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BUILDING JUDICIAL POWER IN LATIN AMERICA: OPPOSITION STRATEGIES AND THE LESSONS OF THE BRAZILIAN CASE *

Construyendo poder judicial en América Latina: estrategias de oposición y lecciones del caso brasileño

Diego Werneck Arguelhes¹
Evandro Proença Sússekind²

Summary: Studies on courts in Latin America have increasingly focused on high court behavior and its relationship with governments in explaining patterns of judicial activity. In this paper, we argue that understanding transformations in patterns of judicial politics over time requires us to consider processes of building judicial power as relatively independent from the actual use of judicial power. Moreover, while the relationship between judges and the incumbent government is decisive in shaping the strategic incentives around the use of judicial power, the opposition plays a more crucial role in the building of judicial power. We illustrate these propositions in a brief discussion of all the Mandados de Segurança (MS) filed before the Brazilian Supreme Court between October 1988 and May 2016. The dynamics around these lawsuits illustrate a kind of partnership between the court and the opposition that might create more favorable conditions for the future judicial exercise of power.

Keywords: judicial politics, Latin America, Brazilian Supreme Court, institutional design, judicial preferences.

Resumen: Los estudios sobre las cortes en América Latina se han centrado cada vez más en el comportamiento de los tribunales supremos y su relación con los gobiernos para explicar los patrones de actividad judicial. En este trabajo, argumentamos que entender las transformaciones en los patrones de la política judicial a lo largo del tiempo requiere que consideremos los procesos de construcción de poder judicial como relativamente independiente del uso real del poder judicial. Además, si bien la relación entre los jueces y el gobierno en ejercicio es decisiva para moldear los incentivos estratégicos en torno al uso del poder judicial, la oposición juega un papel más crucial en la construcción del poder judicial. Ilustramos estas proposiciones en una breve discusión sobre los denominados Mandados de Segurança (MS) presentados ante el Supremo Tribunal brasileño entre octubre de 1988 y mayo de 2016. La dinámica en torno a estos juicios ilustra un tipo de asociación entre el tribunal y la oposición que podría crear condiciones más favorables para el futuro ejercicio judicial del poder.

Palabras clave: política judicial, América Latina, Supremo Tribunal Brasileño, diseño institucional, preferencias judiciales.

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1 Fundação Getulio Vargas, Rio de Janeiro. E-mail: dwarguelhes@gmail.com

2 Harvard Law School. E-mail: e.p.sussekind@gmail.com

1. Introduction

For decades now, constitutional review has become a fixed feature of Latin American political systems, with profound consequences for the political process. Studies of judicial politics in the region have documented how courts have substantively affected the content of national policies (Gargarella, Domingo & Roux, 2006), placing these countries within broader theoretical frameworks of comparative politics, legislative politics and judicial politics (Helmke & Ríos-Figueroa, 2011; Helmke & Staton, 2011; Couso, Huneus, & Sieder, 2010; Kapiszewski & Taylor, 2008; Ríos-Figueroa & Taylor, 2006; Taylor & Da Ros, 2008; Taylor, 2008).

Although there is broad variation in how judicial power is designed and exercised in each of these scenarios over time, they share many important commonalities. They have all gone through regime changes since the 1980s, and most of these systems of constitutional review have been through major reforms in this period, especially since the 1990s (Uprimny, 2011). Moreover, in one form or another, all these countries have courts that have endured the typical trials and tribulations of regular democratic processes, from cycles of electoral disputes (Finkel, 2008) and economic reforms (Kapiszewski, 2012) to fights over judicial appointments (Llanos & Lemos, 2013). In many countries, social movements have been able to obtain important transformations in the *status quo* by means of strategic litigation, both in lower courts and in the supreme and constitutional courts (Couso, 2006; Uprimny, 2006; Wilson, 2009; Arguelhes & Ribeiro, 2018).

