholars of comparative politics have also begun to highlight the importance of informal institutions to explain diverse political dynamics. Beyond foundational studies such as North (1990) and various pieces by O'Donnell (1993 and 1996 among others), informal norms, practices, and customs have been used to explain a variety of outcomes from popular attachment to democracy (e.g. Bratton 2007), to the organization of parties and the party system (e.g., Levitsky 2003, Smyth et al. 2007), to legislative processes (Hansen 1986, Farrell and Heritier 2003) to regime change and performance (e.g., Lauth 2005, Eisenstadt 2003, Llamazares 2005), to state-building (e.g., Tsai 2004), in polities as diverse as Africa, Asia, Eastern Europe, Latin America, and post-communist Eurasia.<sup>13</sup>

### ***Explaining decision-making on courts in developing democracies: focus on judicial institutions***

Drawing from its “parent” sub-fields, the literature on judicial politics in developing democracies has also pointed to the importance of formal and informal and judicial institutions in

---

<sup>12</sup> See Carey 2000 for a good review of the comparative politics literature on formal institutions.

<sup>13</sup> These few references obviously do not do the comparative politics literature that highlights the importance of informal institutions justice. Helmke and Levitsky 2004 (as well as the conclusion of their 2006 edited volume) offer a more complete overview of the literature.

explaining judicial decision-making. With regard to formal institutions,<sup>14</sup> many accounts have focused on the “supply-side,” highlighting how rules of access and other institutions guide which cases reach courts, thus indirectly influencing their decision-making, how and when they can challenge elected leaders, and what roles they can play in politics. Ginsburg (2003), analyzing several Asian cases, suggests that Courts to which cases can arrive more easily are more likely to be assertive. Likewise, Ríos-Figueroa and Taylor (2006) examine how various facets of judicial independence and judicial review affect how policy is contested (and who contests it) in Brazilian and Mexican courts. Wilson (2005) argues that in Costa Rica, due to expansive access to the Supreme Court’s constitutional chamber, almost anyone can challenge policy; likewise, Cepeda Espinosa (2005: 90-91) asserts that broad standing to employ judicial review (together with the 1991 formation of a Constitutional Court) have encouraged traditionally weak actors to “flex their muscles” through the Courts. More directly, Ginsburg (2005) highlights how powers granted to courts via the constitution in a variety of contexts (and in particular the expansion of those powers beyond judicial review) guide how courts operate vis-à-vis elected leaders.

With regard to formal rules that dictate how Courts operate, Ginsburg (2002) finds that constitutional courts’ docket-control capabilities – which allow them to focus on important cases – lead them to be more willing to engage in constitutional review than Supreme Courts that have been granted constitutional review powers (2002).<sup>15</sup> Other scholars have focused on the effects of judicial reform on courts and their decisions. Domingo (2000) and Brinks (2005), for example, examine how reform of various judicial institutions affects the degree to which courts can rule without undue influence from elected leaders (and, in the case of Brinks, how reform impacts judges’ preferences), while others investigate how institutional and constitutional design

---

<sup>14</sup> The following review is very incomplete; as it relies heavily on Kapiszewski and Taylor 2008 and thus focuses disproportionately on Latin America. All suggestions welcome!

<sup>15</sup> Kagan et al. (1978) analyzing U.S. State Supreme Courts, arrive at a similar conclusion.

construed more broadly influence judicial dependence and decision-making (Colon 2003; Navia and Ríos-Figueroa 2005; Ríos-Figueroa 2006). Other scholars of Latin American courts have studied how modification of judicial structures affects court involvement in policy and political debates (Domingo 2000; Rodríguez et al. 2003; Wilson 2005; Wilson and Rodríguez Cordero 2006), and still others have explored how such changes affect judicial influence in particular policy areas: Ballard (1999), for instance, examines courts' involvement in privatization; Skaar (2002) explores judicial decisions in the realm of human rights; and Macaulay (2005) examines judicial cases on domestic violence.

Scholars of courts in developing democracies have also begun to focus attention on the effects of *informal* institutions on judicial decision-making, however. Brinks, for instance, shows that in Argentina and Brazil, police follow informal rather than formal rules of behavior when deciding to what degree to employ deadly force (2003: 2). Chavez, in her study of the rule of law and the judiciary in Argentina, highlights the gap between formal rules and informal practices, and illustrates how “informal institutions and practices... allow Latin American presidents to control the courts,” suggesting that those informal rules are “often stronger than the formal constitutional guarantees of judicial independence” (2004: 23). Miller (1997) proposes that the manner in which a “sociology of judicial review” emerges and develops in a particular context can influence the degree to which courts are willing and able to constrain elected leaders. In the most geographically comprehensive claim reviewed here, Stone Sweet and Mathews (2008: 1-2) argue that proportionality analysis (“a doctrinal construction... [that] emerged and then diffused as an unwritten, general principle of law through judicial recognition and choice”) has become a worldwide phenomenon – “an overarching principle of constitutional adjudication...” And finally, still other accounts point both to formal and informal judicial

institutions in explaining judicial outcomes. For instance, discussing the ECJ, Stone Sweet (2005) highlights both formal and informal institutional elements, suggesting that the preliminary reference procedure, as well as the “robust” doctrine of precedent the Court has developed, have allowed it to increase its power

***Expanding and systematizing the Court-centric approach to explaining judicial outcomes in developing democracies: Court-related tactics and Court attributes***

The fact that scholars of courts in developing democracies have begun to examine how formal and informal “rules of the judicial game” (Whittington 2000) affect judicial decision-making is laudable. However, a focus on established rules and procedures (be they formal or informal) does not capture all that may be important in institutional analysis. The comparative judicial politics literature might benefit from expanding its institutional focus in two directions: toward evaluating how particular formal and informal “Court-related tactics” and “Court attributes” affect high court decision-making, and compliance with high court rulings by elected leaders.

*Court-related tactics.* Actual practice – be it actions or strategies of elected leaders or of judicial actors – can depart from that dictated and implied by the formal or informal rules and procedures on an ad hoc, non-routinized basis. Such practices, which I will refer to as “Court-related tactics” may be formal or informal (depending upon whether they are established via official channels, or through periodic use), and are often facilitated by vague, flexible, or insufficient institutions.<sup>16</sup> While they are often used only briefly (or involve the creation of rules that are in place only briefly), such tactics can have important long-term implications for judicial decision-making and for compliance with judicial decisions. For instance, elected leaders or judicial actors may temporarily modify formal institutions or may create additional institutions

---

<sup>16</sup> Of course, such ambiguity or absence can also facilitate the development of informal institutions.

(such as the mechanisms that exist to take cases to the high court, or the routes that cases must take to arrive to the Court). While such tactics may subvert the original intent of existing institutions, they do not necessarily violate existing institutions:<sup>17</sup> they are not solely the opposite, contradiction, or complete negation of formal rules.<sup>18</sup>

While highlighting the causal importance of such “tactics” is quite rare in the literature on judicial decision-making and compliance with judicial rulings in developing democracies, it is not unheard-of. For instance, scholars of courts in the U.S. have posited a connection between the clarity of judicial decisions and compliance, suggesting that unclear rulings are less likely to elicit full compliance (e.g. Wasby 1970, Baum 1976, Spriggs 1997), and Staton and Vanberg (2008) have echoed the emphasis on that tactic, basing their analysis of what might motivate judges in several countries to *issue* vague rulings on the *assumption* that such decisions are less likely to be fully obeyed.

Court Attributes. Further, certain (formal and informal) high court attributes may be just as important as high court institutions and Court-related tactics to explaining high court assertiveness and authority. The definition of formal and informal high court attributes parallels that of formal and informal institutions: formal high court attributes are attributes that are specified by “rules and procedures that are created, communicated, and enforced through channels that are widely accepted to be official” (Helmke and Levitsky’s 2004 definition of formal institutions). Informal high court attributes, by contrast, are features that institutions assume over time thanks to informal rules or procedures, or simply through actors’ practices.

---

<sup>17</sup> That is, what I am describing here is not simply illegality.

<sup>18</sup> Helmke and Levitsky, in the introduction to their edited volume (2006: 6) warn against conflating informal institutions with what they refer to as “noninstitutional behavior,” the latter of which basically encompasses what I refer to here as “informal tactics.” Nonetheless, in this inquiry, these behaviors are considered institutional in that they involve or are carried out by *the* institution of focus. My goal is to ascertain how various aspects of high courts affect their decision-making and authority, and I consider the degree to which elected leaders behavior vis-à-vis high courts, or high courts’ behavior, departs in a non-routinized way from formal rules and procedures to be an important institutional feature.



In fact, several scholars of comparative judicial politics have pointed to Court attributes to account for judicial decision-making and compliance with judicial rulings. With regard to judicial decision-making, on the “supply side,” various studies of the high court in Mexico and Brazil have argued that particular judicial features impede or facilitate the filing of cases against elected leaders (Arantes 2005; Ríos-Figueroa and Taylor 2006). Further, Taylor (2006, 2008), argues that due to Brazil’s comparatively progressive (though very inefficient) lower courts and its relatively efficient high court (to which access is quite restricted), the Brazilian judiciary represents a “powerful resource” for contesting (or preventing) decision-making in the political arena. Epp (1998) highlights the importance of the informal attribute of “docket content,” positing that high court assertiveness in the United States, Britain, Canada, and India around civil rights cases increased as societal organizations increasingly used litigation as a strategy for social change, increasing the number of civil rights cases on the Courts’ dockets.

Further, Helmke (e.g., Helmke 2002: 291; Helmke and Sanders 2006) highlights the importance of institutional weakness and uncertainty to decision-making on the Argentine high court, suggesting that as sitting executives reach the end of their tenure, insecure judges begin to rule against the government in order to distance themselves from the outgoing administration (and, ostensibly, curry favor with incoming leaders). Similarly, Couso’s (2005) account of Latin American courts suggests that a “reasonable” degree of “external independence” (from government) is a pre-requisite for judicial assertiveness with respect to elected leaders. And Hilbink (2007: 31) combines a focus on courts’ informal attributes and formal judicial institutions to explain the behavior of perpetually illiberal Chilean judges: in her account, judicial identity plays an important role in “constitut[ing] judges’ goals,” while the Chilean judiciary’s particular institutional rules and structure serves constantly to reinforce that identity.

Still other accounts point to the importance of particular Court attributes to *compliance* with judicial rulings. The attribute most often highlighted is legitimacy. Since courts lack the capacity to enforce their rulings, scholars argue, “diffuse public support” awards courts “political capital” that makes it more difficult for politicians to challenge (or fail to implement) their decisions (Caldeira and Gibson 1995; Gibson, Caldeira and Baird 1998). Vanberg (2005), examining the German case via a formal model, suggests that legislative compliance with court rulings depends on legislators’ calculations regarding the likelihood of public outcry if they defy the court (2005: 57); Staton (2004) argues something similar in the Mexican case. Several studies of compliance with European Court of Justice (ECJ) rulings also highlight the importance of judicial legitimacy. Pollack (1997) and Mattli and Slaughter (1998) have suggested that a desire to bolster the legitimacy of national legal systems motivates member states to comply with ECJ rulings, and Carrubba (2003) contends that public perceptions about the legitimacy of the ECJ itself are crucial for compliance with its rulings.

### ***Summing Up***

This section highlighted six types of institutional elements that may be important for explaining high court decision-making and compliance with high court rulings in developing democracies. They are summarized in Table 1. In different settings, to different degrees, particular Court-related institutions (such as a Court’s jurisdiction, a formal institution, or a particular un-written decision-making norm a Court follows, an informal institution); particular Court-related tactics (such as changing a Court’s jurisdiction temporarily through legislation, a formal tactic, or briefly modifying the unwritten rules of standing to file a particular case, an informal tactic); and particular Court attributes (such as a Court’s position vis-à-vis the rest of the judiciary, a formal attribute, or its popular legitimacy, an informal attribute) may affect how

Courts decide cases (particularly those in which elected leaders’ interests are at play), as well as whether or not elected leaders will comply with Courts’ rulings.

**Table 1. High Court Institutional Elements**

<b>Element / Formality →</b> ↓	<b>Formal</b>	<b>Informal</b>
<b>Court-related institutions (rules, procedures)</b>	Formal institutions	Informal institutions
<b>Court-related tactics</b>	Formal tactics	Informal tactics
<b>Court attributes</b>	Formal attributes	Informal attributes

Of course, the six elements likely interact with each other. The ways in which formal and informal institutions can interact, for instance, were discussed previously. To offer another example, high court institutions and high court attributes likely also interact: a Court operating in a context where formal rules dictate ample jurisdiction and significant powers of judicial review, and where a plethora of mechanisms to reach the Court exist, will likely have a large case load (an informal attribute) including cases of diverse types (an informal attribute). Seeking to understand how these different elements interact, as well as where and why they make a difference to high court decision-making and compliance with high court rulings, could represent fruitful steps in the development of the Court-centric approach to explaining judicial outcomes.

### **III. JUDICIAL INSTITUTIONS AND COURT-CENTRIC HYPOTHESES**

This section discusses 21 high court institutions, tactics, and attributes that could form the basis of “Court-centric” hypotheses aimed at accounting for cross-national and over time variation in Courts’ assertiveness with respect to elected leaders, and in elected leaders’ compliance with their rulings. The institutions are divided into six substantive categories: intra-judicial relations;

size and composition of the high court; intra-Court structure and dynamics; the potential and actual ambit of the high court; high court internal procedures; and Courts' external relations.

The exploration does not aspire to be systematic or exhaustive: there are doubtless many other high court rules, tactics, and attributes that could be considered. Rather, the objective is to bring to the fore a range of formal and informal high court elements that could affect Courts' interactions with elected leaders (and to suggest some mechanisms whereby they could do so) in hopes of encouraging further analysis in this vein.<sup>19</sup>

### ***High Courts and Intra-Judicial Relations***

(1) *Position.* The number and type of courts that function beneath the high court and the overall structure of the judiciary (including the existence or inexistence of a sub-system of administrative courts, military courts, electoral courts, and/or labor courts, for instance) could affect the number and type of politically significant cases that arrive to a high court for resolution, thus affecting its opportunities to challenge or endorse the exercise of government power.<sup>20</sup> The existence of more judicial "layers" below the Court offers more opportunities for cases to be resolved before they reach the high court. Further, the existence of judicial sub-systems for certain areas could serve as "parallel tracks" for the resolution of cases in those areas – but could also serve to encourage the filing of such cases; the relationship between high court justices and the judges that sit on the courts at the pinnacle of those sub-systems likely also

---

<sup>19</sup> As Kapiszewski 2007 argues, it can be misleading to talk about a Court's "assertiveness" or "authority" in general terms, without specifying toward or over whom, since Courts likely exhibit different degrees of assertiveness toward, and are able to muster different degrees of authority over, different actors. Moreover, when those actors are elected leaders, high courts' assertiveness and authority should be assessed policy arena by policy arena. This analysis focuses on Courts' assertiveness toward and authority with respect to elected leaders. While it is in remiss in not designating a particular policy arena, again, the goal is more to suggest a line of inquiry than to carry out a systematic empirical analysis.

<sup>20</sup> While not considered here, the position of the high court within the broader "infrastructure of justice" within which it operates and the relationship it maintains with other bodies – for instance, a Judicial Council; Council of State; Ombudsman's office; General Comptroller's office; Attorney General, Solicitor General and/or Public Prosecutor's office; Public Defender's office; different congressional committees that deal with justice sector institutions; and Ministry of Justice to name just a few – are likely also relevant to how high courts act and interact.

affects high court decision-making. Also, Martin Shapiro has suggested that federalism (which generally implies a system of federal courts in addition to state court systems) may contribute to “successful judicial review” by high courts. Courts in federal systems may serve as the central government’s “junkyard dog,” keeping provincial governing authorities and judges “in check;” however, a Court cognizant that it plays such a role may feel more at liberty to challenge the central government (“bite the junkyard owner”) from time to time, gauging that elected leaders thus indebted to the Court may be less inclined to punish it (Shapiro 2002: 163).

(2) Relation with lower courts: control over personnel/judicial career. Whether appointing, promoting, sanctioning, and removing judges at the lower levels of the judiciary are carried out by the high court, by a separate judicial branch organ, by elected leaders, by some other organ, or via a public exam system could have a significant effect on the political and jurisprudential leanings of lower-instance judges and how they handle cases, which in turn affects who appeals, and what sorts of cases arrive to the high court and thus its opportunities to check or endorse the exercise of government power. Elected leaders may also be more hesitant to defy (and likely anger) high courts that retain significant control over the rest of the judiciary (as cases against the government are often filed at a lower judicial level). Further, in countries with an inflexible “judicial career” that reaches to the high court (i.e. where judges on lower courts constitute the pool from which high court justices are ultimately drawn), who manages the tasks mentioned above and how they are performed eventually affects the composition of the high court, and, thus its tendencies in terms of challenging vs. supporting the power of elected leaders.<sup>21</sup> In particular, if appointment and promotion occur on the basis of scores on

---

<sup>21</sup> For example, as Hilbink describes the situation in Chile, given its very hierarchical judicial system, judges who aspire to advance in their career feel that their rulings must reflect the political and jurisprudential leanings of the Chilean Supreme Court, leading to the reproduction of conservative jurisprudence throughout the judiciary, and on the high court (1999).

competitive exams, the judiciary may be more professionalized and may have particular attitudes towards law and the judicial role; if a full judicial career exists, these views will again eventually be reflected on the high court.

(3) Relation with lower courts: control over rulings. In systems in which high court rulings set precedent (for the Court and other courts), latitude for jurisprudential innovation and evolution, and courts' ability to react quickly to changing (political) circumstances, may be limited. Nonetheless, such vertical control facilitates "judicial discipline" (i.e. intra-judiciary homologation of jurisprudence). High courts without such control may not serve the junk-yard dog role mentioned previously as effectively, and elected leaders may hesitate less before defying them. Moreover, in the absence of vertical control, judicial "revolts" can break out (in which lower courts rule *en masse* in a different direction than the high court); quelling such revolts may require coordinated action on the part of high courts and elected leaders.

#### ***Size and Composition of the High Court***

(4) High court size. One way elected leaders can obtain a more quiescent Court is to increase the number of justices that sit on the Court (and then appoint justices whom they anticipate will not challenge them). Whether the number of justices who sit on the Court is stipulated in the constitution or by law can make it more or less difficult (respectively) to alter the size of the Court. Also, a larger Court could feel more confident confronting elected leaders and could be a more formidable opponent for elected leaders (encouraging them to think twice before defying it).

(5) Rules regarding high court appointments. The more rigorous the requirements to be a justice – and, perhaps, when a judicial career exists and reaches all the way to the top of the judicial hierarchy – the better jurists may be appointed to the Court. Of course, being a good

jurist is not *necessarily* associated with a willingness to challenge (or defer to) elected leaders. Nonetheless, justices with greater jurisprudential knowledge *may* be more disposed to challenge elected authorities, either because they are better able to identify firm legal grounds on which to do so, or because they feel they need to do so (i.e. need to exhibit imperviousness to political pressures) in order to maintain their positive image before the legal community. If one or both of the popularly elected branches of government are charged with appointing justices, however, and in particular if the rules regarding high court appointments are vague, there is greater potential for elected leaders to appoint justices whose ideologies are similar to theirs (quite aside from the issue of qualifications). In a situation of stable government, such political appointments could lead to incremental increases in Court-elected branch alignment – and a concomitant decrease in high-court challenges – over time (but could induce *more* high court challenges following a change of government if the Court remains seated).<sup>22</sup>

(6) Rules regarding justices' tenure and dismissal. If elected leaders are responsible for judicial appointments and dismissals, and if rules guiding tenure and dismissal are vague or if it is otherwise easy to dispose of rambunctious justices, justices may be more likely to match their rulings to the political interests of their appointers (and elected leaders may hesitate less before defying a court, confident that they can replace it with a more quiescent one). On the other hand, if justices are guaranteed life tenure (and/or if impeachment is difficult), they might feel more empowered to follow their own political and jurisprudential leanings; moreover, justices with life tenure might be inspired to resist political pressure and to challenge elected leaders when they act unconstitutionally given the potential they retain to make a mark on national jurisprudence

---

<sup>22</sup> A political appointment process will not necessarily produce a partisan Court, however. For instance, as Hilbink (1999) describes Chile's hybrid appointment system, when a Supreme Court vacancy arises, the justices themselves provide the president a list of candidates to fill the empty seat drawn from the lower ranks of the judiciary. The president nominates one of those candidates, who is then vetted by the legislature.

over the length of their tenure. For justices guaranteed shorter terms, the interesting variable becomes whether re-appointment is permitted. If it is not, justices may feel empowered to challenge the government since they “lose less” if impeached (given the relatively short period for which their appointment is guaranteed); if re-appointment is permissible, justices might restrain themselves from too often, or too severely, challenging government authorities.

(7) *Security*. Formal rules regarding Court size, appointments, tenure and removal aside, if high court appointments are made by elected leaders and if they develop a practice of frequently manipulating the size and composition of the Court, an atmosphere of insecurity may exist on the Court. Courts on which justices are more secure may be more likely to challenge the interests of the central government, and elected leaders may be more likely to comply with their rulings (and vice versa). Alternatively, greater Court security may be associated with more frequent ideological misalignment between justices and elected leaders, which could generate inter-branch tensions. Further, Courts on which justices are more secure may be more likely to cooperate with elected leaders under difficult conditions while Courts on which justices have over time experienced insecurity may periodically “rebel,” challenging leaders who have been “kicking them around” for decades.<sup>23</sup>

(8) *“Profile” of high court justices*. We might think of the “profile” of high court justices as including their legal training and focus; their political and judicial background, and their ties to the appointing president. Justices’ lack of familiarity with constitutional law could impede their ability to efficiently, effectively, and consistently carry out judicial review functions, while as suggested above, justices with stronger legal training or a great deal of experience in the judiciary might feel more comfortable declaring elected leaders’ policies

---

<sup>23</sup> As outlined above, Helmke (2005) offers a different argument: that in insecure settings, justices may challenge elected leaders more once it becomes clear that those leaders will be exiting power, in order to ingratiate themselves with the incoming administration.



unconstitutional. Justices with more experience in politics might be better acquainted with the difficulty of governing within the confines of laws and the constitution, and might be more willing to offer elected leaders latitude, for instance, during crisis situations; likewise, elected leaders might be more willing to comply with the decisions of Courts that include justices with such experience in politics, anticipating the importance of having them as allies during future crises. Justices with strong ties to appointed leaders may tend to challenge them less (though, again, such ties could lead to greater challenges following a change in government).

### ***Intra-Court Structure and Dynamics***

(9) *Internal organization*. The way in which a Court is organized can affect case review procedures, and ultimately determines who has the opportunity to influence rulings. The more professional a Court's staff and the longer clerks stay on the Court (given the involvement these individuals can have in writing the Court's opinions), the better-prepared they may be to find strong legal grounds for particular decisions, perhaps increasing the Court's tendency to challenge elected leaders. The existence of separate chambers adds another internal "layer" that can facilitate Courts' delaying case resolution (or, conversely, can augment the efficiency of a Court's decision-making, making quick challenges or endorsements easier).

(10) *Intra-Court relations*. The more harmonious a Court's internal relations (i.e. the greater the degree to which justices engage in deliberation and work together to arrive at consensus solutions [even if their ideas and viewpoints differ], and the less division and turmoil that exist on the Court), the likelier it may be that the Court will challenge elected leaders, and the more hesitant elected leaders may be about defying its rulings (anticipating that it has the wherewithal to unite as a formidable enemy). By the same token, elected leaders may also hesitate to defy a divided and unpredictable Court.

(11) *Justices' Role Perception*. Courts on which there is internal consensus around a clear notion of the Court's role may more consistently challenge or endorse the exercise of government power, depending upon what that role is perceived to be (i.e. whether it is "support the appointer" or "defend the constitution" for instance).<sup>24</sup> Particularly in weakly institutionalized settings, Court's lacking the ballast provided by internal consensus on the institution's role may be more vulnerable to political pressures and more likely to endorse elected leader's initiatives. Leaders may also be more willing to comply with the rulings of a Court on which such consensus exists, given that the Court's rulings may be more predictable, and given that the institution may have greater potential to retaliate against elected leaders who defy its decisions than might a Court lacking internal role consensus.

(12) *Leadership*. Courts with strong leadership – either more informal "intellectual" leadership or more formal appointed or elected leadership – may more consistently challenge or endorse the exercise of government power, again depending upon the direction in which the leader(s) take(s) the Court. Also, the more tasks are assigned to leaders, the greater their influence can be. Frequently rotating leadership could compromise coherence in high court decision-making (and perhaps induce more alternation between challenging and endorsing the exercise of government power). Again, elected leaders may be relatively less inclined to defy a Court that a strong leader could incite to retaliate against their non-compliance.

### ***The High Court's Potential and Actual Ambit***

(13) *High Court Jurisdiction*.<sup>25</sup> The greater the jurisdiction a high court enjoys, the more cases it has the potential to hear, the more cases it likely decides, and the greater the number of

---

<sup>24</sup> Of course, even on a Court that is relatively well-institutionalized, such as the U.S. Supreme Court, not all of the justices agree on what role the Court should play. This does not take away from the point that more internal consensus can only strengthen a Court's position.

<sup>25</sup> This sub-section deals only with jurisdiction in terms of which cases the high court is empowered to consider, not with Courts' administrative jurisdiction.

opportunities it has to challenge (or endorse) the exercise of government power (though “extent of jurisdiction” is probably not naturally associated with a tendency either to challenge or endorse). Broad jurisdiction can also generate possibilities for the Court to delay (perhaps indefinitely) dealing with controversies that come before it or, in any event, can increase its discretion in terms of when it decides which cases (absent formal or informal rules dictating a relationship between when a case is filed and when it must be decided).

(14) *Judicial and Constitutional Review*.<sup>26</sup> The relevant features of judicial and constitutional review are: whether the actions are constitutionally-mandated; whether there is a separate court (or particular chamber of the high court) dedicated to constitutional matters; whether the Court can carry out *concrete* review, *abstract* review or both;<sup>27</sup> whether judicial review is *diffuse* (or decentralized) or *concentrated*;<sup>28</sup> whether review is *a posteriori*, *a priori*, or both;<sup>29</sup> whether the immediate effects of the high court’s decision are *inter partes* or *erga omnes*;<sup>30</sup> whether the Court can exercise *de officio* judicial review;<sup>31</sup> and whether the Court can rule on legislative *omissions*. Justices on a Court with constitutionally-mandated powers of judicial or constitutional review may be less hesitant to carry out review than those on a Court that has created judicial or constitutional review through its own rulings. The more forms of

---

<sup>26</sup> I use the term “judicial review” to refer to the act of reviewing a lower court ruling regarding the constitutionality of a government norm, and “constitutional review” to refer to the Court’s direct review of the norm itself.

<sup>27</sup> *Concrete* review entails evaluating the constitutionality of a government norm or action (or a lower court’s rulings regarding the constitutionality thereof) in the context of a case or controversy brought by an individual or group alleging that the norm violates the constitution. *Abstract* constitutional review entails considering the constitutionality of a norm or government action “in the abstract” – in the absence of a concrete case or controversy.

<sup>28</sup> That is, whether many courts are empowered to review the constitutionality of and suspend the application of laws and decrees to a particular case (*diffuse*) or whether such powers are *concentrated* in a constitutional court.

<sup>29</sup> That is, whether justices are empowered to question the constitutionality of laws before they are formally enacted (*a priori*) or only after they are enacted (*a posteriori*).

<sup>30</sup> *Inter partes* rulings hold only for the specific parties to the case; a declaration of unconstitutionality simply means the norm in question ceases to apply, often from the time it was published, to the parties to the case at hand. Rulings with *erga omnes* effects apply to every person or group in the same circumstance as the party; a declaration of unconstitutionality in essence means the offensive norm “ceases to exist,” and may involve its revocation.

<sup>31</sup> That is, whether a judge can consider and rule on the constitutionality of a particular norm without a party to a case requesting that she or he do so.

judicial and constitutional review exist, the more chances a Court may have to challenge (or endorse) the exercise of government power. A Court may be more likely to declare a norm or act unconstitutional when courts below it have done so, and thus may do so more often in a system of *diffuse* (rather than *concentrated*) review, and may also be more likely to do so when called upon (even if empowered to exercise *de officio* constitutional review). Justices may be slightly more hesitant to challenge the exercise of government power in their Court's abstract review capacity given the broader consequences of such a ruling, and slightly less hesitant to exercise *a priori* than *a posteriori* review given that, in the latter case, they are more clearly acting in an anti-majoritarian manner. All things equal, we might expect elected leaders to be more wary of defying a Court the more well-developed and expansive the Court's constitutional and judicial review powers.

(15) *Mechanisms to Reach the Court*. The more mechanisms there are to reach a high court, the more ways there are to contest policy, and the more cases the Court can receive (although, again, receiving more cases does not mean the Court will be more likely to challenge or endorse the exercise of government power). A very broad and permissive appeals structure can allow the high court to be inundated with cases, making its work more difficult, and perhaps decreasing its ability to decide cases on national policy in a timely manner (or allowing it the latitude to duck such cases). Also, mechanisms that allow appeal all the way to the high court (which can be a lengthy process in some inefficient judiciaries) can allow elected leaders to continue down a particular policy path even though they are losing cases in lower courts. By the time the relevant cases reach the high court, the Court may be unwilling to challenge what is essentially, by that point, a "*fait accompli*" (Taylor 2004: 132); moreover, even if the high court

does challenge elected leaders, those leaders may be essentially unable to comply with its ruling given the difficulty of undoing the policy in question and its effects.

(16) *Case Load: Size.*<sup>32</sup> An immense case load can “stall” a Court’s final ruling against policies that it would likely deem unconstitutional in the short-run (giving elected leaders time to figure out another solution to the issue the policy sought to address or giving the Court an excuse to argue that the policy has “become” constitutional if it employs such a doctrine). What effects the size of a Court’s case load might have depends to some degree on the content of that case load (considered below). Holding thousands of repeat cases (particularly if they imply major monetary responsibility for the central government) could encourage a Court to resolve a “test case” – either to reassure elected leaders that it will not challenge them or to demonstrate that it will not hesitate to do so. Likewise, elected leaders facing a Court that holds thousands of cases which, if lost, could imply a large fiscal outlay, may “tippy toe” around the Court, complying with any challenging rulings it hands down, in hopes of not aggravating the Court and inducing it to begin to decide those cases in a way that does not favor elected leaders’ interests.

(17) *Case Load: Content.* As suggested previously, whether a Court’s case load contains politically important cases is likely not a predictor for that Court challenging or endorsing elected leaders’ power any more consistently or forcefully. For instance, holding politically important cases of various kinds offers the Court the latitude to engage in something of a compromise, mixed approach to decision-making, challenging the power of elected leaders on some cases while endorsing it on others. How this variable affects high court decision-making is likely conditioned by other factors (for instance, the profile of justices, leadership on the Court, the Court’s perceived legitimacy, etc.). If the Court holds cases with important political or fiscal consequences for elected leaders (for instance, cases regarding elections,

---

<sup>32</sup> Many of the points made in connection with Element #15 concerned case load and are thus relevant here as well.

crucial economic policies, or important social welfare policies), the Court's threat potential could induce the government to comply with the Court's rulings on other cases.

### ***High Court Internal Procedures***

(18) *Docket Control*. A high court that can choose the cases it hears has a greater ability to “grab” or “duck” politically important cases – allowing it greater latitude to challenge or endorse (perhaps tacitly, when it ducks) the exercise of government power. Again, what the precise outcome of this increased discretion will be in terms of the high court's decision-making likely depends on other factors. Also, Courts that are unable to filter cases may end up hearing an extraordinary number of cases, the possible effects of which were discussed previously in connection with case load. Elected leaders facing a Court with no control over its docket may feel slightly more compelled to comply with the Court's rulings, knowing that the Court is able to grab (or unable to duck) cases in which its interests are at play.

(19) *Case review and resolution procedures*: Some important aspects of case review and resolution procedures might be whether procedures are formally established; what form decision-making takes (written or oral, individual or involving deliberation); what guidelines exist regarding the authorship, timing and sequencing of rulings; how many external inputs there are to the review and resolution process; and how transparent the process is. Less-formally established procedures, greater discretion in terms of timing,<sup>33</sup> and a less transparent process all afford the Court more discretion in terms of the decisions it makes. Also, no matter whether decision-making is written or oral, the justices who write or speak earlier in the decision-making process may have disproportionate influence over the final ruling and opinion; if justices always proffer votes in the same order, the jurisprudential or political leanings of justices who

---

<sup>33</sup> For instance, the ability to determine the temporal relationship rulings will have to a particular political controversy offers the Court the ability to rule in the midst of a politico-economic storm if it desires, or to delay significantly a decision (in order to stay out of a heated controversy).

participate early (and their collaborators) could help to explain why a Court more often challenges or endorses the exercise of government power. Further, some agenda-setting and decision-making rules and norms might generate more opportunities for coordination, bargaining, and log-rolling among justices than others (Helmke 2000). Also, the ability to issue preliminary rulings offers the Court the possibility to “test the waters,” or “signal” its discontent with (or approval of) certain policies to the elected branches before having to make a final ruling on the merits of the case (which, again, could lead either to more endorsements or more challenges depending upon the consequences of these tests and signals).

### ***External Relations***

(20) *Accountability Mechanisms*. The more mechanisms elected leaders have to hold a high court accountable, the less likely (or able) that Court may be to challenge their power. For example, the lower the barriers to constitutional amendment (when issues such as high court jurisdiction, tenure, or salaries are constitutionally regulated), the easier it is to impeach justices, the less control the Court has over the judiciary’s budget, the existence of legislative override, and the easier it is for elected leaders to appeal high court decisions, the more beholden the Court might be to elected branches (and the less it might challenge them).

(21) *High Court Perceived Legitimacy*. Perceived legitimacy depends upon public support for a Court and professional support for it among the legal community. The degree to which a Court is viewed as legitimate by these two groups can affect how often it challenges elected leaders (assuming, as several studies have suggested [e.g. Gibson, Caldeira, and Baird 1998; Staton 2002; Moustafa 2003] that Courts with more external support will be more likely to challenge elected authorities). Similarly, whether the Court is seen as legitimate influences how formidable of an enemy it can be (or is seen to be by elected leaders); they may be more hesitant

to confront a Court with a great deal of popular support. A Court's perceived legitimacy also affects how the government can use the Court (and thus how deferential they are towards it): when the high court is perceived as illegitimate, it is harder for elected leaders to use it to *legitimate* their policies.<sup>34</sup>

### **Summary**

The 21 high court institutional elements highlighted in this section are categorized in Table 2 below. A few observations might be made regarding the table. First, while certain high court attributes (such as the "security" of high court justices, the size or content of a Court's case load, its perceived legitimacy, or the tenor of intra-Court relations) are likely informal (i.e. not determined through laws or official channels) in most contexts, for most institutions and attributes, whether they are categorized in the "formal" or "informal" column or both is to some degree context specific. In some contexts, for instance, formal rules regarding high court appointments, or the internal organization of the Court may be clearly explicated and may shape behavior; in others there may be no formal rules and informal norms will prevail; and in still others formal rules will be complemented or over-ridden by informal norms.

Further, particular elements can be placed in more than one category. To offer just one example, the *specific rules* governing a Court's jurisdiction (i.e. the rules that dictate the kinds of cases on which a Court can rule, which are obviously Court-related *institutions*) influence the cases that can be filed with the Court and thus the opportunities that the Court has to challenge elected leaders, thus shaping its relations with the elected branches. Nonetheless, whether a Court's jurisdiction is *broad or narrow* (a high court *attribute*), may have independent causal

---

<sup>34</sup> While conferring legitimacy likely does not fall within the institutional repertoire of an illegitimate Court, the government could still use such a high court to concretize its policy choices: once they are declared constitutional by the high court, no matter how illegitimate the tribunal and its ruling, there is no further step that can be taken within the domestic institutional system to bring down that policy.



**Table 2. Categorization of 21 High Court Institutional Elements**

Element / Formality → ↓	Formal	Informal
<b>Court-related institutions (rules, procedures)</b>	<ul style="list-style-type: none"> <li>• Rules guiding appointments (I)<sup>1</sup></li> <li>• Rules guiding tenure and dismissal (I)</li> <li>• Rules regarding internal organization (I)</li> <li>• Rules guiding jurisdiction (I)</li> <li>• Rules guiding judicial review (I)</li> <li>• Mechanisms to reach the Court (I)</li> <li>• Docket control (I)</li> <li>• Case review and resolution procedures (I)</li> <li>• Accountability mechanisms (I)</li> </ul>	
<b>Court-related tactics</b>		
<b>Court attributes</b>	<ul style="list-style-type: none"> <li>• Position</li> <li>• Size</li> <li>• Control over lower court judges (I)</li> <li>• Control over lower court rulings (I)</li> <li>• Leadership (I)</li> <li>• Breadth of jurisdiction (I)</li> <li>• Degree of judicial review (I)</li> <li>• Degree of docket control (I)</li> </ul>	<ul style="list-style-type: none"> <li>• Security</li> <li>• Profile of justices</li> <li>• Intra-Court relations</li> <li>• Consensus on role perception</li> <li>• Case load size</li> <li>• Case load content</li> <li>• Perceived legitimacy</li> </ul>

<sup>1</sup> Institutions and attributes designated with an (I) may be informal as well.

power in shaping the degree to which elected leaders will defy the Court.<sup>35</sup> Concerning the absence of elements in the “Court-related tactics” row, none of the 21 elements outlined above *necessarily* entails ad-hoc tactics (i.e. short-term measures or fixes employed by elected leaders or justices to change the way formal institutions function or to modify different institutional attributes): whether and which ad-hoc Court-related tactics are employed is context-dependent. In some contexts, for instance, governments may pass laws to temporarily change the jurisdiction of the Court; in other contexts justices may employ short-term docket-control strategies that help them select or reject particular types of cases; and in other contexts, no such things will occur.

Finally, Court-centric analysis should focus not only on the interplay between formal and informal elements, but also on the interactions among Court-related institutions, tactics, and

<sup>35</sup> That is, elected leaders who anticipate, due to the Court’s broad jurisdiction, that it will receive a large number of cases regarding, for instance, major changes in economic policy that those leaders expect to make, may choose to defer to the Court today, in hopes of receiving more favorable rulings on those cases tomorrow.

attributes. While it is possible to imagine scenarios in which particular elements (or variables) make a difference to the outcomes of interest, as the brief discussions and hypotheses offered in association with each variable above highlighted, how particular Court-centric elements affect judicial decision-making and compliance with judicial decisions can often depend on the values of other Court-centric elements. For instance, the way in which the content of a Court's case load affects high court decision-making is likely conditioned by other factors such as the profile of justices, leadership on the Court, the Court's perceived legitimacy. As with many analytic frameworks, Court-centric analysis becomes more meaningful as it is applied to particular contexts. The next section applies the framework to the cases of Argentina and Brazil.

#### **IV. COMPARING ARGENTINA AND BRAZIL**

To some degree, Argentina and Brazil, two of Latin America's largest democracies, have been on similar paths since their mid-1980s transitions to democracy. Both are federal systems, and each presidential democracy has faced – and withstood – significant challenges in the post-transition era, including recurrent economic crisis. Each country operates under the civil law tradition and the high court in each context has been actively engaged in resolving crucial political conflicts over the last two decades. However, the literature on the two high courts suggests that they contrast significantly with regard to their assertiveness toward elected leaders. Most scholars of the Argentine Court portray the Court as having been, on the whole, relatively unassertive when ruling on politically important cases over the last two decades (see, e.g., Iaryczower et al. 2000, Scribner 2004, Helmke 2005, etc.). Students of the Brazilian Court, by contrast, suggest that it has been relatively assertive (Taylor 2008), and they have even expressed concern over that assertiveness given the Court's limited accountability (e.g., Arantes 1997 and

Santiso 2004).<sup>36</sup> Brinks (2005) and Kapiszewski (2007), two comparative studies of the judiciary and high court in the two polities, corroborate this contrast.<sup>37</sup>

There has been very little study of the second outcome of interest, compliance with high court rulings. The only study thereof in the Argentine and Brazilian contexts, Kapiszewski (2007), suggests that Argentine elected leaders have complied less often and less fully with high court rulings that challenged their economic policies than have their Brazilian counterparts. Of course, the amount of compliance a Court is able to command in the realm of economic policy may not be representative of its overall authority, given the sensitivity and complexity of that policy arena in the post-transition period in Latin America. Nonetheless, a Court's ability to elicit compliance in cases regarding economic policy is at a minimum suggestive of how elected leaders respond to politically important high court rulings. Thus this paper proceeds on the assumption that the two high courts also differ with respect to the degree of authority they command over elected leaders.

The analytic strategy for this section is the following. First, the two high courts are "scored" on each of the 21 Court-related institutions and attributes outlined in the previous section,<sup>38</sup> demonstrating that the structure and functioning of the two Courts differed in important ways in the post-transition period. Correlating variation between the two high courts' institutions and attributes with the cross-national variation in the outcomes of interest just

---

<sup>36</sup> Again, I would suggest that to arrive at a nuanced and accurate picture of a high court's assertiveness, we should study its assertiveness with respect to particular actors, in particular policy areas, at particular moments. I am generalizing here as I am less seeking to make an empirical argument about the Argentine and Brazilian high courts, and more trying to advocate for the analytic approach I refer to as "Court-centric analysis."

<sup>37</sup> Brinks 2005 discusses the "independence" of the two Courts (and each country's judiciary as a whole) from elected leaders; we can thus consider his work to corroborate the general comparative portrait of the two Courts just outlined if we believe that Courts that are less independent from elected leaders are less likely to assert their authority against them.

<sup>38</sup> Argentina, and more recently Brazil, like many Latin American countries, have undergone judicial reform in the post-transition period (see, e.g., Hammergren 1998; Prillaman 2000; Ungar 2002). Important changes in the Courts' scores on certain variables during that period are included in the description of each country case.

discussed (high court assertiveness and authority vis-à-vis elected leaders) suggests a range of Court-related institutions and attributes (and attendant Court-centric hypotheses) that might help to account for cross-national variation on those outcomes.