Studies on judicial politics in Latin America have reached critical mass in the last few years, moving from theories and arguments developed in national case studies (e.g., Ríos-Figueroa, 2007) to cross-national measuring and empirical testing of some of these ideas and findings (e.g., Helmke & Staton, 2011). This literature has largely focused on (i) how different *institutional designs* of courts and constitutional review mechanisms shape different forms and opportunities both for litigation and for judicial intervention, and (ii) how different *judicial preferences* module how these resources -defined in terms of institutional design- are actually used. Moreover, these studies have analyzed these variables (iii) in the context of the relationship between courts and the government and the ruling coalition.

In this paper, against the backdrop of this critical mass of scholarship, we will point to two generally underexplored dimensions of the problem of judicial power. First, isolating institutional design and judicial preferences is harder than it seems, once we consider that judges have both substantive, policy preferences (“outcome preferences”), and preferences on how judicial power should be used in a democracy (“role preferences”). Observing this distinction in action in case studies, some scholars have shown how role preferences can themselves be shaped by institutional design -for example, when institutional reforms change the way judges are trained and socialized (e.g., Couso & Hilbink, 2011). Much less attention has been given, however, to the possibility that these role preferences might directly shape institutional design. These conceptions not only guide judges in how to use their powers. They also tell judges what is the set of powers they should read, for themselves, into the constitutional text.

Moreover, while studies that emphasize strategic models of judicial and political behavior usually assume that judges will always care about increasing or, at least, protecting the powers of their courts, a different possibility arises when we focus on judicial preferences. If judicial conceptions of their own role matter, then it makes less sense to conceptualize judicial actors as always desiring to participate more in the political process. *Restrictive* judicial preferences, then, might also shape institutional design. Although most studies take judicial preferences into account as explanations of why judges decide not to *use* certain powers they possess, we will point to and illustrate the possibility of judges taking a step further and turning their restrictive preferences (of the judicial role) into institutional design itself³.

Our second point is that these processes of institutional redesign by interpretation, insofar as they involve the *building* of judicial power, should be understood as relatively independent from the dynamics of *using* judicial power⁴. Indeed, from the point of view of courts, the conditions for succeeding at the former are much less stringent than in the case of the latter. While political fragmentation has proved to be important in understanding the use of judicial power, institutional redesign by interpretation can take place regardless of whether government is divided or not and of the strength of the incumbent president, and are often fueled by lawsuits brought by the political opposition. As some case studies in the region have shown, the political opposition and minority political and social actors have mobilized judicial review for purposes that are independent from their actual chances of winning on the merits. In doing so, they give the court the opportunity to reshape and expand their competences for future use, even when they rule in favor of the government in the present case.

We will illustrate these propositions in a brief discussion of all the *Mandados de Segurança* (MS) filed before the Brazilian Supreme Court between October 1988 and May 2016⁵. These *amparo*-like remedies, although designed to have very limited scope and only to reach the Supreme Court in rare circumstances, have been continuously expanded over time, as a tool for the exercise of judicial power in the political arena, through the interaction among judges, the political opposition and political minorities in general. The central role the MS have taken and similar phenomena cannot be accounted for if we focus just on explaining the relationship between the court and the incumbent government. Yet, this has been the clear focus in the most recent waves of scholarship in the region. We suggest, then, that the next generation of judicial politics research in Latin America should move beyond government-centric frameworks and further engage with these processes of institutional redesign and with the political opposition and other minority actors that fuel them, over time, by bringing seemingly hopeless cases to the court.

3 See section 3.1.

4 See section 3.2.

5 See section 4.

2. Courts as a political arena: design, preferences, and interpretation

2.1. How is judicial power configured?

Institutional design has been at the center of the literature of comparative judicial politics since the 1990s (Stone & Sweet, 1992), both as an explanatory variable -how does a court's design influence its behavior and its role in the political process? (Ginsburg, 2003; Navia & Ríos-Figueroa, 2005; Epstein & Knight, 1997; Sweet, 2000)- and as a dependent variable in itself -why are certain courts created and designed with more power than others? why do politicians alter this design over time? (Ginsburg, 2003; Nunes, 2010a, 2010b; Finkel, 2008; Stone, 1992). We organize the literature on these issues of institutional design, which have been basic building blocks for studies of comparative judicial politics, along three dimensions of judicial power broadly considered: (i) *judicial guarantees of independence*, (ii) the *scope of the court's jurisdiction* (which includes both access to the court's jurisdiction and the scope and effects of its decisions) and (iii) *constitutional amendment procedures*.

(i) *Independence*. While the usefulness of a general concept of judicial independence has been questioned by scholars (see, e.g., Kornhauser, 2002), democratic constitutions are typically drafted with an eye to ensure that judges will not lose their jobs or salaries when their decisions displease powerful private or public actors. They need to be shielded especially against political pressure; otherwise, whatever powers they have at their disposal might mean very little. All other things being equal, the greater the protection that judges and courts have from direct retaliation for their decisions, the more active and powerful the court will be (Ríos-Figueroa, 2011; Ginsburg, 2003). Latin American countries have a history of combining *de jure* independence with *de facto* judicial vulnerability to political pressure (Ríos-Figueroa & Staton, 2012). Retaliation against courts has happened in many countries over the 20th century, both at the level of individual judges and at the level of the institution. In several countries, episodes of retaliation against judges are still part of the political scenario⁶. Moreover, although individual attacks might be the most visible examples, one should pay special attention to retaliation against the institution as a whole, not its singular members, as a particular factor in disciplining judicial behavior.

Additional design factors relevant for independence are appointment, tenure, and removal procedures (Ríos-Figueroa, 2011)⁷. Different appointment mecha-

6 The most extreme example is Venezuela, where the latest measures taken by President Nicolás Maduro in a series of attacks on the judiciary include detaining and freezing the assets of Supreme Court judges, five of whom have escaped to the United States through Colombia. Venezuela is an extreme case, but it is possible to find "softer" variations on these themes across a spectrum in countries that are arguably still democracies. In Bolivia, two Constitutional Court judges were suspended by President Evo Morales in 2014. We are focusing here on formal, direct attacks; for a discussion of more subtle forms of interference, see Llanos et al. (2016).

7 Other important mechanisms involve budgetary autonomy, size of the court, institutional location of the constitution review body (that is, in which branch of government it is formally located -or if it is a special body apart from the other branches), and physical means of coercion (Ginsburg 2003; see also Ríos-Figueroa, 2011).

nisms aim at striking balances between the ideological and partisan concerns of the actors involved in the appointment process, while preventing any single actor from building his or her preferred court. Appointment mechanisms can be divided into three groups. The first one is the professional type, in which the sitting judges choose who to nominate. Cooperative appointments happen when two different bodies act in the nomination's process, as when the choice is made by the chief of the executive branch and confirmed by one of the legislative houses. Representative mechanisms instead give multiple different bodies the power to appoint different vacancies within the court (Ginsburg, 2003).

The Chilean and Colombian constitutions establish a representative mechanism. In the Chilean constitution, ten members of the Constitutional Court are designated as follows: three are designated by the President of the Republic, four are elected by the National Congress⁸ and three are elected by the Supreme Court in a secret ballot. In the case of Colombia, judges of the Constitutional Court are elected by the Senate of the Republic for single terms of eight years from lists presented by the President of the Republic, the Supreme Court and the Council of State. In contrast, in Argentina and Brazil, the President appoints the justices of the Supreme Court with the consent of the Senate by two thirds of its members in a cooperative kind of appointment⁹.