### ***High Court Relations with Rest of Judiciary***

(1) *Position*. The Argentine Supreme Court (CSJN) is the highest court in the Argentine justice system, which consists of three separate sets of courts: the federal judiciary (with jurisdiction over federal matters in the entire country), the “national” judiciary of the Federal Capital, and provincial judiciaries (one for each of the country’s 23 provinces). The courts of the federal judiciary are organized in two levels below the Supreme Court: federal appeals courts (including an important sub-system of administrative courts and first instance courts.

In Brazil, the Supreme Federal Tribunal (STF) sits atop the judicial hierarchy, heading the federal and individual state judicial systems. The federal justice system is divided between the “common” judiciary (which includes civil and criminal courts), and separate “special” systems of military justice (created in 1934), electoral justice (created in 1934), and labor justice (constitutionalized in 1946). The common system and the special systems each have three levels: first instance,<sup>39</sup> second or appeals instance,<sup>40</sup> and a third level including superior courts for each “special” (separate) system,<sup>41</sup> as well as the Supreme Tribunal of Justice (*Superior Tribunal de Justiça*, STJ, created in 1988 to hear appeals of non-constitutional cases).<sup>42</sup>

---

<sup>39</sup> There are approximately 750 courts of first instance (often composed of one judge and known as *varas*) in the “common” judiciary (though some of these courts were awaiting personnel and thus not functioning); approximately 1,500 first-instance courts (known as *varas*) in the system of labor courts; approximately 3,000 first-instance courts (known as *cartorios*) in the electoral courts system; and approximately 20 first-instance courts (known as *auditorias*) in the military courts system. All figures regarding the number of courts are from the early 2000s.

<sup>40</sup> This instance consists of Regional Electoral Tribunals (one in each state plus the Federal District for a total of 27); Regional Labor Tribunals (24); Military Justice Tribunals (12); Federal Regional Tribunals (5); and Justice Tribunals (which judge simple civil cases and minor criminal infractions).

<sup>41</sup> That is, the Superior Electoral Tribunal (*Tribunal Superior Eleitoral*, TSE), the Superior Labor Tribunal (*Tribunal Superior do Trabalho*, TST), and the Superior Military Tribunal (*Superior Tribunal Militar*, STM). Because the STF is loath to take cases on appeal and contradict these courts (particularly the TSE, on which three STF justices

(2) Relation with lower courts: control over personnel/judicial career. There is no constructed judicial career in Argentina: lateral entry is possible at all levels of the federal judiciary, including to the Supreme Court (Gershanik 2002: 23). From the transition to democracy through the late 1990s, the Argentine president appointed all federal judges (with the approval of the Senate); since that time, the judicial council (*Consejo de la Magistratura*, of which the high court president also serves as president) has proposed three names from which the president must choose to fill any federal judgeship (and those nominations must still be approved by the Senate).<sup>43</sup> The judicial council is also charged with monitoring the work of federal judges and of disciplining them; the eventual removal of judges requires the creation of an ad hoc jury (Tulchin 1998).

In Brazil, a judicial career has existed within the federal judiciary since 1934: judges must work their way up the judicial ranks, and lateral entry – except to the very highest ranks of the judiciary – is rare. In stark contrast to Argentina, the only members of the judiciary appointed by the president are the justices of the STF and the *Supremo Tribunal de Justiça* (STJ). Most judges are selected on the basis of their scores on rigorous and competitive public exams, and the judicial bureaucracy consists of highly professional, well-trained judges (Rosenn 1984: 29-30). The federal judiciary manages its own promotion system, and promotion is based mainly on time of service, as well as seniority and merit. A 15-member National Justice Council (*Conselho Nacional de Justiça*, CNJ) was created through judicial reform (via constitutional amendment #45) in December 2004 and charged with administering the judiciary, handling

---

sit), the presence of these “special” upper courts likely weeds out some important cases regarding elections and labor issues from the STF’s docket.

<sup>42</sup> The 33-member STJ is the court of last instance on non-constitutional matters – that is, the “guardian” of federal legislation except for labor, military, and electoral legislation. The STJ represents something of an institutional innovation: while in most other contexts increasing emphasis on constitutionalism and rights led to the creation of a constitutional court, in Brazil, an “everything-but-constitutional” court – was established in 1988.

<sup>43</sup> In order to choose these three individuals, the council administers an exam to aspirants, evaluates their professional background, and interviews them.

discipline around the administration of the common, special, and state judiciaries at the first and second instances, and elaborating judicial policy.<sup>44</sup>

(3) Relation with lower courts: control over rulings. The Argentine high court retains no formal mechanism to exert control over the lower courts. As in most civil law systems, Argentina lacks the institution of formal precedent (i.e. the principle of *stare decisis* does not exist): the high court's decisions are not formally binding on other courts hearing identical cases. However, the CSJN has, through its jurisprudence, introduced a loose, informal type of binding precedent, insisting with increasing vigor over time that lower court judges have the "duty" (that is, it is their "moral imperative") to make their decisions conform with those of the high court on cases analogous to those on which it has ruled. Moreover, if lower courts fail to apply the high court's jurisprudence, the affected party can continually appeal its case until it reaches the Court, which generally considers baseless lower court rulings that stray from its precedents without bringing new arguments justifying that variation; in practice, then, jurisprudence can behave as if *stare decisis* existed (Ferreyra 2004: 15, 21; Iaryczower et al. 2000: 4).<sup>45</sup> Nonetheless, given that lower court rulings are little studied, the degree to which lower courts actually follow the high court's lead is largely unknown, though instances of lower court "rebellion" have been documented.<sup>46</sup>

---

<sup>44</sup> While Brazilians refer to the CNJ as an "external control body," the majority of the council is drawn from the judiciary, it is located within the structure of the judiciary, questions regarding illegality or abuse of authority by, the CNJ are heard by the STF, and the STF president is the president of the CNJ.

<sup>45</sup> That is, in essence, the high court functions as a court of cassation charged with rationalizing legal interpretation throughout the judicial system by reviewing lower court decisions (although a separate Federal Court of Cassation exists for criminal matters). Moreover, ad hoc rules have sometimes been imposed to increase the high court's control. For instance, in April 2002, Congress enacted temporary legislation, which came to be known as an "*anti-leakage*" law, which disallowed depositors from withdrawing their money from bank accounts the government had frozen on the basis of a lower court decision; instead access would be blocked until all judicial appeals had been exhausted and a final and conclusive decision in favor of the depositor was rendered by the high court (*New York Times*, 26 April 2002, "Argentine Congress Tightens Rules on Bank Withdrawals").

<sup>46</sup> For instance, even once the high court had ruled constitutional some highly controversial policies to address the early 2000s economic crisis, lower courts continued to rule the policies unconstitutional.

High court control over lower courts is relatively weak in Brazil. The Brazilian system lacks the institution of precedent in the realm of concrete judicial review: the STF's rulings in concrete review cases do not bind the decisions of courts in other instances, and the STF has not developed any informal mechanism of "top-down" control over lower courts' rulings (as the CSJN has sought to impose) (AS-02).<sup>47</sup> However, the rules guiding the effects of high court rulings on abstract review cases (a small minority of the STF's rulings) allow the Court some piecemeal control over lower court decisions. For instance, since 1999, the STF's decisions on all abstract review cases have had *erga omnes* effects and set binding precedent.<sup>48</sup> Further, when the high court issues an injunction in an *Arguição de Descumprimento de Preceito Fundamental* (ADPF, a type of abstract review case), that injunction can instruct lower courts to suspend judicial proceedings or the effects of judicial decisions or most other measures related to the object of the ADPF (Vilhena Vieira 2002: 131-34). Also, judicial reform (carried out via Constitutional Amendment #45 in 2004) stipulated that the STF can, with the vote of two-thirds of its members, establish its summary jurisprudence as precedent.<sup>49</sup> Nonetheless, most consider "judicial discipline" to be relatively weak in Brazil and lower courts have sometimes disregarded STF jurisprudence (Taylor 2004: 140; 376; Vilhena Vieira 2002: 218; AS-02).<sup>50</sup> Anecdotes and generalized impressions notwithstanding, however, there has been little systematic study of the degree to which lower courts follow the STF's jurisprudence in Brazil.

---

<sup>47</sup> Nonetheless, the same principle mentioned in connection with the Argentine Court – that the Court in essence serves as a court of cassation – holds.

<sup>48</sup> The STF's rulings on a particular type of abstract review case, *Ações Declaratórias de Constitucionalidade* (ADCs), were binding on all courts since the creation of the mechanism via Constitutional Amendment #3 in 1993.

<sup>49</sup> Constitutional amendment #45 also mandated that when the STF judges positively an *ação suspensiva* in a certain type of case, all similar cases in the entire judiciary are suspended until the STF rules on the merits of the case.

<sup>50</sup> One STF clerk suggested that pro-society rulings issued by lower court judges who consider themselves more attuned to social reality than the "11 old folks in the capital" have created something of a culture of disrespect for high court rulings in the post-transition period (AS-02). A justice concurred, attributing lower courts' "activism" to lower courts judges' relative youth and idealism and their desire to use the law as a tool to reform government and society (JG-06). These dynamics may relate to the emergence, in the South of Brazil in the later 1970s, of an "alternative" movement of judges who considered it their responsibility to protect the vulnerable social classes that had born the brunt of the military repression and economic chaos induced by military rule (Ballard 1999: 234-240).

### *Size and Composition of the High Court*

(4) *High court size.* The size of the Argentine Court is regulated by legislation rather than by the constitution. Upon regime transition, the Court consisted of five members, but at the behest of President Menem, Congress passed Law 23.744 (April 1990), which increased the size of the Court to nine justices.<sup>51</sup> In December 2006 Congress passed Law 26.183, which gradually reduced the official number of members on the Court from nine back to five.<sup>52</sup> By contrast, the number of justices on the Brazilian high court is established in the constitution (Article 101), which congressional super-majorities are required to amend. The STF has consisted of 11 justices throughout the post-authoritarian era.

(5) *Rules regarding high court appointments.* Until 1994, the constitution stipulated that appointments to the CSJN were to be made by the president and approved by a majority of the Senators present at the time of the vote (with quorum); following the 1994 constitutional reform, presidential appointments had to be approved by two-thirds of the Senators present at the time of the vote (with quorum) (Constitution, Article 99).<sup>53</sup> Soon after assuming office in 2003, President Kirchner issued Decree 222, which regulated further and increased the transparency of the process of appointing Supreme Court justices.<sup>54</sup> The only requirements to be a justice are

---

<sup>51</sup> The politics of this episode – including the details of Menem’s constitutionally questionable maneuvers to circumvent opposition to his Court-expansion plan in the Chamber of Deputies – have been discussed in detail elsewhere; see Chavez 2001 and 2004: 456, Finkel 2001: 81, Helmke 2000, Larkins 1998, and Ungar 2002.

<sup>52</sup> “Ya es ley: la Corte Suprema tendrá menos miembros,” *La Nación*, 30 June 2006. When the law passed there were two vacancies on the Court, and the law stipulated that the Executive would not fill the next two vacancies, thereby producing a Court with five members.

<sup>53</sup> These rules have been bent if not broken on several occasions: most contend that illegality marred congressional approval of several of President’s Menem’s high court appointments (see, e.g., Chavez 2004: 457-58).

<sup>54</sup> The June 2003 decree requires that the identity and background of those whom the president is considering as appointees be published within 30 days of the appearance of a vacancy on the Court; that potential nominees then provide additional information about themselves to the public; that civil society then have 15 days to submit written endorsements of or objections to the candidates; and that the president take those submissions into account when deciding upon his nominee. In addition, high court appointees now participate in a hearing before the Senate in which they are asked a series of questions ostensibly based on the endorsements and objections submitted. President Kirchner did not consistently follow these stipulations however: he did not seek to fill the two vacancies that



that aspirants be lawyers with eight years of service, be at least 30 years old, have been an Argentine citizen for at least six years, and have an annual income of at least 2,000 pesos or the equivalent (Constitution, Articles 55 and 111).

Brazilian high court justices are appointed by the president and confirmed by an absolute majority of the Senate. Legislative confirmation, however, is largely a formality; rarely has confirmation entailed significant debate (Ballard 1999: fn 216), and only once in Brazilian history did the Senate reject a presidential nominee to the STF (EG-10).<sup>55</sup> As in Argentina, efforts have been made to make the appointment process more transparent. For instance, while prior to the 1988 constitution Senate deliberations on Supreme Court nominees were secret; the new constitution stipulates that those deliberations will be public (Article 52). While there are few requirements to be a justice in Brazil, they are more rigorous than those in Argentina: individuals must be Brazilian citizens between the ages of 36 and 64 when appointed, must possess outstanding judicial knowledge, and have an impeccable reputation (Article 101).<sup>56</sup>

(6) *Rules regarding justices' tenure and dismissal.* In Argentina, both the 1853 constitution and its 1994 reform (Article 110) indicate that justices have life tenure as long as they exhibit "good conduct" (though this phrase is not defined).<sup>57</sup> Impeachment is the only procedure mentioned in the constitution for removing a justice. Impeachment can occur if a justice engages in "bad performance or carries out an offense connected with the exercise of his

---

appeared on the Court in September 2005, leaving the Court with only seven members even though the legally mandated number of justices was nine until December 2006.

<sup>55</sup> In the first republic (1889-1930) Marshal Floriano Vieira Peixoto nominated a doctor with no knowledge of law to be a STF justice. The Senate refused to confirm the nominee (JG-06).

<sup>56</sup> An additional contrast is that "substitute justices" sit on the Court in lieu of those formally appointed to the Court far less frequently in Brazil than in Argentina.

<sup>57</sup> Article 99 of the 1994 constitutional reform, which came into effect in August 1999, requires justices who reach the age of 75 to be reconsidered and reappointed by the Senate every five years. Nonetheless, in the *Fayt* case (decided in August 1999), the CSJN declared this article of the constitution unconstitutional. Justice Fayt, aged 90 in 2008, remains on the high court and has never been reconfirmed or reappointed by the Senate. Since 1999, the only other justice whom the reform might have affected was Justice Belluscio; he resigned upon turning 75 in September 2005.

functions or commits a common crime.” Impeaching a justice requires a vote of two thirds of the members present in the Chamber of Deputies at the time of the vote; removal of a justice (already impeached by the Chamber) requires assent of two-thirds of the members present in the Senate at the time of the vote (Constitution, Articles 53 and 59).

In Brazil, justices are required to retire when they reach the age of 70. Only the Senate can impeach and remove justices: it is responsible for trying and deciding cases in which justices are accused of misconduct (*crimes de responsabilidade*) (1988 constitution, Article 52, clause 2). The constitution does not describe in detail the process of impeachment or dismissal. Article 39 of Law 1079 (April 1950), however, outlines the behaviors that qualify as “misconduct.”<sup>58</sup>

(7) *Security*. While the Argentine high court was a relatively stable institution from its founding through the mid-20<sup>th</sup> century, it has since suffered from dramatic instability (see Chavez 2001, Finkel 2001, Helmke 2000, Larkins 1998, and Ungar 2002). Beyond the changes in Court size referenced above, all justices on the Court were replaced with each change of regime or government between 1947 and 1983 (the year in which Argentina transitioned to democracy). Subsequently, one sitting justice resigned prior to, and another in response to, the 1990 expansion of the Court, and between February 1994 and December 1995 three Menem appointees resigned (as part of the political bargain struck to facilitate the 1994 constitutional reform). The Argentine Congress initiated several high-profile and ultimately unsuccessful attempts to radically change the composition of the Court during the tumultuous years between

---

<sup>58</sup> These include (1) changing, by any means (except through appeal) a decision made or vote proffered in a high court session; (2) engaging in decision-making when recused by law from a case; (3) being overtly remiss in carrying out the duties associated with the post; (4) (repealed); (5) violating the honor, dignity, and decorum associated with being a justice. Article 41 of Law 1079 stipulates that any citizen can denounce a high court justice before the Senate for misconduct.

Menem's departure from office in 1999 and Kirchner's election in May 2003.<sup>59</sup> In early June 2003, President Kirchner called on Congress to reinstate impeachment proceedings against several justices and shortly thereafter proceedings were initiated against five of the nine sitting justices, generating a cascade of judicial instability and six vacancies.<sup>60</sup> While President Kirchner had filled four of the vacancies by December 2004 (creating a seven-member Court), he failed to fill the remaining two empty seats (while simultaneously insisting through 2005 and much of 2006 that he would not shrink the size of the Court as various civil rights groups advocated).<sup>61</sup> While these changes (and the constant threat of further manipulation)<sup>62</sup> certainly produced an institutional environment of significant insecurity, it bears noting that few of the changes of court size or court membership were unconstitutional or illegal.

The STF's history since the mid-20<sup>th</sup> century (in particular, under democratic rule) has been more stable than that of its Argentine counterpart: Brazilian presidents manipulated neither the size nor the composition of the STF in the post-transition period, perpetuating a relatively secure institutional environment. STF justices were not replaced when Brazil transitioned to

---

<sup>59</sup> In late 2001, in view of calls for impeachment of several justices, the Argentine Congress established a committee to evaluate dozens of complaints against various Supreme Court justices, and in early February 2002 legislators promised to accelerate the process of impeaching the entire Supreme Court; these efforts were ultimately unsuccessful (*La Nación*, 22 December 2002, "El plan de Duhalde para frenar la Corte).

<sup>60</sup> One justice quickly resigned, another resigned soon after the opening of the impeachment process against him, a third was impeached and dismissed by Congress in early December 2003, a fourth resigned when impeachment was imminent in September 2004, a fifth was impeached and suspended by Congress in June 2005 and dismissed in September 2005, and a sixth retired in September 2005.

<sup>61</sup> As noted above, a December 2006 law mandated the gradual reduction in the size of the Court from nine to five members. Some initially condoned Kirchner's replacement scheme given the taint that the "Menem justices" had given to the high court. It was repudiated by others as a continuation of traditional unbridled manipulation of the high court. Kirchner's delay in filling vacancies not only directly violated his own decreed process for replacing justices, but was interpreted by some as a sophisticated political maneuver. By keeping the Court's number officially at nine and appointing no more than four justices, Kirchner could deny that he had appointed "a majority" of the CSJN, while simultaneously thwarting the Court's work by impeding its ability to assemble the five votes necessary to reach majority decisions on important cases, and keeping it in institutional limbo and in a position of weakness which further compromised its ability to issue crucial rulings (JG-04).

<sup>62</sup> Only the most well-known attempts to change the composition of the Court are mentioned here, there were other (failed) calls for or attempts at impeachment of justices.

democracy in 1985,<sup>63</sup> and subsequent Brazilian presidents also waited for vacancies to arise on the Court to appoint justices.<sup>64</sup> The rate at which justices left the Court between 1985 and 2008 was similar to the rate at which justices left the Argentine high court, however the conditions under which they exited were quite different: no justice was induced to resign, impeached, or removed from the Court for political reasons since regime transition.<sup>65</sup>

(8) *“Profile” of high court justices.*<sup>66</sup> Few of the 21 justices appointed to the Argentine high court in the post-transition era had a background in public law generally or constitutional law specifically.<sup>67</sup> With regard to professional experience, five justices had held high-ranking posts in the federal government previous to being appointed to the Court, and one-third had never held a significant position in the judiciary.<sup>68</sup> In any event, having served as a federal judge neither guaranteed significant preparedness nor signaled a strong professional background: judges are appointed to the Argentine federal judiciary (rather than joining the ranks through an exam process) and few consider federal judges to be the elite of the legal profession (in contrast to the mystique associated with the Brazilian federal judiciary). Finally, most of the justices appointed by President Alfonsín (1984-1989) were “close friends of the administration” (Nino 1996: 72), and with the exception of Justice Bossert, each of the 10 justices appointed by

---

<sup>63</sup> It was not until 2003 that all of the justices who sat on the Court at the time of transition in 1985 had retired from the Court, meaning that Brazil spent the early post-transition period with a Court consisting of justice used to defending (and, by some accounts [JG-06] still loyal to) a different political regime and constitutional system.

<sup>64</sup> President Sarney (1985-1990) made five appointments; President Collor (1990-1992) appointed four justices; President Franco (1992-1995) appointed one justice, and President Cardoso (1995 to 2002) appointed three justices. It was not until President Lula’s sixth appointment joined the bench in June 2006 that one leader had appointed a majority of the sitting Court; a seventh Lula justice joined the STF in September 2007.

<sup>65</sup> Nineteen justices left the Court between 1985 and 2008. Fifteen justices resigned when they reached the mandatory retirement age (70 years); one left to assume another judicial post; three left to assume political posts; and one left to pursue political aspirations. One justice, Francisco Rezek, sat on the Court on two different occasions, leaving the STF once to assume a political post, and the second time to assume a different judicial post. He was appointed the first time by a military leader, and the second time under democracy, a point that speaks to the continuity of appointment politics.

<sup>66</sup> The discussion of this element draws on Appendices 2.3 and 3.5 in Kapiszewski 2007.

<sup>67</sup> Five justices were trained in public law or constitutional law and two had a background in Administrative law.

<sup>68</sup> That is, one-third had *not* sat on a federal first instance or appeals court or been a state Supreme Court justice.

President Menem (1989-1999) had relatively strong ties to the president or his party. Change may be afoot, however: President (Néstor) Kirchner's (2003-2007) four appointees had minimal or no ties to the president or his party (though there is little doubt they were firmly ideologically aligned with the president). Again, no president's appointments were illegal and unconstitutional: there is no established judicial career in Argentina (meaning that justices do not need to hail from lower judicial ranks), and no formal rules prevent presidents from appointing individuals with little experience (and with strong personal ties) to the high court.