Appointment mechanism procedures are decisive for observing independence at the level of the *court*, even if not directly connected to individual independence, and independent from tenure and removal mechanisms. As a general rule, the more institutions are involved in the appointment process, the more we would expect the resulting composition of the court to act independently (Ríos-Figueroa, 2011). Even when these mechanisms formally require sharing of the power to appoint, political dynamics might still allow for a single actor, in practice, to have its way in selecting judges. In the extreme scenario, a court that has a majority of justices appointed by a single president with a majority in congress will likely, either share preferences with the president or be staffed with political allies. In Argentina, for example, when former President Carlos Menem was able to appoint a majority of justices to the court, he could reportedly count an "automatic majority" in support of his decisions (Gargarella, 1998). Building on the Argentina case, Brinks (2004), instead of judicial independence, speaks in this sense of *ex ante* and *ex post* autonomy -the separation of judicial decision-making from presidential (or any appointer's) preferences both, in the formation of the court's composition itself, through successive appointments (*ex ante*), and in its decisions (*ex post*). Similar problems can be found in the experience of other countries in the region (see, e.g., Domingo, 2000).

Such problems recommend designing the length of tenure in the judicial office so that the terms are not staggered, making it less likely that a single govern-

8 Two of the court's judges are to be appointed by the Senate by two thirds of the votes, and two are nominated by the favorable vote of two thirds of the Chamber of Deputies for the Senate's approval by two thirds of the votes.

9 Beyond these broad structures, there are different levels of civil society participation in oversight in each country. In Guatemala and Ecuador, for example, the level of civil society engagement in high court appointments has been much higher (Ríos-Figueroa, 2011).

ing coalition will have the chance to appoint a majority of judges. From an *ex post* perspective, moreover, judges who will be leaving the court in the near future might be encouraged to worry about how incumbents will receive their decisions, assuming that future professional perspectives are in the judge's mind. In this sense, the conventional argument is that longer terms of office (or life tenure) will make the judge less responsive to the preferences of current political actors or prospective employers in deciding (Ríos-Figueroa, 2011)¹⁰.

Finally, scholars have analyzed removal mechanisms. Once again, power sharing arrangements are seen as independence-promoting—the more institutions involved in a removal procedure, the greater the level of judicial independence. There is significant variation in the region in this regard. In some countries, a simple majority of the court or the congress can start the process, while in others a supermajority is needed, at least in one of the houses of congress (Ríos-Figueroa, 2011).

Studies in the region have provided many important insights on the possibilities and limitations of these theoretical arguments. First, some scholars have shown the insufficiency of these formal guarantees, as there are other mechanisms of interfering with judicial offices that are parallel to and independent from the formal rules concerning tenure, appointment, and removal (Llanos et al., 2016). For example, there is the possibility of court-packing (changing the composition of a court, even by expanding it) and court-curbing (changing a court's competences, or decreasing its power by indirect means, e.g., its budget).

In Bolivia, President Evo Morales attacked the Constitutional Court by not appointing new judges over several years, thus preventing the remaining judges from reaching the minimum quorum required for decisions (Pérez Liñán & Castagnola, 2011). In Paraguay, a recent study has argued that politicians have adopted the informal practice of co-optation of judges that cuts across formal sharing of power in appointments procedures (Basabe-Serrano, 2012). Determining if and how such practices are available to rulers in each country, as a feasible political court of action, requires contextual analyzes beyond formal structures, and research on these issues has been moving in this direction (Llanos et al., 2016).

Moreover, some scholars have highlighted the possibility that independence might not even be a necessary condition for the exercise of judicial power. Political context and short-term strategic calculation on the part of judges, for example, might be more decisive than guarantees of independence in encouraging judges to check rulers. In Argentina, the very lack of *de facto* independence, combined with the possibility of alternation of power in the short run, can be a factor encouraging judicial action in some circumstances. For example, it can encourage judges to rule against the government before the transition takes place, so as to dissociate themselves from outgoing rulers (on Argentina, see Helmke, 2002, 2005; Chávez, Ferejohn & Weingast, 2011).