In Brazil by contrast, 13 of the 20 justices appointed to the high court between 1985 and 2008 specialize in constitutional law, and many were considered eminent jurists. Further, 11 of the 20 appointees had held significant posts in the judiciary;<sup>69</sup> given that the federal judiciary contains the elite of the legal profession (judges are required to pass rigorous and competitive entrance exams and are promoted on merit), the fact that many justices have come up through the judiciary is a testament to their preparedness and training. Eight justices had held posts within the newly empowered and independent federal prosecutorial organ, eight had held an important post in the executive branch of the federal government, and four had been a deputy or senator in the national congress. In a few cases, strong connections have existed between justices and the president who appointed them, and it is likely safe to assume some connection between justices who had previously played a role in the executive and their appointer (at least those who had held their position within the administration that eventually appointed them). Nonetheless, these are the exceptions rather than the rule: more often, justices have never met or barely know their appointer prior to their confirmation hearings (CSM-01). Aside from justices with ties to the

---

<sup>69</sup> Understood here as serving in the lower levels of the federal judiciary, sitting on a superior federal court, or serving as state Supreme Court justice.

*Partido dos Trabalhadores* (PT, Workers' Party) appointed by President Lula (of the PT),<sup>70</sup> most justices are not popularly identified with any political party.<sup>71</sup> While some justices are understood to be “pro-government,” they have not been considered specifically or only “pro-appointer,”<sup>72</sup> as is more the case in Argentina.

### ***Intra-Court Structure and Dynamics***

(9) *Internal organization.* The two high courts exhibit significant commonalities and differences in terms of internal organization.<sup>73</sup> First, fewer of the details regarding the Argentine high court's structure are formalized in a written document (such as the Brazilian STF's internal manual, the *Regimento Interno*). The CSJN operates in a single chamber while the Brazilian Court operates in two five-member chambers (the chief justice sits on neither). The Argentine Court includes a set of *Secretarías* (secretariats) that coordinate the circulation of cases through the Court (and also formulate some opinions); no such separate offices exist in the Brazilian Court. In both countries each justice has his or her own staff of attorneys, and the degree to which justices rely on their staff to draft opinions varies in both. In Argentina, most important staff positions within a justice's chambers (as well as those within a secretariat) were accessed through an established testing system until 1994; since the suspension of those “*concursos*,” justices may choose whomever they wish to work with them.<sup>74</sup> In Brazil justices may appoint

---

<sup>70</sup> Important to note, however, is that the “PT justices” appointed by Lula have not necessarily backed up the interests of the PT in all or even most cases; Justice Ayres Britto, long a member of the PT, has often ruled to challenge the exercise of government power.

<sup>71</sup> Any informal appointment practices that are developing are decidedly non-partisan. For instance, the STF generally includes at least one state Supreme Court judge from São Paulo, and a balanced geographic representation. Further, following Cardoso's appointment of the first woman to the Court (Justice Ellen Gracie Northfleet) and President Lula's appointment of the first Afro-Brazilian (Joaquím Barbosa), it is likely that at least one woman and one Afro-Brazilian will sit on future configurations of the Court.

<sup>72</sup> Minister Jobim, for example, who was appointed by President Cardoso (1995-2002), continued to be known as the “leader of the government in the Court” (I-7) even after President Lula (2003- ) assumed power.

<sup>73</sup> This comparison draws on Appendices 2.4 and 3.6 in Kapiszewski 2007.

<sup>74</sup> Some high court clerks interviewed expressed some resentment at the change, suggesting that it led to a de-professionalization of the high court staff. Five justices are to approve the choice, but this is a formality.

whomever they wish to their staff; particularly since the early 2000s (and more often than in Argentina), justices' staff includes young super-star lawyers with strong academic backgrounds. Finally, clerks tend to remain with their justices for longer periods of time in Argentina; in Brazil, especially of late, clerks consider the Court a stepping stone to high-powered careers.

(10) *Intra-Court relations*. In Argentina, it is the exception rather than the norm for justices to deliberate orally about cases in their weekly sessions, and justices' seldom communicate outside those meetings (particularly given that case review procedures are written and individual in style). Further, the CSJN suffered from significant internal rifts through the 1990s and early 2000s (with the most public – if overblown – division being that between the *mayoría automática* [“automatic majority”] and the rest of the Court).<sup>75</sup> Much greater intra-Court interaction over decision-making and far less internal upheaval mark the Brazilian STF. Of course, the Court is not monolithic. For instance, experts suggested that a division exists within the Court between justices that are more oriented toward considering the political or economic consequences of their decisions (*consequencialistas*, often justices with more experience in politics) and justices who are more oriented toward legal considerations alone when issuing rulings (*legalistas*) (CSM-01, CSE-04, EC-33),<sup>76</sup> and some justices suggested that different justices' chambers are akin to “islands” (JG-03).<sup>77</sup> Nonetheless, more often than not

---

<sup>75</sup> The “*mayoría automática*” refers to a subset of Menem appointees whom, as the story went, could be counted upon to vote *en bloc* to “automatically” support Menem’s interests and his government’s policies when the former were in play or the latter were questioned.

<sup>76</sup> It was often possible to discern a particular justice’s “persuasion” when interviewing him or her, and justices’ individual votes, included in published high court rulings, often betrayed their viewpoint on the matter as well.

<sup>77</sup> There was little consensus among clerks regarding the STF’s internal segmentation. Some clerks suggested that the STF is very segmented, reinforcing the vision of justices’ chambers as “islands” with their own internal rules (AS-01, AS-04). However, another clerk suggested more interaction, highlighting that there is an association for all the clerks, that clerks sometimes request help and information from each other, and that the different chambers are often in touch via phone, e-mail, and instant messenger (AS-02-03).

justices interviewed in connection with this project emphasized the Court's collegiality and the degree to which it functions as a unit (e.g., CSM-03, JG-03).<sup>78</sup>

(11) *Justices' Role Perception.*<sup>79</sup> In Argentina, my interviews suggested little agreement among justices regarding what role the high court should play. While many justices automatically responded "defending the constitution" when I inquired about the Court's main role (JG-01; JG-03), other suggested that the high court should work to maintain the institutional system more generally (JG-04), and others indicated that, at times, the Court's role was to support the administration (J-03; EC-30). Several experts on the high court in Argentina also suggested that the Court's role is not clear to the justices that sit upon it (Santiago 1998). In Brazil, practically every justice interviewed in connection with this project answered "to defend the constitution" when asked about the STF's primary function. Nonetheless "consequentialist" judges seemed to think of this function in different terms than did their "legalist" colleagues. Making a distinction somewhat similar to that highlighted by Argentine justices, "consequentialist" justices were more likely to discuss constitutional defense in terms of the entire system laid out in the constitution, while their "legalist" colleagues were more likely to highlight the importance of defending the particular constitutional articles and clauses most relevant to particular cases.

---

<sup>78</sup> This notion suggests another somewhat related informal high court attribute that it could be worthwhile to consider: the degree to which the Court (as institution) stands apart from the justices who populate it at any moment. In Argentina, for instance, relationships between high court justices and other political actors are often personalized rather than institutionalized. Moreover, justices have indicated in several majority opinions that the ruling represented the thinking of the Court "in its current configuration" – as if to acknowledge that a different Court could and would make a different decision. Further, when one Kirchner appointee was asked in her Senate confirmation hearings whether the changing composition of the high court would imply changes in the Court's jurisprudence, she answered without hesitation, "of course." Obviously any Court's jurisprudence changes gradually as justices of differing political and judicial ideologies join and leave the Court; what makes the Argentine case distinct is the degree to which and speed at which such changes occur. The STF, by contrast, seems to retain a sense of itself that is larger than the individuals who sit upon the Court at any given moment.

<sup>79</sup> Discussion of this informal attribute is weak as I was not able to develop an effective way to measure justices' role perceptions. Nonetheless this is likely a crucial informal attribute, and several scholars of the Chilean court (for instance Huneeus 2006 and Hilbink 2007) have considered this informal feature.



(12) *Leadership*. In Argentina, high court presidents are elected by their colleagues to renewable three-year terms. Presidents exercise agenda-setting power (deciding which themes will be treated in the Court's closed sessions [*acuerdos*]) and preside over these sessions, supervise the Court's activities, have disciplinary powers, carry out functions related to protocol, and serve as President of the extra-judicial administrative body created with the 1994 constitutional reform (*Consejo de la Magistratura*). In practice, however, leadership on the CSJN has been weak through much of the post-transition period.<sup>80</sup> Neither justices interviewed in connection with this project nor scholars writing about the Court indicated any particular recognition of or deference to the high court president. Further, the president did not serve as the main public spokesperson for the Court – other justices also appeared in the media with frequency (Santiago 1998: 254). Moreover, through much of the post-transition period, no justice appeared to have been assigned or to have assumed intellectual leadership of the Court.<sup>81</sup>

The Presidency of the Brazilian high court revolves among the members of the Court; each justice occupies the post for two years, and may not serve a second term. While the rules stipulate that justices vote for the STF president, the informal (but consistently followed) norm is that every two years the most experienced justice (i.e. the justice who has sat on the STF for the longest) who has not yet been president assumes the role.<sup>82</sup> The president represents the Court in

---

<sup>80</sup> The presidency of Justice Petracchi (1989-1990; 2004-2006) represented an exception. He took several steps to improve the Court's operation and transparency. It is symbolic that while in the U.S. Supreme Courts come to be known by the name of the chief justice of the era (the "Marshall Court," the "Brennan Court"), high courts in Argentina, at least in the contemporary era, are known by their appointer ("Alfonsín's Court," "Menem's Court").

<sup>81</sup> The justice mentioned most often by the few interviewees who discussed intellectual leadership was described in unflattering terms by at least as many respondents.

<sup>82</sup> Clerks and justices alike emphasized the positive externalities of the lack of "real elections" for STF president (AS-01, AS-04, JG-03). Lack of meaningful elections saves the STF from internal campaigning (which could be distracting, could lead justices to engage in "deal-making" and favors to earn the backing of other justices, could engender conflicts among justices aligned with one candidate vs. another, etc.). Further, if justices were to "campaign" for the presidency, they would be tied to their "campaign promises" (as politicians ostensibly are), which would limit their ability to be absolutely faithful to law.

official functions, decides certain types of cases,<sup>83</sup> sets the Court's agenda (choosing which cases will be heard, and in what order they will be heard in each full-Court session), manages the *en banc* sessions, and interprets the direction of each justice's vote.<sup>84</sup> The role of high court president seems to be recognized (and respected) by justices, legal scholars, and politicians alike.<sup>85</sup> High court presidents are more likely to speak with the press than are other justices, and presidents have taken important initiatives with respect to improving the internal operation of the STF.<sup>86</sup> The STF has also often had an intellectual leader (a "*decano*," generally the justice who has sat on the Court the longest) to whom the full Court turns for direction; justices and legal scholars alike were generally consistent in identifying who these intellectual leaders had been over time.<sup>87</sup> In contrast to the absence of leadership on the Argentine high court, then, two types of meaningful leadership co-exist on the Brazilian STF.

### ***The High Court's Potential and Actual Ambit***

(13) High Court Jurisdiction.<sup>88</sup> The Argentine Supreme Court has broad jurisdiction. The Constitution outlines what falls in the original jurisdiction of the Court and the Civil and Commercial Procedural Code and Decree-Law 1285 (of February 1958, which organized the

---

<sup>83</sup> The types of cases the president decides are outlined in Appendix 3.6 in Kapiszewski 2007. The decisions made by the president can be quite important. To give just one example, one justice recalled ruling on a *suspensão de segurança*: different judges all over the country were awarding pension readjustments to retirees when the STF received the case. As STF president he evaluated whether those decisions were causing a risk to economic stability, and decided that they were (estimating that if the government were to have to adjust all of the pensions in question it would cost the state \$11 billion); he thus suspended all such decisions until the STF had received and decided one of the cases on the merits (JG-01).

<sup>84</sup> Since justices' votes are proffered orally, it is not always clear in which direction they are voting; "defining" votes, particularly in close cases, gives the president great potential power.

<sup>85</sup> For instance, respondents often noted who was president of the STF when certain cases were decided (attributing significance to it), and/or intimated a link between the presidency of certain justices and certain decisions (CSE-23); such references were never made in Argentina.

<sup>86</sup> This pattern first became obvious under the STF presidency of Justice Nelson Jobim (2004-2006), continued subsequently as the Court's next president (Justice Gracie Northfleet) had a similar outlook on the Court and its operations, and was anticipated to continue under the subsequent president (Justice Gilmar Mendes) as well.

<sup>87</sup> Obviously, sometimes this role coincides with that of STF president, but it often does not. I found no evidence of conflict between the two types of leaders.

<sup>88</sup> This sub-section deals only with jurisdiction in terms of which cases the high court is empowered to consider, not with the Courts' administrative jurisdiction. Both Courts' jurisdictions are described in very general terms.

national judiciary) regulate the constitution. In general terms, the Court has original jurisdiction over cases concerning ambassadors, ministers, foreign consuls, and cases in which a province is a party. Most cases arrive to the Court via appeal. The Court's appellate jurisdiction may be either ordinary or extraordinary. The former includes cases involving issues regulated by the constitution and the laws of the nation; involving treaties with foreign nations; involving maritime law; in which the nation is a party; and in which a foreign country or citizen is the defendant (Constitution of 1994 reform, Articles 116 and 117). The Court's extraordinary appellate jurisdiction, which is broader, includes any sort of case in which the interpretation of a federal norm is at stake, or a contradiction is alleged between the Constitution and another act or norm at any level (Helmke 2000: 21; Molinelli et al. 1999, 639-50).

The jurisdiction of the STF can be divided between original and appeals jurisdictions; the latter can be sub-divided between ordinary and extraordinary appeals (Article 102 of the 1988 constitution). Its original jurisdiction includes abstract review cases regarding the constitutionality of federal, state, or local norms passed after 1988 and still in effect; certain cases involving high state officials; cases between Brazil (or a Brazilian state or territory) and other countries or international entities; conflicts between the union and a particular state or between states; extradition requested by a foreign state; conflicts of competency between superior courts (STJ, STM, STE, TST), or between any superior court and any other court. Its ordinary appeal jurisdiction includes cases regarding constitutional rights decided by one of the superior courts if the decision is against the party claiming the right, or cases involving political crimes. Its extraordinary appeal jurisdiction includes cases decided by lower courts in which the appealed decision either contradicts a constitutional clause; declares unconstitutional a treaty or

federal law; declares valid a municipal law or government act whose constitutionality was questioned; or deals with conflicts between municipal and state law.<sup>89</sup>

(14) *Judicial Review*. Argentina has never had a separate court (or a separate chamber of the high court) dedicated to constitutional matters. While neither the 1853 Constitution nor any reform explicitly empowers the Supreme Court to exercise judicial review (Chavez 2001: 81), the Supreme Court has adopted and developed the power of judicial review through its own jurisprudence (with the assistance of some legislation).<sup>90</sup> Constitutional adjudication in Argentina involves only *concrete* review (not *abstract* review), and judicial review is *diffuse* (or decentralized). Judges can only exercise *a posteriori* review, and in judicial review cases, as with all others, the immediate effects of the high court's decision are *inter partes*. Judges cannot exercise *de officio* judicial review,<sup>91</sup> and cannot rule on legislative *omissions* (Chavez 2001: 82; Helmke 2000: 268; Constitution of 1988).

In contrast to Argentina, Brazilian courts' judicial review powers are constitutionally mandated: all state and federal courts were granted the power of concrete constitutional review in the constitution of 1891,<sup>92</sup> and most subsequent constitutions also included that power (for

---

<sup>89</sup> It is possible to appeal decisions of the superior courts by challenging the procedure in the case or the means by which a decision was reached (Taylor 2004: 113, 135), and even interlocutory decisions can be appealed to the STF.

<sup>90</sup> The Court originally based its claim to the power of judicial review on Article 31 of the Constitution of 1853 (and its 1994 reform), which establishes the supremacy of the Constitution, and Article 100 (Article 116 of the 1994 reform of the Constitution), which establishes the jurisdiction of all courts over all the points regulated by the Constitution (Helmke 2000: 109; Nino 1993: 316). Legislation through the 1860s made the power more explicit: Law 20 (1862) mandated that ensuring that the branches of the central government abided by the Constitution was a duty of the judiciary (Chavez 2001: 81), and Law 48 (1863) recognized and regulated the Supreme Court's ability to evaluate the constitutionality of laws and decrees, although the constitutionality of that very law has been questioned (Nino 1993: 333). During the second half of the nineteenth century, the Court handed down several key rulings that demonstrated its ability to exercise judicial review: it declared unconstitutional a presidential decree in 1863 in *Ríos* (Iaryczower et al. 2000: 5), and dealt with the constitutionality of a federal legislative enactment in 1887 in *Sojo* (frequently referred to as Argentina's *Marbury v. Madison*, 1803) (Nino 1993: 316). The Court further expanded this function in the early 20<sup>th</sup> century and has continued to broaden it (though in a more piece-meal fashion) since Argentina's 1983 transition to democracy (Helmke 2000: 21, 109; Nino 1993: 317).

<sup>91</sup> Lucas Arrimada Antón reminded me that the Court has appeared to exercise constitutional control in the absence of a petition to do so by one of the parties to a case. See, for example, the *Mill de Pereyra* case (2001).

<sup>92</sup> The STF first declared a law unconstitutional in 1894.

instance, Article 97 of the 1988 constitution) (Sadek 1995: 10; Dolinger 1990: 812). The STF essentially serves as a constitutional court although it is not designated as such. Brazil's judicial review is *diffuse* (or decentralized),<sup>93</sup> and judges can only exercise *a posteriori* review.<sup>94</sup> Judicial review in Brazil is both *concrete* and *abstract* (i.e. Brazil's is a "hybrid" system, Arantes 1997). When the STF carries out concrete constitutional review, the immediate effects of its decisions are *inter partes*;<sup>95</sup> however, when the STF carries out abstract review the effects of its ruling are *erga omnes*.<sup>96</sup> Justices can exercise *de officio* judicial review in any case (Rocha and Paulo 2003: 37; Barros 2000: 12), and in particular types of cases, courts can declare unconstitutional particular legislative *omissions*.<sup>97</sup>

(15) *Mechanisms to Reach the Court*. While a small sub-set of the cases the Argentine Court considers fall within its original jurisdiction and are filed directly with the Court, most cases the Court hears are appeals (most frequently of either a federal appeals court or a provincial Supreme Court ruling). Appendix C outlines the three mechanisms used most often to access the Court. If a case falls within the Court's ordinary appellate jurisdiction, the case may

---

<sup>93</sup> Specifically, courts can review constitutional amendments, complementary laws, ordinary laws, delegated laws, provisional measures (MPs), legislative decrees, and legislative resolutions (Barros 2000: 1). The declaration of unconstitutionality may result from (1) failure to observe the constitutionally mandated procedure to create the norm (form) or (2) the existence of a contradiction between the content of the law and that of the constitution (substance).

<sup>94</sup> However, under exceptional circumstances, when activated by congressmen via a *mandado de segurança* (a concrete review mechanism discussed below), the STF can carry out constitutional review of legislative procedures (*interna corporis*) (Rocha and Paulo 2003: 43).

<sup>95</sup> However, since the 1934 constitution, the Senate may, if it so chooses, and within whatever time frame it sees fit, issue a resolution suspending the part of any federal, state, or municipal law that the STF declared unconstitutional (or, if it were the case, the whole law) in a concrete review case, thus effectively expanding the effects of the decision from *inter partes* to *erga omnes* (Rocha and Paulo 2003: 38-40).

<sup>96</sup> In certain abstract review cases, the STF can, at its sole discretion, decide whether its decision will be prospective or retrospective (and can in fact indicate the exact point from which a law declared unconstitutional will be considered without effect. One constitutional scholar commented that this ability frees the STF to make more radical decisions since it can limit the effects of those decisions by making them prospective (EG-10). The criteria on which justices decide from what point their decision will go into effect can be political: as one justice explained to me, "sometimes declaring a law unconstitutional since its promulgation (and thus undoing everything that was constructed on the basis of that law) could ruin an economic sector, or engender social preoccupation or some other problem with which it would be unreasonable to afflict society" (*translation mine*) (JG-07).

<sup>97</sup> An unconstitutional legislative omission is understood to be an instance when the failure of the elected branches to establish laws or administrative acts prevents the full exercise of a constitutional right or full application of some other constitutional principle (Rocha and Paulo 2003: 18-19).

be appealed to the court using a *recurso ordinario* (RO). A party that loses a case that appears to be outside the ordinary jurisdiction of the high court but wishes to appeal to the CSJN anyway must file a *recurso extraordinario* (RE) with the appeals court or state Supreme Court explaining why his case is a federal or constitutional matter that should be considered by the high court. If that court grants his petition (i.e. rules that the case can be sent to the high court), the case is raised to the Supreme Court.<sup>98</sup> If his petition is denied,<sup>99</sup> he may present a *recurso de queja* (RQ) directly before the Supreme Court. While there are far fewer mechanisms to reach the high court in Argentina than there are in Brazil, several additional mechanisms for rights-protection do exist (including *habeas corpus* and *habeas data*).

During the post-transition period, various decrees and laws changed the rules guiding the appeals just described. For instance, Article 19 of Law 24.463 (*Ley de solidaridad previsional*, 08 March 1995, which reformed the pension system) created a special kind of RO that the *Administración Nacional de Seguridad Social* (ANSES, the Social Security Administration) used to appeal rulings of the *Cámara Federal de la Seguridad Social* (the special social security appeals court) to the Supreme Court (SC-03; private correspondence from constitutional scholar, 03 April 2007).<sup>100</sup> Also, in November 2001, through Article 50 of Delegated Decree 1387/01, the Executive introduced a new clause to the *Civil and Commercial Procedural Code* (Article 195 bis) that allowed the direct appeal before the high court of first instance injunctions that

---

<sup>98</sup> Through the time period of study, REs were often brought before the court using the mechanism of *amparo* (or “protection”), which was constitutionalized in 1994.

<sup>99</sup> Appeals courts can only deny *recursos extraordinarios* due to technical shortcomings.

<sup>100</sup> Prior to this law, the amount of money in play in cases appealed to the Supreme Court via RO generally had to exceed a legally-established minimum. The law abolished that minimum, allowing tens of thousands of additional cases to enter the Court. The CSJN declared Article 19 of law 24.463 unconstitutional in *Iztcovich, Mabel c/ANSES s/reajustes varios* (decided 29 March 2005) (*La Nación*, 30 March 2005, “La Corte falló a favor de los jubilados”), and the Article was subsequently declared void by Law 26.025 (April 2005) which modified the *Ley de Solidaridad Previsional*.

blocked the development of activities of essential state services.<sup>101</sup> This special appeal remained in place through April 2002 and was often employed by banks to contest injunctions granted by first instance courts in favor of the release of bank deposits that had been caught in the bank freeze instituted in December 2001 (the *corralito*).<sup>102</sup> While these changes were all imposed by law, each was temporary and had an associated political goal; in other words, the idea was not to permanently alter appeals procedures but rather to facilitate particular political outcomes.

The diverse array of mechanisms that can be used to question the constitutionality of norms before the Brazilian high court and to appeal decisions regarding constitutionality taken by lower courts are outlined in Appendix D.<sup>103</sup> As the appendix outlines, only certain political actors can file abstract review cases – which fall in the Court’s original jurisdiction. The mostly commonly used abstract review mechanism is the *Ação Direta de Inconstitucionalidade* (ADIn, Direct Act of Unconstitutionality) which allows plaintiffs to question the constitutionality of federal or state norms issued by the executive and legislature, or administrative decrees issued by courts, *since 1988*. Nonetheless, the 1988 constitution, constitutional amendment #3 of 1993 (which created the *Ação Direta de Constitucionalidade*, ADC, Direct Action of Constitutionality), Law 9868 (1999), Law 9882 (1999), and constitutional amendment #45 of 2004 (which constitutionalized judicial reform) all created new mechanisms of abstract review or facilitated usage of previously existing mechanisms.<sup>104</sup> It is important to note that, in

---

<sup>101</sup> The new article made possible direct appeal the CSJN with respect to injunctions, but not with respect to issues of the merit of the case, which still had to go through the normal channels as established in legislative procedure.

<sup>102</sup> *La Nación*, 29 December 2001, “La Corte impide que los jueces ordenen devolver los ahorros;” Gelli JA 2003-II-1294. The *corralito* was one of a series of policies that the government imposed between December 2001 and February 2002 to address economic crisis.

<sup>103</sup> Brazil’s very loose and permissive appeals structure has led to the ballooning of the STF’s case load and the concomitant slowing of the decision-making process. Indeed, parties filing cases with the Court often request that the STF issue a provisional ruling (for which the decision-making process is expedited, and which generally serves to suspend any law or decree considered unconstitutional until the Court rules on the merits of the case).

<sup>104</sup> As one justice criticized, even political parties holding a single seat in Congress can file abstract review cases in the STF to contest public policy (JG-02).

comparison to Argentina, these changes were imposed via permanent new procedures rather than with emergency measures that temporarily suspended existing rules.

Every year since 1991, at least 90% of the cases distributed for resolution in the STF were *recursos extraordinarios* (REs) or *agravos de instrumento* (AGs) – two instruments of concrete review used to appeal cases to the high court.<sup>105</sup> REs (the Brazilian correlate of the Argentine RE) have been used traditionally to appeal practically any lower court ruling on constitutional grounds; AGs (the Brazilian correlate of the Argentine RQ) are used to appeal lower court rulings when the Court just prior to the STF denies the use of an RE. A slew of additional mechanisms for accessing the high court exist, a few of which are described in Appendix D (including the *Mandado de segurança* [MS] and the *Mandado de injunção* [MI]); *habeas corpus* and *habeas data* are also anticipated in the Brazilian justice system.

(16) *Case Load: Size.*<sup>106</sup> While in the early 1990s the Argentine Supreme Court decided fewer than 10,000 cases annually, in 1997 that number skyrocketed to 41,318 cases, and between 1997 and 2007, the Court decided an average of almost 30,000 cases per year.<sup>107</sup> Thousands of these cases were identical (that is, questioned the same policy in the same way). The STF's case load also ballooned since the transition to democracy: 163,950 cases were filed with the high court during the 1980s, while 326,493 were filed in the 1990s, and 829,770 cases were filed with the STF between January 2000 and June 2007. In particular, the STF received thousands, and sometimes tens of thousands of cases about the very same issue (often questions

---

<sup>105</sup> Despite the prevalence of these cases, much of the (admittedly sparse) academic writing on the Brazilian STF and its jurisprudence focuses on cases the STF decides in its abstract review jurisdiction, perhaps because such decisions can have more general and immediate effects (see, e.g., Taylor 2004 and Werneck Vianna et al., 1999). Yet depending upon how the elected branches react to high court rulings on REs, they can be very important as well.

<sup>106</sup> This discussion relies on Appendix 2.5 and 3.7 in Kapiszewski 2007.

<sup>107</sup> Of course, it is impossible for five or nine justices to decide this many discrete cases annually; as the discussion of the high court's internal operation in Appendix 2.4 in Kapiszewski 2007 reveals, the Court includes a substantial internal bureaucracy that helps to dispose of cases, and has also devised several methods to abbreviate the decision-making process.



of economic policy): one scholar of the high court suggested that, already by the 1990s, between 85 and 90% of the cases before the STF involved questions that the STF had already adjudicated (Ballard 1999: 259-60). The Brazilian Court actually has a drive-through window in the basement to facilitate lawyers' filing of cases.

(17) *Case Load: Content.* In Argentina, significant evidence suggests the Court's case load includes political cases (amid a sea of narrower cases regarding "every day justice"). First, many of the cases it holds were originally filed against the government (although they are often raised to the Court via a government appeal). In particular, in the late 1990s and early 2000s the cases the Court held regarding economic policy (such as those addressing salaries and pensions, and government responses to crisis) were worth millions of dollars to the government.

The STF's caseload has also contained a range of politically important cases (as well as many cases of little broad importance) in the post-transition period. Many interview respondents in Brazil (and most of the justices with whom I spoke) maligned the degree to which the government capitalizes on the ease of appeal (JG-03, et al.). Also, one justice indicated that government lawyers understand it to be their *responsibility* to appeal decisions against the state, fearing that they will be accused of having been "co-opted" by the other party if they fail to file an appeal, or even be held legally responsible (JG-03).<sup>108</sup> Respondents also emphasized how many cases regarding the government's "fiscal skeletons" the Court held.<sup>109</sup> Further support for

---

<sup>108</sup> Nonetheless, it is also the case that the elected branches on several occasions directed government lawyers or public entities not to appeal, or to desist in participating in, particular types of politically important cases on which the STF had established a track record of challenging the exercise of government power.

<sup>109</sup> This term refers to debts originating in previous administrations that a current administration assumes (but may not acknowledge or even know about); sometimes such debts remain "potential" debts when they take the form of judicial cases that have yet to be decided but whose cost to the government can be estimated. To name just three examples, the STF held thousands of repeat cases regarding "inflation readjustment of home mortgages under the 1990 Collor Plan (estimated potential cost: 87 billion *reais*), losses incurred by sugar farmers and mill operators in the wake of the 1986 Cruzado Plan (40 billion *reais*), and losses to the airlines under the same plan (7 billion *reais*)" (Taylor 2004: 132).

the idea that each Court held many politically important cases was provided by interviews I carried out in Argentina and Brazil to aid in case selection.<sup>110</sup>

### ***High Court Internal Procedures***

(18) *Docket Control*. The Argentine Supreme Court has traditionally been unable to control its docket: it lacks the power to issue *certiorari* decisions and must consider fully all cases in its original jurisdiction and all appeals (although the Court has been able to dismiss without consideration cases with technical defects) (Iaryczower et al. 2000: 4). However, both the elected branches and the Court itself have developed a series of mechanisms to augment the Court's control over what cases it considers. For instance, in 1990 the Court was formally granted the ability to summarily dismiss *recursos extraordinarios* (REs) and *recursos de queja* (RQs) that it considered "insufficiently important" (doubtless a subjective notion), and the Court took advantage of that power to free its case load of an extraordinary number of such cases.<sup>111</sup>

Further, the Court has made use of several doctrinal devices to control what cases it considers. The original intent of one doctrinal device, *sentencia arbitraria* (arbitrary ruling) was to provide litigants to whom a federal court of appeals or state supreme court had handed down a legally or constitutionally aberrant ruling (or one in some way at odds with high court jurisprudence) on cases outside the high court's jurisdiction a way to petition the high court to

---

<sup>110</sup> In each interview (25 in each country), I asked expert respondents to name a pre-determined number of cases in which the high court had been presented the *opportunity* to affect the political system, the conduct or policy of the government, or national laws (my definition of politically important cases). No respondent had any trouble naming politically important cases that had been taken to the two Courts; for instance, in Argentina, respondents named 120 different cases. In each context, the challenge was more often getting the respondent to decide which were the *most* politically important.

<sup>111</sup> Law 23.774 (April 1990) modified article 280 of the Civil and Commercial Procedural Code, affording the Court the ability to utilize an expedited review process in order to dismiss REs and RQs lacked "transcendental importance." In 2001 for instance, 34% (372 of 807) of the REs and 80% (3,060 of 3,787) of the RQs the Court dismissed without hearing were rejected using that mechanism (Legarre 2004: 1267-80). (Note that the wave of individual cases having to do with social security and pensions that inundated the Court in the 1990s are excluded from these figures.)

revoke the ruling.<sup>112</sup> Over time, however, the Court expanded the use of the device, and it became essentially a “back door” to the Court, allowing it to consider almost any case whose content does not regard federal or constitutional issues (and thus cannot be appealed using a *recurso extraordinario* [RE]), enlarging the Court’s jurisdiction and case load considerably.<sup>113</sup> A second device the Court created, *gravedad institucional* (institutional graveness), is in some senses the inverse: the doctrine allows the Court to consider cases that should be dismissed for technical deficiencies when it deems the case to be of sufficient transcendence.<sup>114</sup> The Court has also developed a confusing political questions doctrine that it applies in what some constitutional scholars describe as an arbitrary manner (Bianchi n.d.: 924). Finally, on the more ad hoc side, the CSJN has taken advantage of the fact that rules concerning standing for many types of cases are vague to avoid considering some cases while grabbing others.<sup>115</sup> And on at least four occasions through the 1990s, the Court accepted important cases via *per saltum* (that is, taking cases from lower instance courts before they were heard by an appellate court, an action with no constitutional or statutory basis) (Bianchi 2002, Volume II: 331-34).

The Brazilian STF has also lacked control over its docket traditionally: only when appeals manifested some technical flaw could the STF formally dismiss them without hearing. Further, no “political questions doctrine” exists. The creation of the institution of *repercussão geral* (“general repercussions”) via judicial reform in December 2004, which requires plaintiffs

---

<sup>112</sup> The argument is that the decision is so defective that it violates “due process” which is a constitutional guarantee, which converts the case into one regarding a constitutional issue and thus allows the plaintiff to bring it to the CSJN.

<sup>113</sup> The doctrine was first created and used by the Court in the early 20<sup>th</sup> century (Bianchi 2002, tomo 2: 315); nonetheless, the Court began to admit more cases on the basis of this doctrine in the 1960s, and its use expanded progressively through the 1970s and 1980s until cases admitted via this doctrine would constitute 70% of the high court’s case load (personal correspondence, constitutional scholar, 03 May 2007).

<sup>114</sup> This doctrine also has roots in the early 20<sup>th</sup> century, and the Court also began to admit many more cases on the basis of this doctrine starting in 1960. However, it has fallen into disuse over the past years.

<sup>115</sup> To give just one example, the 1994 constitutional reform instituted a form of class action suit but the reform’s stipulations regarding who had standing to file such suits were unclear; the Court was initially very restrictive in terms of deciding which groups and associations had standing to file such a case.

filing REs or AGs (the two most-often-used mechanisms of concrete appeal to the STF) to demonstrate the broad political, economic, or social “relevance” of the constitutional questions raised in their cases, represented a formal step towards docket control.<sup>116</sup> Nonetheless, and somewhat akin to its Argentine counterpart, the STF has adopted a number of informal strategies to bat away cases over the last few decades (a dynamic referred to in Brazil as “defensive jurisprudence”), drawing lines in the sand regarding the types of appeals it will take, and issuing decisions that it knows will discourage the filing of certain types of cases (AS-02). To name just two examples, in its early rulings on concrete review cases in which plaintiffs alleged a legislative omission,<sup>117</sup> the STF limited how much it could legislate; those rulings made that type of case a less effective instrument for contesting legislative omissions and likely discouraged the filing of such cases. The STF has also interpreted standing to file ADIns and other abstract review cases in a restrictive manner.<sup>118</sup>

(19) Case review and resolution procedures.<sup>119</sup> Below I highlight some similarities and differences in terms of how the two high courts process and decide the most important cases they consider – those that go to the full Court for resolution.<sup>120</sup>

---

<sup>116</sup> This mechanism allows the STF to accept technically deficient cases that it considers important and to dismiss technically sound cases it deems to lack relevance. The reform thus acknowledges and may even amplify the political role of the Court. Nonetheless, as of late 2007, the mechanism had not been effectively utilized. Note that this mechanism closely resembles the mechanism of “*gravedad institucional*” in the Argentine context. While the objective of establishing the mechanism in Brazil was to reduce the STF’s case load, constitutional scholars and justices alike in Argentina suggested that plaintiff’s abuse of the institution of *gravedad institucional* had contributed to the gross *inflation* of the CSJN’s case load.

<sup>117</sup> The cases are *mandados de injunção* (MIs) – in particular, MI 107.

<sup>118</sup> While Article 103 of the 1988 constitution stipulates the types of groups that have standing to file ADIns, the description of the types of civil society groups that may file such cases does not correspond to a category in the juridical world. The STF consequently elaborated its own criteria, which were restrictive and likely served to discourage civil society groups from filing ADIns (Guzman Leon et al. 2000: 108; see also Rocha and Paulo 2003). Further, the STF stipulated that “class entities” could not file an ADIn on any topic they wished; rather, what they were claiming was unconstitutional had to relate to the theme of their organization (EG-02).

<sup>119</sup> This section draws on Appendices 2.4 and 3.6 in Kapiszewski 2007, which outline the Argentine CSJN’s and Brazilian STF’s case review and resolution procedures respectively.

<sup>120</sup> While such cases are doubtless the most important each Court decides, they represent a small minority of the cases the Courts handle. In each country, a single individual (the head administrator in a secretariat or a justice of the Argentine Court, and a justice in Brazil) can rule by him or herself on repeat cases. In fact, since the early

**A. Formality of procedures.** In Argentina, only limited procedural guidelines are outlined in the constitution or established in the Court’s “statements” (*acordadas*) and “resolutions,” and in no interview did a clerk or justice refer to any written record of high court procedure. While different clerks’ renditions of the Court’s case review procedures were relatively consistent (suggesting that Court activity is at least somewhat routinized), there was sufficient uncertainty to suggest that procedures are sometimes created on an ad hoc basis. In Brazil, decision-making carried out by the full Court appears to occur in a relatively uniform way,<sup>121</sup> as internal procedures adhere to rules outlined in the STF’s internal manual (*Regimento Interno*), in laws regarding particular abstract review mechanisms, and in the constitution itself (a copy of which most clerks and justices with whom I spoke had right at hand).<sup>122</sup>

**B. Locus and style of decision-making.** In Argentina, after a case is distributed to a particular Court “secretariat” or justice (on what amounts to a relatively ad hoc basis), either the secretariat legal staff or the justice and his clerks read the case and write an initial draft opinion. The draft opinion and the case then circulate to each justice’s chambers, and each justice (individually) reads the case and writes an endorsement of the draft opinion, an amendment, a concurrence, or a dissent. Cases circulate to the justices in different orders depending upon the secretariat from which they originate. When the case has finished circulating, the head administrator in the secretariat that was assigned to shepherd the case

---

2000s, the vast majority of STF decisions have been taken by one justice (due in large part to the high number of repeat cases and the fact that in 1994 justices were awarded the ability to declare government acts or norms unconstitutional when the STF’s jurisprudence on an issue or policy is set) while another sub-set is decided by one of the Court’s two chambers.

<sup>121</sup> By contrast, my interviews suggested that the rules guiding how justices decide the cases that they decide *individually* are developed by each justice and his chamber staff; the rules followed in one justice’s chambers may differ from those followed in another justice’s chambers.

<sup>122</sup> While the 1988 constitution indicated that the process for deciding abstract review cases would be regulated by law, for a decade the STF defaulted to the procedures for handling abstract review cases outlined in its Internal Manual (*Regimento Interno*) until Law 9.868 (which regulates the use of and the process for deciding ADIns and ADCs) and Law 9.882 (which does the same for ADPFs) were passed in 1999 (Rocha and Paulo 2003: 91).

through the Court tallies the votes (interpreting in which direction they were), designates one vote to be the Court's opinion, and the case is essentially decided and ready to be taken to one of the Court's weekly sessions for signature. The president of the high court generally decides what themes (and therefore what cases) will be treated in these meetings and the justices together decide which opinions are signed. Verbal deliberation about cases is the exception rather than the norm in the Court's sessions. In Brazil by contrast, each case is randomly assigned by computer to a particular justice. That justice and his or her clerks analyze the case, write a summary (*relatorio*) and draft vote, and then advise the Court president that the case is ready to go to the full Court. The STF president then chooses the cases to be decided in each full-court session. These sessions are spirited and interactive: the summary and draft vote are presented orally,<sup>123</sup> oral arguments are offered and real debate occurs, and then each justice votes orally (always in the same order). The STF president then decides the direction of those votes and announces the ruling on the case. If the case was decided in the direction that the *relator* argued, he writes the final opinion; if not, another justice is chosen. In neither Court does much communication occur among the justices before the case is signed/deliberated upon in a full-Court session,<sup>124</sup> and both Courts' most important rulings often include lengthy separate concurrences and dissents.

---

<sup>123</sup> To clarify: historically, only the *relator* (lead justice) on a certain case would be familiar with the case prior to deliberations on the case *en banc*. (Note that, as a result, justices had to rely heavily on their counterparts to explain cases and offer reasonable interpretations and solutions, which likely contributed to collegial relationships among the justices, an attribute discussed previously). Today this is less often the case as materials regarding cases are more often assembled and distributed in advance of the STF's sessions.

<sup>124</sup> Brazilian high court clerks were particularly emphatic that neither the *relator* nor his or her clerks ever discusses draft opinions with other justices or clerks before they are read in the STF session. It is understood that doing so would facilitate and/or could suggest deal-making outside of Court sessions, which would be anathema to the Court's high ethical standards and reputation.

**C. Timing of decision-making.** No guidelines or regulations exist in either country regarding the order in which or speed with which the high court must decide cases,<sup>125</sup> and considerable variation exists on each Court with respect to how quickly politically crucial cases are decided. In both countries the high court president decides when the full Court will sign (in Argentina) or deliberate and decide (in Brazil) cases for which the full Court is responsible. Both Courts have adopted practices that facilitate delaying decision-making. In Argentina, these include sending the case to be considered by the Attorney General, or, in criminal cases, sending the case to be considered by the Criminal Court of Cassation; the Court has also occasionally delayed ruling on a case until the matter was moot.<sup>126</sup> While most STF justices I interviewed emphasized that the Court's slow decision-making was simply a function of the sheer number and complexity of the cases on its docket, clerks and external experts on the Court acknowledged that the STF president sometimes delays a decision in order not to upset the political apple cart at a critical moment, or otherwise chooses the "most opportune" moment to issue rulings (e.g., JG-04, AS-02, CSE-02).<sup>127</sup> Further, at any point before the final votes on a case are cast, Brazilian justices may request time to study the case in greater detail ("*pedir*

---

<sup>125</sup> In Brazil, this latitude includes complete freedom in terms of the time that can pass between when the Court issues an injunction on a certain case, and when it hands down a final ruling on the merits (despite the fact that the final ruling on the merits may be in a different direction than the injunction) (JG-02).