10 The members of the Colombian Constitutional Court, for example, remain in office for nine years, and must be partially renewed every three years, while members of the Chilean Constitutional Court are elected for a period of eight years. Neither the Chilean constitution, nor the Colombian one offers the option for reelection. Foreclosing renewal of judicial terms of office is the prevailing norm in the region.

(ii) *Scope of the Court's jurisdiction*. Even if judges are completely insulated from potential retaliation against their decisions, and have no incentives to take into account anything other than their own views on what the law requires, this might mean very little in practice if they do not have opportunities to actually decide, or if the authority of their institution and the effects of their decisions are too limited (Brinks & Blass, 2017). From this perspective, one longstanding venue of research on Latin American constitutional review has focused on different structures for making a court's decision possible in terms of the scope of the court's jurisdiction, the effects of its decisions, and who can trigger its jurisdiction. These different instruments for triggering and issuing a judicial decision, vary according to *type* (concrete or abstract), *timing* (*a priori* or *posteriori*), *jurisdiction* (centralized or decentralized), *effects* (*erga omnes*, when it is valid for all the citizens, or *inter partes*, when it is valid only for the parts involved in the case) and *access* (open or restricted) (Ríos-Figueroa, 2011).

We will focus here on *access* and *effects*. Although these two dimensions have been decisive in many research projects in the region, there is room for improving our understanding of how these elements interact and change over time (section 3). Inside the wide range of possible instruments, some are common across different countries in Latin America: the variations on the *amparo* suit¹¹, the *habeas corpus*, the *habeas data*¹², abstract review "actions of unconstitutionality"¹³ and constitutional controversies (to clarify and enforce, in case of conflict, the prerogatives and responsibilities of political authorities as stipulated in the constitution) (Ríos-Figueroa, 2011).

The Mexican *Amparo*, Colombian *Tutela*, Chilean *recurso de protección*, Argentine *Amparo*, and Brazilian *Mandado de Segurança* are cases of instruments with *inter partes* effects -at least in how they were formally designed by legislators- and open access to any citizen. Beyond significant differences, the procedures are examples of a common trend in Latin American constitutional law. Even in countries where there is abstract review, we generally find an older mechanism for concrete review challenges brought by individuals, typically with limited effects. In practice, however, in many countries these lawsuits can move up through the courts to be ultimately decided by the constitutional court, functioning as a sort of super court of appeals, thus blurring the lines between formal (*restricted, inter partes*) and *de facto* (expansive) effects (Ríos-Figueroa, 2011). These supposedly limited individual remedies have become a relevant mechanism enabling judicial activism in some Latin American countries (see, e.g., Uprimny, 2006; Espinosa & Landau, 2017; Oquendo, 2007).

11 *Amparo* is used here as a category for individual remedies, with very broad standing, for the protection of constitutional rights against state (or, in some cases, state-like) violations. The precise scope and standing rules of such mechanisms vary from country to country. See Brewer-Carias (2009).

12 We use *habeas data* here as a category of injunctions that guarantees (to different extents in each country) the right of access to information and, in some variations, to protect personal data, stored in public or private databases, against abusive uses by third parties. While only some of these constitutional texts expressly mention "*habeas data*", most Latin American constitutions include some functionally equivalent mechanism or provision.

13 Here we include any lawsuit that allows an actor to directly challenge the constitutionality of a law or decree, typically before the Supreme Court or Constitutional Court. Access to such procedures is often (but not necessarily) restricted to a list of state and social institutions.