<sup>126</sup> The Court has developed an additional doctrine that allows it to capitalize on its freedom in terms of timing (and to justify apparently contradictory rulings on the same policy): the Court can find that policies have "become" constitutional (or unconstitutional) as a result of events occurring or policies imposed between the imposition of the policy in question and the Court's ruling. The doctrine is similar to one created in Spain, though in Spain the doctrine is only invoked following *constitutional* change, not when circumstances have changed but the constitution has not (EC-34). In Brazil by contrast it is an "inviolable (though unwritten) rule" that the STF does not recognize this institution of "*inconstitucionalidade superveniente*" (JG-06).

<sup>127</sup> The justice who explained this most clearly said, "for example, sometimes people still do not have a very clear idea of what a certain issue is about; if the Court decides a case on the issue, it could be misunderstood. It is sometimes better to let society discuss things a bit more so that they understand better and are more conscious of the issue so that the Court's decision is more accepted, no matter in which direction it is" (*translation mine*); the same justice noted that personal inclinations may also impinge on when cases are decided (JG-04). Another expert on the STF suggested that the Court sometimes lets contentious issues "mature" before deciding cases regarding them (CSE-02). Another clerk acknowledged that the STF has on occasion chosen to accelerate rulings on some "more important cases" (AS-03). And two clerks acknowledged that political factors may motivate the timing of decisions; for instance, if the justices sense that the Court is being used for political purposes, it may delay deciding the cases in question (AS-02, AS-03).

*vista*”); granting the request suspends voting on the case until the justice who made the request returns the case.<sup>128</sup>

**D. Input to decision-making process.** In general terms, there are fewer external inputs to the CSJN’s case review and resolution process than to the STF’s. Chief Justice (2003-2006) Enrique Petracchi’s efforts to augment the Court’s transparency included some reforms to increase inputs to the process, however. Lawyers can now access information regarding where a case stands in the Court’s internal “circuit” (via the secretariat charged with shepherding a case through the Court), which has allowed lawyers to “lobby” the justices more effectively. Further, it is now possible to file *amicus curiae* to circulate with the relevant case, and the Court may also begin to hold public audiences prior to deciding socially significant cases. Nonetheless, the Brazilian Court appears more open to external inputs. The STF accepts a variety of written memos from different actors regarding cases.<sup>129</sup> Further, when the STF is examining a very socially-visible case, justices can receive hundreds or thousands of e-mails about the case (AS-03; J-07). Finally, lawyers orally argue their cases before the STF when it sits *en banc* and interested others may also speak. The STF may also begin to hold public audiences prior to deciding socially significant cases.<sup>130</sup> In both countries, the rules regarding inputs from the head of the Public Ministry seemed more ad hoc and less-established.

**E. Types of decisions.** In most cases, the Argentine high court hands down final decisions, although on occasion it issues preliminary decisions. The process of issuing

---

<sup>128</sup> As one clerk explained, in ADIns at least, despite the fact that there are certain rules about when justices should return cases they have requested to review, it is easy (formally or tacitly) to extend the period of time for which they hold the case. Consequently, justices have been known to hold onto cases they so requested for long periods of time. He explained that justices often delay returning cases due to the complexity of the case and/or their huge decision-load, but also acknowledged that their delay may sometimes have other motivations (AS-02).

<sup>129</sup> These memos are often delivered by the lawyers to a case, and justices acknowledged that it could appear this practice places undue pressure on them, particularly when they receive government lawyers. Nonetheless, they asserted that it is a long-time practice of the Court to interact with case lawyers (JG-01).

<sup>130</sup> For instance, the Court decided to hold a public audience about a case it currently holds regarding a mother’s right to abort a pregnancy when the baby she carries has been diagnosed with anencephaly.



preliminary rulings (i.e. that temporarily suspends application of a law or portions of the law until its constitutionality has been determined) is more formalized in Brazil, and such decisions are issued more often; in particular in the case of ADIns (one type of abstract review case), much time can pass between the Court's preliminary ruling and a ruling on the merits of the case. Further (and again unlike the CSJN), the STF can issue "*súmulas*," or general statements or doctrine abstracted from one or a series of related cases that articulate how the STF understands and interprets a particular theme or issue (Rosenn 1984: 34).<sup>131</sup>

**F. Transparency of process.** In general terms, the CSJN's case resolution process is less transparent than the STF's. However, as Chief Justice (2003-2006), Enrique Petracchi attempted to implement reforms to increase the transparency of the Court's activities. For instance, an *acordada* (Court procedural decision) in late 2003 mandated greater transparency in the circulation of cases (and aimed at avoiding the "filing away" or continual delay of cases) by requiring the Court's reception (*Mesas de Entrada*) to advise those who inquire about the status of a particular case to divulge what secretariat (*Secretaría*) is in charge of it (SC-03). Further, in February 2004, the justices resolved that every time one of the parties to a case (or their lawyer) wishes to visit a justice, the other party to the case must be informed of and invited to the meeting (*La Nación*, 24 February 2004). Nonetheless, the Court remains a very opaque institution. The Brazilian STF, by contrast, prides itself on transparency. All of the full Court's sessions (as well as those of the Court's two chambers) – which inevitably include the airing of various viewpoints – have been public since the Court began to function, and the full Court's sessions have been televised live on Brazil's dedicated judiciary channel, *TV Justiça*,

---

<sup>131</sup> Cases brought to the STF that contradict *súmulas* are rejected (unless the Court desires to change the *súmula*). Judicial reform of December 2004 (constitutional amendment #45) instituted the *súmula vinculante*; once agreed upon by two-thirds of the STF and published, the content of such *súmulas* is binding on future STF decisions and on judges at all levels when deciding similar cases.

since August 2002.<sup>132</sup> Further, there is an immense wealth of information about the STF – statistics, decisions, an outline of its past and future schedule, etc. – available on the Court’s web site (www.stf.gov.br), and the Court publishes a weekly electronic newsletter outlining its most important decisions.<sup>133</sup>

### ***External Relations***

(20) *Accountability Mechanisms*. In Argentina, the other branches of government have few formal tools they can use to hold the Court accountable for its rulings. First, there are relatively high barriers to constitutional reform (which is necessary in order to amend the Court’s jurisdiction), impeachment is the only formal mechanism to remove a justice from the Court, and justices enjoy life tenure (at least until age 75 and likely beyond that).<sup>134</sup> Further, the Argentine Supreme Court’s decisions cannot be appealed (except supra-nationally), and the institution of legislative override does not exist in Argentina. The Court also enjoys relative budgetary autonomy: while it does not receive a fixed percent of the national budget, two laws assign the CSJN the power to prepare the judicial branch’s budget (the *Presupuesto de Gastos y Recursos del Poder Judicial*).<sup>135</sup> Important to note, however, is that the budget prepared by the CSJN is forwarded to the executive for incorporation in the general administrative budget (*Presupuesto de la Administración Nacional*), and the executive can (and has) lowered the budgetary figure proposed by the Supreme Court before presenting the budget to Congress (Ungar 2002: 150). Finally, while justices’ salaries are determined by law, they cannot under any circumstances be

---

<sup>132</sup> Again, while the vast majority of the STF’s rulings are made by one justice (and thus ostensibly “in secret”), these justices are most often applying jurisprudence arrived at through a public session of the STF *en banc*.

<sup>133</sup> Constitutional amendment #45 promised that the Courts’ administrative sessions would also become open to the public. It is not clear that the STF has been firmly adhering to this requirement.

<sup>134</sup> As noted above, the high court declared Article 99 of the 1994 constitutional reform – which requires justices who reach the age of 75 to be reconsidered and reappointed by the Senate every five years – unconstitutional.

<sup>135</sup> The laws are the *Ley Complementaria Permanente del Presupuesto* (11.672/1933) and the *Ley de Autarquía Judicial* (23.853/1990). In addition, the Constitution of 1994 awarded the Judicial Council (on which the CSJN president sits) the authority to execute the budget and manage the assets of the judiciary (Gershanik 2002: 25).

reduced during their tenure on the court (Constitution, Article 110). Nonetheless, there are few *obstacles* to informal manipulation of the high court by the executive, and the manipulation that has occurred (and that threat of further manipulation) likely *do* serve as accountability mechanisms. For instance, as outlined above, the number of justices is easily changed (since it is established via legislation rather than the constitution); there are very few requirements to be a justice (which affords executives latitude in terms of whom they appoint to the Court); and the requirements for impeachment are vague and general.

In Brazil, few external actors hold formal tools to hold the STF accountable (Sadek 1995: 11; Taylor 2004: 338). The 1988 constitution granted the judiciary unprecedented financial and administrative independence vis-à-vis the other government powers (Articles 96 and 99). Courts elaborate their own budgets (although they must do so within limits determined by the other branches of government), and are free to organize internally as they choose. While STF justices must retire at the age of 70, they are “irremovable” before that age, and their salaries are “irreducible” (Article 95 of the 1988 constitution). In fact, the broad law regulating the judiciary’s promotion system, courses, pensions and salaries, the creation of new courts, and judicial decisions (*Estatuto da Magistratura*) was written by the STF (within limits established in Article 93 of the 1988 constitution). Unlike in Argentina, however, a variety of mechanisms exist to appeal STF decisions,<sup>136</sup> giving elected authorities (among others) additional chances to hold the high court accountable for its decisions.<sup>137</sup>

---

<sup>136</sup> Any decision made by a single justice can be appealed using an *agravo regimental* (AR); this raises the case to a STF chamber, or to the full Court, depending on the type of case and its importance. When each of the STF chambers is deciding similar cases and the rulings are heading in opposite directions, a party to one of the cases can request that the case be turned over to the chamber that is favoring it, or to the full Court (*embargos de divergência*). Further, a party to a case may file an *embargo de declaração* against the decision of an individual justice, a chamber, or the full Court in order to request clarification or a modification of the decision (a more complicated process, *embargo de declaração com efeitos modificativos*). A party to a case may file an *embargo infringente* when he has lost in the full-Court but the vote was not unanimous and he wishes a dissent to prevail. Finally, an *ação rescisória* can be filed against to request the annulment of a decision of the STF president, a chamber, or the

(21) *High Court Perceived Legitimacy*.<sup>138</sup> The perceived legitimacy of the Argentine Court is low. The popular view of the judiciary and of the high court in particular was quite negative by the late 1980s, and public support for the Court remained very low through the early 2000s. The fact that evolving combinations of Menem-appointed justices became known as the “*mayoría automática*,”<sup>139</sup> and the repeated demonstrations by hoards of Argentine citizens beating pots and chanting for the resignation of the entire Court in 2002, serve as further evidence of popular disdain for the Court. Professional support for the Court among the legal community was also quite weak. Beyond editorials and articles published by the bar association, law students, and lawyers, experts interviewed in connection with this project (constitutional scholars, lawyers, and even some former justices) repeatedly used terms such as “completely lacking in independence” (E-22) to describe the Court; “political opportunists” (E-11) to describe the justices; “juridical disasters” (E-12) and “grave errors” (E-01) to describe the Court’s rulings; and “lamentable” (E-12) and “a horror” (E-01) to describe the Court’s performance in general.

In Brazil by contrast, there has been strong to middling public support for the Court (and the Brazilian judiciary) in absolute terms, and exceptionally strong support by Latin American

---

full Court that cannot be appealed on the basis of its illegality. While these internal appeals have been used on occasion in the post-authoritarian period (often as a delay tactic by the government), on few occasions was the original STF decision overturned or significantly modified.

<sup>137</sup> Final decisions on the merits made by the full Court in abstract review cases cannot be appealed by any means.

<sup>138</sup> Appendix 6.2 of Kapiszewski 2007 contains the results of public opinion surveys, newspaper headlines, newspaper editorials and articles, and empirical examples that can be used to trace public and professional opinion regarding the Argentine judiciary in the post-transition period. Appendix 7.2 contains the same for the Brazilian judiciary. It is important to note at the outset that public opinion regarding the judiciary is an imperfect indicator for public opinion regarding the high court as the former likely refers to the public’s opinion of the courts with which they are familiar or that they have used, and relatively few Argentines or Brazilians have interacted with the high court. Nonetheless, there is very little public opinion data regarding the two Courts available in the two countries, and public opinion regarding the judiciary is the closest possible proxy. Moreover, in both cases, interviews conducted regarding the two high courts reaffirmed the level of perceived legitimacy reflected in the public opinion and other data collected.

<sup>139</sup> To repeat, “*mayoría automática*” refers to a group of Menem appointees who appeared to vote, as a block, to support Menem’s policies and interests. The perception that such a block existed was almost certainly overblown. Yet the point here is distinct from the one made previously regarding justices’ profiles: the important empirical reality highlighted here is the *perceived legitimacy* of the high court as reflected in public opinion data, as well as this “nickname” for some justices in the 1990s and early 2000s.

standards. The contrast with Argentina is particularly stark. In the *Latinobarómetro* survey of 17 Latin American countries (and in a few additional international polls) the Brazilian judiciary consistently ranked first or second among 17 regional judiciaries in terms of the percentage of citizens with “a lot of trust” in the judiciary between 1995 and 2005, while Argentine courts consistently ranked 10<sup>th</sup> or lower. Further, jurists and legal scholars repeatedly came to the defense of the high court (and the judiciary) in print media over the time period of study, and polls of specific sectors of the legal community also suggested strong to middling support for the high court (though with a weak decline in the second decade of the post-authoritarian period). Jurists and legal scholars were also on average positive about the Court in interviews carried out in association with this project: more often than not respondents emphasized justices’ strong qualifications, the Court’s credibility, and elected leaders’ consistent compliance with its rulings (EG-02, EG-05, CSE-02, CSE-03, CSE-04, CSE-07, CSE-12, et al.).<sup>140</sup>

### *Comparative Summary*

Table 3 below summarizes the comparisons and contrasts between the Argentine and Brazilian high courts on the 21 institutional elements considered here. The analysis and the summary table demonstrate several points. First, the Argentine and Brazilian Courts – both of which have been thrust forcefully onto the political stage in the post-transition period as politics have been judicialized in each country – are very dissimilar institutions. They differ significantly on nine of the 21 institutional elements under study:<sup>141</sup> the security of high court justices; the profile of justices; the Courts’ internal organization; intra-Court relations; leadership

---

<sup>140</sup> The fact that there was relatively little public discussion regarding President Lula’s appointment of more than half of the STF’s justices suggests that the institution is popularly considered to be independent of the executive.

<sup>141</sup> The coding system employed was relatively imprecise, and drew on the author’s knowledge of the contexts under study. To repeat, rather than to offer a systematic analysis of the two high courts, the aim of this paper is to encourage “Court-centric analysis” – that is, to suggest a way forward with respect to determining the causal import of judicial institutions to judicial behavior and compliance with judicial rulings.

**Table 3. Argentine and Brazilian High Courts' Scores on Court-related Institutions and Attributes**

Variable	Formal/ Informal	Argentine CSJN score	Brazilian STF score	X-national variation?
(1) Position	F	Sits atop a federal judicial hierarchy and provincial judiciaries	Sits atop a federal judicial hierarchy and three separate "special (judicial) systems" as well as state judiciaries	Some
(2) Control over lower court judges/ judicial career	F	Relatively little	Relatively little	No
(3) Control over lower court rulings	F and I	No formal mechanism; CSJN insists on an informal type of binding precedent	None in concrete review capacity; some in abstract review capacity	Some
(4) Size	F	Has varied from 5 (1983-1990) to 9 (1990-2006) to 5 (2006-)	11 members have composed the Court throughout the post-transition period	Some
(5) Rules guiding appointments	F	Appointed by president with approval of Senate; less rigorous requirements	Appointed by president with approval of Senate; more rigorous requirements	Some
(6) Rules guiding tenure and dismissal	F	Life tenure with good conduct; vague criteria for impeachment; clear impeachment rules	Mandatory retirement at age 70; clear criteria for impeachment; vague impeachment rules	Some
(7) Security	I	Extreme insecurity	No insecurity	<b>Significant</b>
(8) Profile of justices	I	Weaker knowledge of constitutional law; less judicial and political experience; more ties to appointing presidents (may be decreasing)	Stronger knowledge of constitutional law; more judicial and political experience; fewer ties to appointing presidents (may be increasing)	<b>Significant</b>
(9) Internal organization	F and I	Fewer formalized rules; operates in one chamber; includes a set of "secretariats;" exams to form part of staff until 1994; clerks tend to be older and to stay longer in the Court.	More formalized rules; operates in two chambers; "secretariats" do not exist; no exams to form part of staff; increasingly clerks are young and stay less time in the Court.	<b>Significant</b>
(10) Intra-Court relations	I	Little inter-justice interaction and significant internal rifts	More inter-justice interaction and less severe internal rifts	<b>Significant</b>
(11) Consensus on role perception	I	Some; justices suggested that role is to defend the constitution, but this meant different things to different justices.	Some; justices suggested that role is to defend the constitution, but this meant different things to different justices.	No
(12) Leadership	F and I	Weaker	Stronger; of two types, elected and intellectual	<b>Significant</b>

(13) Jurisdiction	F	Very broad; includes original, ordinary, and appellate	Very broad; includes original, ordinary, and appellate	No
(14) Judicial review	F and I	<ul style="list-style-type: none"> <li>No separate court dedicated to constitutional matters or separate chamber of the high court</li> <li>Judicial review not constitutionally mandated; CSJN has developed power through its own jurisprudence</li> <li>High court can carry out only <i>concrete</i> review, not <i>abstract</i> review</li> <li>Judicial review is <i>diffuse</i> (or decentralized), not <i>concentrated</i></li> <li>Only <i>a posteriori</i> (rather than <i>a priori</i>) review:</li> <li>Immediate effects of the high court's decision are <i>inter partes</i> rather than <i>erga omnes</i></li> <li>No exercise of <i>de officio judicial review</i></li> <li>Judges cannot rule on legislative <i>omissions</i>.</li> </ul>	<ul style="list-style-type: none"> <li>STF is essentially a constitutional court</li> <li>Judicial review is constitutionally mandated</li> <li>High court can carry out both <i>concrete</i> review and <i>abstract</i> review</li> <li>Judicial review is <i>diffuse</i> (or decentralized), not <i>concentrated</i></li> <li>Only <i>a posteriori</i> (rather than <i>a priori</i>) review:</li> <li>Immediate effects of the high court's decision on concrete review cases are <i>inter partes</i>; on abstract review cases are <i>erga omnes</i></li> <li>No exercise of <i>de officio judicial review</i></li> <li>Judges can rule on legislative <i>omissions</i>.</li> </ul>	<b>Significant</b>
(15) Mechanisms to reach the Court	F and I	Various ways to access the Court in its concrete review capacity; ad hoc changes have temporarily changed the appeals structure to facilitate government appeal	Extraordinary number of ways to access the Court in its concrete and abstract review capacities; most changes to the appeals structure have been permanent and have facilitated appeal by a range of political actors	<b>Significant</b>
(16) Case load size	I	Staggers under an extraordinary case load and holds many repeat cases	Staggers under an extraordinary case load and holds many repeat cases	No
(17) Case load content	I	Significant evidence that the high court receives politically salient cases	Significant evidence that the high court receives politically salient cases	No
(18) Docket control	F and I	Little formal docket control; various informal mechanisms to control docket	Little formal docket control; various informal mechanisms to control docket	No
(19) Case review and resolution procedures	F and I	<ul style="list-style-type: none"> <li>More informal procedures</li> <li>Decision-making written and individual in form</li> <li>No formal guidelines regarding the order in which or speed with which cases must be decided; decision time varies considerably</li> <li>Fewer external inputs to case review process</li> <li>Mainly issues final rulings</li> <li>Less transparent case review process</li> </ul>	<ul style="list-style-type: none"> <li>More formal procedures</li> <li>Decision-making oral and deliberative in form</li> <li>No formal guidelines re: order in which/speed with which cases must be decided; decision time varies</li> <li>More external inputs to the case review process</li> <li>Issues more preliminary rulings and can issue "summary" rulings</li> <li>More transparent case review process</li> </ul>	<b>Significant</b>
(20) Accountability mechanisms	F and I	Few formal accountability mechanisms; Court manipulation serves as informal control mechanism	Few formal accountability mechanisms, although STF rulings can be appealed by elected leaders (and others)	Some
(21) Perceived legitimacy	I	Low among the general public and the legal community	Higher among the general public and the legal community	<b>Significant</b>

on the Court; several aspects of the Courts' judicial review powers; the number and type of mechanisms that can be used to reach the Court; the Courts' case review and resolution procedures; and the Court's perceived legitimacy. In other words, the two Courts differ significantly both in terms of particular high court *institutions* (that is, four of the nine contrasts) and in terms of certain high court *attributes* (five of the nine contrasts).<sup>142</sup>

A second point relates to the use of ad-hoc tactics to modify Court-related institutions or change Court attributes – that is, to alter the judicial playing field temporarily (though with potentially with long-term consequences for judicial behavior and inter-branch relations). In broad terms, where rules are vague, actors may have more latitude/discretion to employ informal tactics to modify (and perhaps subvert or “hollow out” institutions) *while not breaking any laws*. The fact that ad-hoc tactics to alter judicial institutions or attributes were more in evidence in Argentina than in Brazil may be related to the differing incentives to subvert the rules in the two countries (the use of such tactics was often motivated by political crisis in Argentina), and to the overall appreciation and respect for law (which is understood to be much greater in Brazil than in Argentina, see e.g. Rosenn 1984). Moreover, the employment of such informal tactics often served to increase high court discretion, offering the Court latitude to operate outside pre-existing formal rules (and, in the Argentine case, at the behest of elected leaders). These observations suggest that the relationships between institutions and Court-related tactics – and between each and discretion – deserve further attention.

Third, most of the institutional elements considered here had both formal and informal aspects – only six elements were purely formal (position, control over lower courts judges, size, rules guiding appointments, rules guiding tenure and dismissal, and jurisdiction). This again points up the importance of studying informal judicial features. The analysis offered some

---

<sup>142</sup> Table 2 above categorizes each of the 21 high court institutional elements as institutions or attributes (or both).



thoughts on how the informal and formal aspects of the institutions under study interacted in the two countries, highlighting instances in which informal institutions filled gaps in formal institutions, subverted those institutions, and negated them. Deepening and systematizing that aspect of the analysis – and seeking within-country and cross-national patterns in institutional interaction – could be quite fruitful and revealing.

Finally, the fact that the two Courts' scores vary on so many of the institutional elements under study obviously complicates drawing inferences regarding whether variation in any of these Court-related institutions, tactics, and attributes is associated with variation in the outcomes of interest (Courts' assertiveness with respect to elected leaders, and their authority over those leaders). Indeed, two next steps would be to use process tracing to try to tease out whether (and if so, via what mechanism) these institutional elements affect the outcomes of interest in the cases under study, and to increase the number of observations in order to gain better inferential leverage.<sup>143</sup> Nonetheless, purely on the basis of the analysis presented here, at least one observation can be made. Each of the Court-related elements that varied “significantly” between Argentina and Brazil had an informal aspect: none of the purely formal elements varied so significantly as to suggest a connection between those elements and variation in the two high courts' assertiveness and authority vis-à-vis elected leaders. That finding reaffirms the importance of examining more carefully informal judicial institutions, tactics, and attributes.

## **V. CONCLUSIONS AND IMPLICATIONS**

Over the past 20 years, several macro-processes have combined to produce a dramatic expansion in the number of disputes potentially subject to legal adjudication in third wave developing democracies, and the potential of judiciaries to resolve them: transitions from authoritarian or

---

<sup>143</sup> See King et al. (1994), Chapter 6 for a discussion of increasing the number of observations; doing so does not necessarily require increasing the number of cases under study.

totalitarian rule, the turn to neoliberal economic policies, and widespread judicial reform. As a result, today myriad important political conflicts are being argued, considered, and resolved in courts of law in third wave democracies. Understanding why courts in these contexts decide cases as they do, why elected leaders respond to judicial rulings as they do, and what broader political implications judges' and elected leaders' decisions have has never been so important.

This paper has argued for an analytic approach that focuses on how formal and informal high court institutions (rules and procedures), Court-related tactics, and Court attributes affect the propensity for high courts to issue rulings that challenge the interests of elected authorities, and the inclination of elected authorities to comply with those rulings. Of course, it is highly unlikely that such high court institutional elements *alone* explain judicial decision-making or compliance with judicial rulings – in any context. Nonetheless, unless or until our inquiries prove otherwise, we should not dismiss them as an important part of the causal puzzle. Instead, we should design analytic inquiry to determine when, where, and how different institutional elements matter to high court behavior and elected branch responses, and how they combine with legal, attitudinal, and strategic explanations, as well as accounts that focus on the effects of the broader institutional context within which Courts operate.

One priority of future study should be to focus on informal institutional elements. As O'Donnell has suggested, it is crucial that we seek to understand “to what extent and in what areas.... informal rules and institutions actually govern behavior” (2006: 287). Indeed, this paper's brief application of the proposed “Court-centric analytic framework” to Argentina and Brazil highlighted the importance of informal high court institutional elements: of the 9 elements that co-varied with the outcomes of interest (high court assertiveness and authoritativeness vis-à-vis elected leaders), each had an informal aspect. An equally important

part of future institutional inquiry will be to examine the different sorts of *relationships* that exist between formal high court elements (rules, tactics and attributes) and informal elements. Again, the Argentina-Brazil comparison pointed out a variety of ways in which formal and informal institutions combine, complement, and undermine each other. Systematizing our analysis of formal (vs. informal) institutions and attributes will enhance our understanding of how courts work. Yet we also need to understand how high court institutions, Court-related tactics, and attributes (be they formal or informal) combine empirically – how do they interact with, counteract, and react to each other, and how that varies over space and time. The Argentine and Brazilian analysis again suggested a variety of ways in which formal and informal rules produce informal attributes, and in which Court-related tactics can work to undermine formal and informal institutions.

Finally, and more in the explanatory realm, further inquiry should focus on finding the causal connections between single and combined institutional elements and the outcomes of interest. The Argentina-Brazil comparison suggested that it may be worthwhile to look for a connection between four particular high court *institutions* and five specific high court *attributes* on the one hand, and high court assertiveness and authority vis-à-vis elected leaders on the other. Yet which elements will emerge as potentially important and in what combinations they will do their causal work will likely differ from context to context. Tracing the causal effects of different high court institutional elements in different contexts will help us begin to identify the trends and patterns in the ways in which they produce – independently and in combination – high court behavior and inter-branch relations.

The notion that informal high court institutions, tactics, and attributes may be important to explaining variation in judicial behavior and compliance with judicial decisions raises the

question of whether it might be worthwhile to modify or reorient existing categorizations of courts to include informal attributes. One well-known typology (e.g. Merryman 1985) simply divides courts between those that operate in civil law contexts and those that operate in common law contexts. Others differentiate between Supreme Courts with constitutional review powers and Constitutional Courts (e.g. Ginsburg 2002 and, implicitly, Epstein et al. 2001). Navia and Rios-Figueroa (2005), in depicting the “constitutional adjudication mosaic” in Latin America, carry out their categorization on the basis of formal judicial institutions. And, of course, there is the ubiquitous classification of courts as lower courts, appeals courts, and high courts.

To the extent that it is worthwhile to build typologies on the basis of theoretically relevant elements and attributes (as work on typological theorizing would suggest, see e.g. Elman 2005), existing typologies suggest that it is different legal traditions’ contrasting legal trappings (the existence of precedent, etc.) and other formal institutions and attributes that explain how courts operate and account for judicial outcomes. Yet the current analysis suggests that informal high court institutions and attributes such as leadership, intra-Court relations, and legitimacy may at least as important to explaining judicial decision-making and compliance with judicial decisions than formal institutions and attributes. If inquiries on Courts in developing democracies proceed in the more institutional direction this paper suggests, and if certain informal institutions emerge as important for explaining the judicial outcomes that interest us in a variety of contexts, attempting to re-structure judicial typologies such that those informal elements are taken into consideration could represent an important analytic innovation.

Understanding the conditions under which high courts will enforce laws and the constitution and elected leaders will obey their rulings – that is, understanding when Courts will seek to and succeed in playing a role in rule of law entrenchment – is a crucial undertaking. The

enterprise assumes even more significance, however, when we consider the broader consequences of judicial assertiveness and authority for regime quality and stability in the world's young democracies. Various scholars have suggested that the greatest threat to third wave democracies may not be authoritarian (or totalitarian) regression, but rather a slow "hollowing out" of democracy, entailing the gradual erosion of the freedoms, guarantees, and processes that are vital to that political system (O'Donnell 2001). Courts may be able to slow this decay, for instance, by ruling against the state in cases in which it is demonstrated that elected leaders violated a constitutional right or ignored a democratic process, and by compelling compliance with those rulings. Yet courts may not capitalize on this opportunity: they may duck politically sensitive cases, or endorse the exercise of government power when a state agent has acted illegally or unconstitutionally. Either action could damage judicial legitimacy and potentially diminish courts' ability to compel adherence to democratic rules in the future. Further, elected leaders may choose to comply with or defy high court rulings (particularly when Courts issue rulings that elected leaders can only fulfill at the risk of producing economic or political turmoil), and their decisions also have important consequences for the salience and power of democratic rules and rights. Given what is at stake when high courts in developing democracies receive and rule on politically significant cases, the importance of discovering what guides the decisions that justices and elected leaders make with respect to those cases is indisputable. Opening the black box of the judiciary may help us to make significant strides towards understanding their choices.

## A NOTE ON NOTATION

One data source for this paper is a set of interviews carried out with a range of political and judicial actors in Argentina (between February and October 2004) and Brazil (in November and December 2004 and between February and November 2005). Respondents' names are not mentioned to protect confidentiality, and instead, each interview is assigned a particular code.

- For Argentine references, citations with the prefix "II" were informational interviews; citations with the prefix "E" were case selection interviews; citations with the prefix "J" or "JG" were interviews with justices; citations with the prefix "EC" or "CC" were expert interviews regarding economic policy cases; and interviews with the prefix "SC" were interviews with Supreme Court clerks.
- For Brazilian references, citations with the prefix "I" were informational interviews; citations with the prefix "EG" were general expert interviews; citations with the prefix "CSE" were case selection interviews; citations with the prefix "CSM" or "JG" were interviews with justices; citations with the prefix "EC" were expert interviews regarding economic policy cases; and interviews with the prefix "AS" were interviews with Supreme Court clerks.

Another data source for the paper are newspapers articles. References of the form NP 0X-X refer to articles regarding particular high court case; references of the form NP 0X-E-X refer to articles regarding the effects of a particular ruling; and references of the form NP 0X-R-0X refer to articles containing other relevant information regarding the high court. All articles are on file with the author. For Argentina, articles span December 1983 to December 2003 and were culled from *La Nación*. For Brazil, articles span January 1985 to December 2004 and were culled from *O Estado de São Paulo*.

## WORKS CITED

- Arantes, Rogério Bastos. 1997. *Judiciário e Política No Brasil*. São Paulo: IDESP.
- Arantes, Rogerio B. 2000. "The Judiciary, Democracy, and Economic Policy in Brazil." Pp. 335-49 in *Handbook of Global Legal Policy*, Editor Stuart Nagel. New York: Marcel Dekker.
- . 2005. "Constitutionalism, the Expansion of Justice and the Judicialization of Politics in Brazil." In Rachel Sieder, Line Schjolden, and Alan Angell eds. *The Judicialization of Politics in Latin America*. New York: Palgrave.
- Atiyah, P. and R. Summers. 1987. *Form and Substance in Anglo-American Law*. Clarendon.
- Ballard, Megan J. 1999. "The Clash Between Local Courts and Global Economics: The Politics of Judicial Reform in Brazil." *Berkeley Journal of International Law* 17(230).
- Barros, Sérgio Resende de. 2000. "Controle De Constitucionalidade: Proposta De Simplificação." *Revista Da Procuradoria Geral Do Estado De São Paulo* 54.
- Baum, Lawrence. 1976. "Implementation of Judicial Decisions." *American Politics Quarterly* 4: 86-114.
- . 2006. *Judges and Their Audience: A Perspective on Judicial Behavior*. Princeton: Princeton University Press.
- Bianchi, Alberto. 2002. *Control de constitucionalidad, Tomo I y II*. Buenos Aires: Abaco.
- . ND. ¿Ha llegado la Corte Suprema al final de su lucha por una jurisdicción discrecional? Perspectivas actuales y futuras del Recurso Ordinario." *El Derecho*.
- Bratton, Michael. 2007. "Formal versus Informal Institutions in Africa." *Journal of Democracy* 18(3): 96-110.
- Brinks, Daniel. 2003. "Informal Institutions and the Rule of Law: The Judicial Response to State Killings in Buenos Aires and São Paulo in the 1990s." *Comparative Politics* 36(1): 1-19.
- . 2005. "Judicial Reform and Independence in Brazil and Argentina: The Beginning of New Millennium?" *Texas International Law Journal* 40(30): 595.
- Bussiere, Elizabeth. 1999. "The Supreme Court and the Development of the Welfare State: Judicial Liberalism and the Problem of Welfare Rights. In Cornell W. Clayton and Howard Gillman, eds.

- Supreme Court Decision-Making: New Institutional Approaches*. Chicago: University of Chicago Press.
- Caldeira, Gregory A. and James L. Gibson. 1995. "The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support." *American Political Science Review* 89: 356-76.
- Carey, John M. 2000. Parchment, Equilibria, and Institutions. *Comparative Political Studies* 33(6-7): 735-761.
- Carrubba, Clifford J. 2003. "The European Court of Justice, Democracy, and Enlargement." *European Union Politics* 4(1): 75-100.
- Cepeda Espinosa, Manuel J. 2005. "The Judicialization of Politics in Colombia: The Old and the New." In Rachel Sieder, Line Schjolden, and Alan Angell, Eds. *The Judicialization of Politics in Latin America*. New York: Palgrave.
- Chavez, Rebecca. 2001. "The Construction of the Rule of Law in Nascent Democracies: Judicial Autonomy in Latin America." Doctoral Dissertation, Political Science, Stanford University.
- . 2004. *Rule of Law in Nascent Democracies: Judicial Politics in Argentina*. Stanford: Stanford University Press.
- Clayton, Cornell W. and Howard Gillman, eds. 1999. *Supreme Court Decision-Making: New Institutional Approaches*. Chicago: University of Chicago Press.
- Colon, Edgardo. 2003. "The State of Judicial Independence of Latin America: A Framework for Evaluating Judicial Independence and the Success or Failure of Judicial Reforms." PhD Dissertation, Department of Political Science, University of Houston.
- Couso, Javier. 2005. "Judicial Independence in Latin America: the Lessons of History in the Search for an Always Elusive Ideal." In Tom Ginsburg and Robert A. Kagan eds. *Institutions and Public Law: Comparative Approaches*. New York: Peter Lang.
- Crawford, Beverly and Arend Lijphart. 1995. "Explaining Political and Economic Change in Post-Communist Eastern Europe: Old Legacies, New Institutions, Hegemonic Norms, and International Pressures." *Comparative Political Studies* 28(2): 171-99.
- DiMaggio, Paul. 1998. "The New Institutionalism: Avenues of Collaboration." *Journal of Institutional and Theoretical Economics*. Vol. 154: 197-225.
- Dolinger, Jacob. 1990. "The Influence of American Constitutional Law on the Brazilian Legal System." *The American Journal of Comparative Law* 38(4): 803-37.
- Domingo, Pilar. 2000. "Judicial Independence: The Politics of the Supreme Court in Mexico." *Journal of Latin American Studies* 32(3):705-35.
- Eisenstadt, Todd. 2003. "Thinking Outside the (Ballot) Box: Informal Electoral Institutions and Mexico's Political Opening." *Latin American Politics and Society* 45(1): 25-54.
- Elman, Colin. 2005. "Explanatory Typologies in the Qualitative Study of International Politics." *International Organization* 59(2): 293-326.
- Elster, Jon, Clauss Offe, and Ulrich K. Preuss. 1998. *Institutional Design in Post-Communist Societies. Rebuilding the Ship at Sea*. Cambridge: Cambridge University Press.
- Epp, Charles. 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago: University of Chicago Press.
- Epstein, Lee and Jack Knight. *The Choices Justices Make*. Washington: Congressional Quarterly Press.
- Epstein, Lee, Jack Knight, and Olga Shvetsova. 2001. "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government." *Law and Society Review*, 35:2.
- Farrell, H. and A. Heritier. 2003. "Formal and Informal Institutions under Co-Decision: Continuous Constitution-Building in Europe." *Governance* 16(4): 577-600.
- Favetti, Rafael Thomaz. 2003. *Controle de Constitucionalidade e Política Fiscal*. Porto Alegre: Sergio Antonio Fabris Editor.
- Feeley, Malcolm M. and Edward L. Rubin. 1998. *Judicial Policy Making and the Modern State*. Cambridge: Cambridge University Press.

- Ferreya, Raul Gustavo. 2004. "Corte Suprema de Justicia Argentina y Control de Constitucionalidad: Vicisitudes y retos del papel institucional del tribunal." Presentado en el Congreso Internacional de Culturas y Sistemas Jurídicos Comparados, UNAM, Instituto de Investigaciones Jurídicas, México, febrero de 2004; en vías de publicación con la Memoria del Congreso.
- Finkel, Jodi. 2001. "Judicial Reform in Latin America: Market Economies, Self-Interested Politicians, and Judicial Independence." Doctoral Dissertation, Department of Political Science, U.C. Los Angeles.
- Gershanik, Martin. 2002. *Argentina: The Judicial System 2001/2002*. Buenos Aires: Ministerio de Justicia, Seguridad y Derechos Humanos.
- Gibson, James L., Gregory A. Caldeira, and Vanessa A. Baird. 1998. "On the Legitimacy of National High Courts." *American Political Science Review* 92: 343-58.
- Gillman, Howard. 2005. "How Political Parties Can Use the Courts to Advance their Agendas: Federal Courts in the United States, 1875-1891." In Tom Ginsburg and Robert A. Kagan, eds. *Institutions and Public Law: Comparative Approaches*. New York: Peter Lang.
- Gillman, Howard and Cornell Clayton, eds. 1999. *The Supreme Court in American Politics: New Institutional Interpretations*. Lawrence: University of Kansas Press.
- Ginsburg, Tom. 2002. "Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan." *Law and Social Inquiry*, Vol. 27: 763-799.
- . 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. New York: Cambridge University Press.
- . 2005. "Beyond Judicial Review: Ancillary Powers of Constitutional Courts." In Tom Ginsburg and Robert A. Kagan, eds. *Institutions and Public Law: Comparative Approaches*. New York: Peter Lang.
- Ginsburg, Tom and Robert A. Kagan, eds. 2005. *Institutions and Public Law: Comparative Approaches*. New York: Peter Lang.
- Hall, Peter A., and Rosemary C. R. Taylor. 1996. "Political Science and the Three New Institutionalisms." *Political Studies* 44, no. 5: 936-957.
- Hansen, JM. 1986. "Detecting and Explaining the Structure of Informal Institutions – Agricultural Policy Networks in the United States Congress." *Legislative Studies Quarterly* 11(1): 131.
- Hammergren, Linn. 1998. *The Politics of Justice and Justice Reform in Latin America: the Peruvian case in Comparative Perspective*. Boulder, CO: Westview Press.
- Helmke, Gretchen. 2000. "Ruling Against the Rulers: Court-Executive Relations in Argentina Under Dictatorship and Democracy." Doctoral Dissertation, Department of Political Science, University of Chicago.
- . 2002. "The Logic of Strategic Defection: Court-Executive Relations in Argentina." *American Political Science Review*, Vol. 96, No. 2: 291-303.
- . 2005. *Courts Under Constraints: Judges, Generals, and Presidents in Argentina*. Cambridge: Cambridge University Press.
- Helmke, Gretchen and Stephen Levitsky. 2004. "Informal Institutions and Comparative Politics: A Research Agenda." *Perspectives on Politics* 2(4): 725-40.
- Helmke, Gretchen and Stephen Levitsky, eds. 2006. *Informal Institutions and Democracy: Lessons from Latin America*. Baltimore: John Hopkins University Press.
- Helmke, Gretchen, and Mitchel Sanders. 2006. "Modeling Motivations: A New Technique for Inferring Judicial Goals." *Journal of Politics* 68(4): 867-78
- Hilbink, Lisa. 1999. "Legalism against Democracy: The Political Role of the Judiciary in Chile, 1964-1994." Doctoral dissertation, Department of Political Science, U. C. San Diego.
- . 2007. *The Politics of Judicial Apoliticism: Chile in Comparative Perspective*. Cambridge: Cambridge University Press.
- Huneus, Alexandra. 2006. "The Dynamics of Judicial Transition: Judges, Pinochet-Era Claims, and the Question of Judicial Legitimacy in Chile (1998-2005)." PhD Dissertation, Jurisprudence and Social Policy Program, University of California, Berkeley.