In recent decades, many countries have also adopted mechanisms for direct, abstract, and centralized review, with *erga omnes* effects, which in most countries can only be brought by a limited array of actors and authorities (like in Brazil or Mexico)¹⁴. Although they are recent additions to many of these countries' constitutional systems from a historical perspective, often being superimposed on much older traditions of concrete, individualized review (like in Argentina, Brazil and Mexico), some scholars posit a connection between recent waves of transition to democracy and an expansion of abstract review mechanisms (Vianna et al., 1999). Such mechanisms would allow political conflicts to reach apex courts in a more direct, effective, and speedy fashion -in contrast to appeals and individual *amparo*-like lawsuits that would have to work their way through the judicial system before reaching the Constitutional or Supreme Court, and that would often have only *inter partes* effects. For this reason, many scholars have directly linked the expansion of judicialization processes with the expansion of abstract review (e.g. Carvalho 2010; Vianna et al., 1999).

Still, Latin America is a scenario of *accumulation* of different models for accessing constitutional review (Ríos-Figueroa, 2011, p. 47). In Brazil, for example, there are dozens of institutional pathways to the Supreme Court. In all of them the court might, in principle, suspend the application of an unconstitutional law at least with *inter partes* effect (Arguelhes & Ribeiro, 2016). Such a scenario creates more space for choice, both for litigants (on what and how to litigate) and for the court (on which procedure or pending case to choose to decide a given political conflict). The implications of allowing judges to hear and decide cases by means of these different mechanisms, both in terms of what they mean for prospective litigants and what they mean for the court, has been a longstanding concern of the comparative judicial politics literature (Stone & Sweet, 1992). In Latin America, in particular, scholars have long discussed the implications of the co-existence of many channels for constitutional adjudication (see Ríos-Figueroa & Taylor, 2006; Navia & Ríos-Figueroa, 2005).

Broadly speaking, existing theories hold that instruments that allow for broader access, broader effects (*erga omnes*), a posteriori control, and centralized review tend to empower apex courts, all other things being equal. From the point of view of the actors outside the court, some instruments are more attractive than others in terms of their timing and effects, as well as the fact that rules of standing and access allow for certain instruments to be used only by certain actors in certain contexts (Ríos-Figueroa & Taylor, 2006). From the point of view of the courts themselves, some scholars of Latin American judicial politics argue that direct, abstract challenges of unconstitutionality are a more appropriate judicial tool to make political decisions, because of the kind of power they involve.

In developing and testing these ideas, the most recent waves of judicial politics scholarship on Latin America distinguish between two roles that courts can

14 Several Latin American countries have created abstract review procedures with very open standing, which can be filled by any citizen (for example, in Colombia, El Salvador and Nicaragua) or any person. This picture becomes more complicated when we consider that, in some countries, although any citizen can in principle initiate an abstract review, she is required to show that the law is affecting her rights somehow (for example, in Uruguay and Paraguay), thus blurring the lines between abstract and concrete review.

play in the political process -*adjudicating rights* (“vertical” conflicts, between citizens and the state) and *arbitrating political conflicts* (“horizontal” conflicts, between institutions of the state) (Helmke & Ríos-Figueroa, 2011). The distinction has been helpful to move beyond debates on “judicial activism” in many of these countries, in which participants implicitly focus on just one of these dimensions (usually rights adjudication) as sufficient to describe and criticize a court as excessively aggressive or excessively shy. From this perspective, abstract review would be a better tool for arbitrating political conflicts because, instead of simply finding a violation in a specific case, it allows the judge to act as a “negative legislator” in the sense that she removes from the legal system, in part or in its entirety, the unconstitutional statute (Ríos-Figueroa, 2011).

(iii) *Amendment procedures*. Constitutional rigidity can be crucial for the configuration of judicial powers, interacting with both independence and power. Rules concerning the design of systems of judicial review and judicial independence are positive law, enacted by means of a political decision by legislators. Procedures for changing these rules will, therefore, shape the political incentives of different actors interested in subduing an independent court. All other things being equal, if judicial competences and guarantees of independence are written in the constitutional text, then judicial space for action increases, as this makes it less likely that such rules will be changed (in unfavorable ways for courts and judges) as retaliation for decisions that defy organized political interests (Ginsburg, 2003). Constitutions that enshrine provisions on the high courts’ competences, size, appointment mechanisms, salaries, and budgets, for example, make it harder for politicians to tinker with these dimensions so as to adjust judicial behavior, depending on how hard it is to amend the constitutional text in the first place¹⁵.