- Iaryczower, Matías, Pablo T. Spiller, and Mariano Tommasi. 2000. "Un Enfoque Estratégico para Entender el Comportamiento de la Corte Suprema de Justicia de la Nación." Paper presented at the Conferencia en Honor a G. Molinelli, 27 de noviembre, Centro de Estudio para el Desarrollo Institucional, Buenos Aires, Argentina.
- Immergut, Ellen. 1998. "The Theoretical Core of the New Institutionalism." *Politics and Society* 25, no. 4: 5-34.
- Kagan, Robert, Bliss Cartwright, Lawrence M. Friedman, and Stanton Wheeler. 1978. "The Evolution of State Supreme Courts." *Michigan Law Review* 76: 961.
- Kahn, Ronald. 1999. "Institutional Norms and Supreme Court Decision-Making: The Rehnquist Court on Privacy and Religion." In Cornell W. Clayton and Howard Gillman, eds. *Supreme Court Decision-Making: New Institutional Approaches*. Chicago: University of Chicago Press.
- Kapiszewski, Diana. 2007. "Challenging Decisions: High Courts and Economic Governance in Argentina and Brazil." Doctoral dissertation, Department of Political Science, U. C. Berkeley.
- Kapiszewski, Diana and Matthew M. Taylor. 2008. "Doing Courts Justice? Studying Judicial Politics in Latin America." *Perspectives on Politics* (forthcoming).
- King, Gary, Robert O. Keohane, and Sidney Verba. 1994. *Designing Social Inquiry: Scientific Inference in Qualitative Research*. Princeton: Princeton University Press.
- Larkins, Christopher. 1998. "The Legacies of Hyper-Presidentialism: Executive-Judicial Relations, Constitutional Cultures, and The Future of Democratic Governance in Argentina and Peru." Ph.D. dissertation, University of Southern California.
- Lauth, Han-Joachim. 2005. "The Impact of Informal Institutions on Democratic Performance: Theoretical Reflections and Empirical Findings." Paper prepared for delivery at the 2005 Annual Meeting of the American Political Science Association.
- Legarre, Santiago. 2004. "Una puesta al día en materia de 'certiorari'." *La Ley*, 1267-74.
- Levitsky, Steven. 2003. *Transforming Labor-Based Parties in Latin America: Argentine Peronism in Comparative Perspective*. New York: Cambridge.
- Linz, Juan. 1990. "The Perils of Presidentialism." *Journal of Democracy* 1:51-69.
- Lijphart, Arend and Carlos H. Waisman, eds. 1996. *Institutional Design in New Democracies: Eastern Europe and Latin America*. Boulder: Westview Press.
- Llamazares, Iván. 2005. "Patterns in Contingencies: The Interlocking of Formal and Informal Political Institutions in Contemporary Argentina." *Social Forces* 83(4): 1671-696.
- Macaulay, Fiona. 2005. "Private Conflicts, Public Powers: Domestic Violence in the Courts in Latin America." *The Judicialization of Politics in Latin America*, Editors Rachel Sieder, Line Schjolden, and Alan Angell. New York: Palgrave.
- Mainwaring, Scott. 1993. "Presidentialism, Multipartyism and Democracy: the Difficult Combination." *Comparative Political Studies* 26: 198-228.
- Maltzman, Forrest, James F. Spriggs II, and Paul J. Wahlbeck. 1999. "Strategy and Judicial Choice: New Institutional Approaches to Supreme Court Decision-Making." In Cornell W. Clayton and Howard Gillman, eds. *Supreme Court Decision-Making: New Institutional Approaches*. Chicago: University of Chicago Press.
- Mattli, Walter and Anne-Marie Slaughter. 1998. "Revisiting the European Court of Justice." *International Organization* 52(1): 177-209.
- Melnick, R. Shep. 2005. "Deregulating the States: The Political Jurisprudence of the Rehnquist Court." In Tom Ginsburg and Robert A. Kagan, eds. *Institutions and Public Law: Comparative Approaches*. New York: Peter Lang.
- Merryman, John Henry. 1985. *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Second Edition). Stanford: Stanford University Press.
- Miller, Jonathan. 1997. "Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and Its Collapse in Argentina." *Hastings International and Comparative Law Journal* (21): 77.
- Molinelli, N. Guillermo, M. Valeria Palanza, and Gisela Sin. 1999. *Congreso, Presidencia y Justicia en Argentina*. Buenos Aires: Temas Grupo Editorial SRL.

- Moustafa, Tamir. 2003. "Law versus the State: The Judicialization of Politics in Egypt." *Law and Social Inquiry* 28(4): 883–930.
- Navia, Patricio and Julio Ríos-Figueroa. 2005. "The Constitutional Adjudication Mosaic of Latin America." *Comparative Political Studies* 38(2): 189-217.
- Niño, Carlos S. 1993. "On the Exercise of Judicial Review in Argentina" In Irwin P. Stotzky, ed. *Transition to Democracy in Latin America: the Role of the Judiciary*. Boulder: Westview Press.
- . 1996. *Radical Evil on Trial*. New Haven: Yale University Press.
- North, Douglass C. 1990. *Institutions, Institutional Change, and Economic Performance*. New York: Cambridge University Press.
- O'Donnell, Guillermo. 1993. "On the State, Democratization and Some Conceptual Problems: A Latin American View with Glances at Some Postcommunist Countries." *World Development* 21(8).
- . 1996. "Illusions about Consolidation." *Journal of Democracy* 7: 45-57.
- . 2001. "Democracy, Law, and Comparative Politics." *Studies in Comparative International Development* 36(1): 7-36.
- . 2006. "On Informal Institutions, Once Again." In Gretchen Helmke and Steven Levitsky, eds. *Informal Institutions and Democracy: Lessons from Latin America*. Baltimore: John Hopkins University Press.
- Pollack, Mark A. 1997. "Delegation, Agency, and Agenda Setting in the European Community." *International Organization* 51(1): 99-134.
- Prillaman, William C. 2000. *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law*. Westport, CT: Praeger.
- Richards, Mark and Herbert Kritzer. 2002. "Jurisprudential Regimes in Supreme Court Decision Making." *American Political Science Review*, Volume 90: 305-20.
- Ríos-Figueroa, Julio. 2006. "Institutional Models of Judicial Independence and Corruption in Latin America." Ph.D. Dissertation, Department of Political Science, New York University.
- Rios-Figueroa, Julio and Matthew M. Taylor. 2006. "Institutional Determinants of the Judicialization of Policy in Brazil and Mexico." *Journal of Latin American Studies* 38(4): 739-66.
- Rocha, Zélio Maia da and Vicente Paulo. 2003. *O Controle de Constitucionalidade nos Concursos Públicos*. Brasília: Vestcon.
- Rodríguez, César A., Rodrigo Uprimny, and Mauricio García-Villegas. 2003. "Justice and Society in Colombia: A Sociolegal Analysis of Colombian Courts." In Lawrence Friedman and Rogelio Pérez Perdomo, eds. *Legal Culture in the Age of Globalization: Latin America and Latin Europe*. Stanford, CA: Stanford University Press.
- Rosenn, Keith S. 1984. "Brazil's Legal Culture: The Jeito Revisited." *Florida International Law Journal* I (1): 1-43.
- Sadek, Mara Teresa. 1995. "A Crise do Judiciário Vista pelos Juízes: Resultados da Pesquisa Quantitativa," in Maria Teresa Sadek, Ed. *Uma introdução ao Estudo da Justiça*. Editora Sumaré.
- Santiago, Alfonso. 1998. *La Corte Suprema y el control político*. Buenos Aires: Abaco.
- Santiso, Carlos. 2004. "Economic Reform and Judicial Governance in Brazil: Balancing Independence With Accountability." In Siri Gloppen, Robert Gargarella, and Elin Skaar, eds. *Democratization and the Judiciary*. London: Frank Cass.
- Scheppele, Kim Lane. 2003. "The Agendas of Comparative Constitutionalism." *Law and Courts* 13(2): 5-22.
- Scribner, Druscilla L. 2004. "Limiting Presidential Power: Supreme Court – Executive Relations in Argentina and Chile." Ph.D. Dissertation, Department of Political Science, University of California, San Diego.
- Shapiro, Martin. 2002. "The Success of Judicial Review and Democracy." In Shapiro and Stone Sweet. *On Law, Politics, and Judicialization*. Oxford: Oxford University Press.
- . 2005. "Law, Courts and Politics." In Tom Ginsburg and Robert A. Kagan, eds. *Institutions and Public Law: Comparative Approaches*. New York: Peter Lang.

- Skaar, Elin. 2002. "Judicial Independence: A Key to Justice. An Analysis of Latin America in the 1990s." Ph.D. Dissertation, Department of Political Science, University of California, Los Angeles.
- Smith, Rogers M. 1988. "Political Jurisprudence, the 'New Institutionalism,' and the Future of Public Law." *American Political Science Review* 82: 89-108.
- Smyth, Regina, Anna Lowry and Brandon Wilkening. 2007. "Engineering victory: Institutional reform, informal institutions, and the formation of a hegemonic party in the Russian federation." *Post-Soviet Affairs* 23(2): 118-37.
- Spriggs II, James F. 1997. "Explaining Federal Bureaucratic Compliance with Supreme Court Opinions." *Political Research Quarterly* 50: 567-93.
- Staton, Jeffrey. 2002. "Judicial Activism and Public Authority Compliance: The Role of Public Support in the Mexican Separation-of-Powers System." Doctoral Dissertation, Department of Political Science, Washington University.
- . 2004. "Judicial Policy Implementation in Mexico City and Mérida." *Comparative Politics* 37.
- Staton, Jeffrey and Georg Vanberg. 2008. "The Value of Vagueness: Delegation, Defiance, and Judicial Opinion." *American Journal of Political Science* 52(3): 504-19.
- Stone Sweet, Alec. 2005. "Judicial Authority and Market Integration in Europe." In Tom Ginsburg and Robert A. Kagan, eds. *Institutions and Public Law: Comparative Approaches*. New York: Lang.
- Stone Sweet, Alec and Jud Mathews. 2008. "Proportionality Balancing and Global Constitutionalism" (March 11, 2008). Yale Law School. Yale Law School Faculty Scholarship Series. Paper 14.
- Taylor, Matthew. 2004. "Activating Judges: Courts, Institutional Structure, and the Judicialization of Policy Reform in Brazil, 1988-2002." Doctoral Dissertation, Department of Government, Georgetown University.
- . 2006. "Courts, Policy Contestation and the Legitimation of Economic Reform under Cardoso. In Lourdes Sola and Laurence Whitehead, eds. *Statecraft and Monetary Authority: Democracy and Financial Order in Brazil*. Oxford: Centre for Brazilian Studies.
- . 2008. *Judging Policy: Courts and Policy Reform in Democratic Brazil*. Stanford: Stanford University Press.
- Tsai, Lily Lee. 2004. "The Informal State: Governance and Development in Rural China." Ph.D. dissertation, Department of Government, Harvard University, Cambridge, MA.
- Tsai, Kellee S. 2006. "Adaptive Informal Institutions and Endogenous Institutional Change in China." *World Politics* 59(1): 116.
- Tulchin, Joseph. 1998. *Argentina: the Challenges of Modernization*. Rowman and Littlefield.
- Ungar, Mark. 2002. *Elusive Reform: Democracy and the Rule of Law in Latin America*. Boulder, CO: Lynne Rienner Publishers.
- Valenzuela, Arturo. 1993. "Latin America: Presidentialism in Crisis." *Journal of Democracy* 4: 3-16.
- Vanberg, Georg. 2005. *The Politics of Constitutional Review in Germany*. Cambridge: Cambridge University Press.
- Vilhena Vieira, Oscar. 2002. *Supremo Tribunal Federal: Jurisprudencia Política*. São Paulo: Malheiros Editores.
- Wasby, Stephen L. 1970. *The Impact of the United States Supreme Court: Some Perspectives*. Homewood, IL: The Dorsey Press.
- Werneck Vianna, Luiz et al. 1999. *A Judicialização Da Política e Das Relações Sociais No Brasil*. Rio de Janeiro: Editora Revan.
- Whittington, Keith. 2000. "Once More Unto the Breach: Post-Behavioral Approaches to Judicial Politics." *Law and Social Inquiry*, 601-32.
- Wilson, Bruce M. 2005. "Changing Dynamics: The Political Impact of Costa Rica's Constitutional Court." In Rachel Sieder, Line Schjolden, and Alan Angell eds. *The Judicialization of Politics in Latin America*. New York: Palgrave.
- Wilson, Bruce M. and Juan C. Rodríguez Cordero. 2006. "Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics." *Comparative Political Studies* 39(3): 325-51.

**Appendix A**  
**Most-used Mechanisms to reach the Argentine CSJN**

Mechanism	Description
<i>Recurso ordinario</i> (RO)	<ul style="list-style-type: none"> <li>• Concrete review</li> <li>• Appeal</li> <li>• ROs generally represent the smallest category of appeals</li> <li>• ROs proceed: (1) when the nation is a party to the case and the amount of money at stake exceeds a certain limit (the limit was not reformed in a long time and is thus rather low, SC-03); (2) in the extradition of criminals; (3) in cases having to do with <i>apresamiento</i> or the embargoing of large ships in time of war (personal correspondence, constitutional scholar, 03 April 2007).</li> <li>• In the late 1990s and early 2000s the number of ROs ballooned when a special “RO <i>previsional</i>” was established.</li> </ul>
<i>Recurso extraordinario</i> (RE)	<ul style="list-style-type: none"> <li>• Concrete review</li> <li>• Appeal</li> <li>• REs proceed when there is a federal or constitutional question, specifically, when the interpretation of a federal norm is at stake, or a contradiction is alleged between the constitution and another federal or provincial act or norm (personal correspondence, constitutional scholar, 03 April 2007).</li> <li>• When an appeals court (or provincial Supreme Court) grants a petition for an RE (i.e. rules that a decision it has just issued can be appealed to the high court), the appeals court ruling is suspended until the high court decides the case.</li> </ul>
<i>Recurso de queja</i> (RQ) (also called <i>Recurso de hecho</i> (RH) and <i>Recurso directo</i> )	<ul style="list-style-type: none"> <li>• Concrete review</li> <li>• Presented directly before the CSJN when an appeals court or provincial Supreme Court denies a party’s request for an RE.</li> <li>• Most of the appeals that arrive to the CSJN are of this type.</li> <li>• More than 90% of RQs arrive to the CSJN oriented such that the Court can accept and consider them in the category of <i>sentencia arbitraria</i>.</li> <li>• RQs are not a request that the CSJN resolve the case at hand, but rather a request that it make a decision on whether the appeals court should have denied the RE. If the Court accepts the RQ it can either rule that the appeals court was correct in rejecting the RE (at which point the case is closed and the last instance court’s rulings holds), or it can rule that the appeals court should not have rejected the RE (at which point the case is raised to the Supreme Court). That is, in the end, the appellant can still lose the case even after the RQ is accepted.</li> <li>• One clerk estimated that 80% of <i>recursos de queja</i> are rejected (SC-03).</li> <li>• Filing an RQ with the CSJN does <i>not</i> suspend the previous court’s ruling.</li> </ul>

**Appendix B**  
**Most-used Mechanisms to reach the Brazilian STF**

Mechanism	Description
<i>Recursos extraordinario</i> (RE)	<ul style="list-style-type: none"> <li>• Concrete review</li> <li>• Appeal</li> <li>• Analogue of the Argentine RE</li> <li>• Can be used to appeal practically any lower court ruling on constitutional grounds.</li> <li>• The court in the instance just prior to the STF acts as gatekeeper, admitting or denying the elevation of REs to the STF.</li> <li>• Judicial reform in 2004 (constitutional amendment #45) mandated that the appealing party in an RE must demonstrate the broad importance (<i>repercussão geral</i>) of the issues involved in such cases in order for the STF to consider admitting the appeal.</li> </ul>
<i>Agravo de instrumento</i> (AG)	<ul style="list-style-type: none"> <li>• Concrete review</li> <li>• Filed directly with STF (though acts as an appeal)</li> <li>• Analogue of the Argentine RQ</li> <li>• If the court just prior to the STF rules not to allow an appeal to the STF via RE, the losing party may file an AG directly with the STF.</li> <li>• Judicial reform in 2004 (constitutional amendment #45) mandated that the appealing party in an AG must demonstrate the broad importance (<i>repercussão geral</i>) of the issues involved in such cases in order for the STF to consider admitting the appeal.</li> </ul>
<i>Mandado de segurança</i> (MS)	<ul style="list-style-type: none"> <li>• Concrete review</li> <li>• Can come to the court in its original jurisdiction or on appeal.</li> <li>• Created in the 1934 constitution</li> <li>• Resembles the <i>amparo</i> in Mexico</li> <li>• A “summary remedy” to protect rights whose violation can be easily documented from abuse by administrative authorities.</li> <li>• The 1988 constitution created the <i>mandado de segurança colectivo</i> which enabled political parties represented in Congress, unions, business syndicates or associations in operation for more than one year to protect their collective rights</li> </ul>
<i>Mandado de injunção</i> (MI)	<ul style="list-style-type: none"> <li>• Concrete review</li> <li>• Can come to the Court in its original jurisdiction or on appeal.</li> <li>• Can be used to request that courts declare unconstitutional the <i>failure</i> of a public power to regulate or implement a rule regulating a constitutional precept when that failure prevents the full exercise of constitutional rights and liberties and the prerogatives inherent in nationality, sovereignty, and citizenship (Article 5).</li> <li>• Such a declaration of unconstitutionality for omission does not oblige the legislator to fill the gap, but rather simply guarantees the immediate application of the constitutional precept in question, thus halting the constitutional violation (Vilhena Vieira 2002: 130-31).</li> <li>• Some believe that the MI made the STF into a positive legislator since it implicitly set the policy that was missing (Arantes 1997: 107; EG-01)</li> </ul>
<i>Ação direta de inconstitucionalidade</i> (ADIn)	<ul style="list-style-type: none"> <li>• Abstract review – most commonly used abstract review mechanism</li> <li>• Filed directly with STF</li> <li>• The 1988 constitution (Article 103) indicates that the following can file an ADIn with the STF: the President; the Executive Committee of the Senate and Chamber of Deputies; State governors; Executive Committee of state legislatures; the PGR; the Federal Council of the Bar Association; political parties with representation in the Senate and/or Chamber of Deputies; nationwide trade unions or professional associations. With Law 9868 (1999), the Governor of the Federal District and the Legislative Assembly of the Federal District were also given the ability to file ADIns</li> </ul>

	<p>(and constitutional amendment #45 amended Article 103 to reflect these additions).</p> <ul style="list-style-type: none"> <li>• Most-commonly used abstract review mechanism</li> <li>• Allows plaintiffs to question – in the absence of a case or controversy – the constitutionality of federal or state norms issued by the executive and legislature, or administrative decrees issued by courts, <i>since 1988</i>.</li> <li>• The STF’s decision-making process is expedited in ADIns; the STF often considers such cases while the particular political controversy that sparked the case is still boiling, placing the STF in the hot seat (Taylor 2004: 112; 166-69). However, the STF often initially resolves ADIns by issuing an injunction, and may delay years before issuing a final ruling. Some have speculated that this delay is strategic; clerks and justices suggested that the Court is so overburdened with cases that once an ADIn is “more or less settled” through the issuing of an injunction (the issuance of which required careful consideration of the case), the Court does not rush to make a final ruling on the case due to the crush of additional cases – and that in an event, final rulings on ADIns are usually in the same direction as injunctions (e.g. AS-02, JG-07).</li> <li>• Rulings against a norm in ADIns imply its revocation by the constitution of 1988 (rather than its unconstitutionality).</li> <li>• The executive is the main target of ADIns that question federal government action; (main opposition) political parties file more than one third of all federal ADIns.</li> <li>• Between 1990 and June 2007, more than 3,500 ADIns were assigned to an STF justice to begin resolution.</li> </ul>
<i>Ação direta de inconstitucionalidade por omissão</i> (ADIn for omission)	<ul style="list-style-type: none"> <li>• Abstract review</li> <li>• Filed directly with STF</li> <li>• Standing is the same as for an ADIn.</li> <li>• Used to question the constitutionality of legislative <i>omissions</i> and is thus the abstract review counterpart of the <i>Mandado de injunção</i> (MI) mentioned above.</li> <li>• The objective of filing an ADIn for omission is to effectuate a constitutional provision or right that depends, for its application, on complementary legislation or regulation that has not yet been adopted.</li> <li>• A ruling for the plaintiff in an ADIn for omission obliges the legislator or administrator to elaborate the missing norms (Rocha and Paulo 2003: 19, 61-65). While the constitution stipulates that administrative organs must pass the required regulation within 30 days of the Court’s ruling, no time period is set for the legislature, which lessens the potential impact of such rulings (Vilhena Vieira 2002: 130-131).</li> <li>• Used relatively infrequently.</li> </ul>
<i>Ação declaratória de constitucionalidade</i> (ADC)	<ul style="list-style-type: none"> <li>• Abstract review</li> <li>• Filed directly with STF</li> <li>• Constitutional Amendment #3 indicated that on the President, the Executive Committee of the Senate and Chamber of Deputies and the PGR could file an ADC at the STF, but with constitutional amendment #45 of 2004, standing to file an ADC was expanded to include all who can file an ADIn</li> <li>• Created via constitutional amendment #3 in 1993.</li> <li>• Allows certain political actors to request that the STF declare the <i>constitutionality</i> of a particular federal norm.</li> <li>• Can be used by the government to hasten a final judicial ruling on the constitutionality of a particular norm, preventing potential scrutiny and contestation (or attenuating scrutiny and controversy that has already begun) regarding federal policy in the lower courts (Faro 1997: 242; Rocha and Paulo 2003: 65-69).</li> <li>• The mechanism can be dangerous: there is no need to file an ADC if the constitutionality of a particular law is clear; if it is not, the government may have little incentive to have it evaluated by the judiciary.</li> <li>• Used sparingly (fewer than 20 times by 2007).</li> <li>• Favetti 2003: 127-148 has a nuanced analysis of the creation of the ADC.</li> </ul>
<i>Arguição de</i>	<ul style="list-style-type: none"> <li>• Abstract review</li> </ul>

<p><i>descumprimento de preceito fundamental</i> (ADPF)</p>	<ul style="list-style-type: none"> <li>• Filed directly with STF</li> <li>• The 1988 constitution did not indicate who had standing to file an ADPF, indicating that standing would be determined subsequently by law; Law 9.882 of 1999 indicated that standing to file an ADPF would be the same as standing to file an ADIn.</li> <li>• Allows plaintiffs to question the constitutionality (or confirm the constitutionality) of federal, state, or municipal norms that cannot be attacked or defended using an ADIn or ADC (for instance, those established prior to 1988).</li> <li>• Offers the STF the opportunity to become familiar with important constitutional controversies and accelerate its decisions over such controversies (perhaps ruling on them before any other judicial organ has been activated) in an effort to quickly resolve polemical issues and avoid the consolidation of viewpoints that the STF could overturn (Rocha and Paulo 2003: 95-98).</li> <li>• Used more often than the ADC but less often than the ADIn</li> </ul>
---	---