One additional complexity is who gets to decide how the constitution can be changed, and which of its parts are beyond the reach of amendments. When constitutions establish substantive limits to the power of enacting amendments, they end up creating space for judges to present themselves as the ultimate arbiters of constitutional change (Schwartzberg, 2007). Despite the large variation across constitutional traditions, judicial review of constitutional amendments -sometimes called “eternity clauses” - seems to be rising as a global trend at least in terms of how courts describe their competences, if not necessarily as a power that they are willing to employ (Roznai, 2017). Some legal systems include judicial review of constitutional amendments just on procedural grounds, while others go a step further and allow for judges to review amendments on the basis of their alleged substantive violations with “eternity clauses,” explicit or implicit in the constitutional text.

The strongest protection and expanded space for judicial action is the combination of (a) explicit constitutional clauses detailing guarantees of independence

15 One extreme scenario is the Constitution of the United States, which describes the Supreme Court in very minimalistic terms. This arguably made it easier for Congress to tinker with the Court’s size and competences as a tool in inter-branch conflicts (Ferejohn & Kramer 2002). Argentina’s constitution is perhaps the closest point to this end of the spectrum in Latin America. In 1990, for example, President Menem was able to expand the Supreme Court’s size by means of a simple bill approved in Congress.

and competences, (b) difficult procedures for amending the constitution and (c) at least the possibility, in principle, for courts to review constitutional amendments. When all these elements are in place, courts have -even if sometimes only as a formal matter- the power to (tentatively) claim the last word in any conflict involving attempts to reduce their independence or powers. The first two dimensions are easier to identify, as they require looking at constitutional texts. In Brazil, for example, the Supreme Federal Tribunal (SFT)'s vast array of guarantees and competences are listed in detail across several constitutional clauses, putting its judges in a particularly favorable position (Arguelles & Ribeiro, 2016).

Regarding (c), however, the answer rarely lies in the constitutional text itself. How this power is understood and exercised, and whether it exists at all, varies across the region. In Argentina, for example, the Court has precedents affirming its power to review constitutional amendments both procedurally and substantively. It has only once struck down an amendment, and on procedural grounds -in the *Fayt* case (1998). In Colombia, courts developed a doctrine of procedural reviewability in the 1980s, but it was only in the first decade of the 21st century that the Constitutional Court developed what is called the "constitutional replacement doctrine", i.e., the idea that some core parts of the constitution can only be changed by calling a special constitutional convention and not simply by constitutional amendment (Bernal, 2013). In Brazil, the power to review amendments on substantive grounds has been affirmed by the Court since the early 1990s, with some antecedents before the transition to democracy (Sussekind, 2014), and it has been used several times to change the content of recent constitutional reforms, successfully securing compliance from the other branches of government (Kapiszewski, 2013).

2.2. When will courts use their power?

One recurrent lesson in studies of judicial politics in Latin America is insufficient to understand patterns of adjudication and the judicialization of politics. The basic implication of theories on the separation of powers or strategic approaches to judicial politics is that fragmentation of power tends to empower courts (Helmke & Ríos-Figueroa, 2011, p. 6). Fragmentation of power is measured by looking at the political process, including the electoral process and the legislative process. In particular, in presidential systems of government, when power is unified between the executive and legislative branches, judges should hesitate to decide against the government interests – and, in scenarios of divided government, judges would have more space for acting (Ríos-Figueroa, 2007; Gauri & Brinks, 2008).

The effect of fragmentation of power, however measured, is contingent on the institutional design variables we discussed in the last section. First, institutional design shapes opportunities for cases to reach the court, and for the court to decide them. If standing to challenge a certain measure is too restricted, judicial action should be blocked, regardless of fragmentation of power¹⁶. In contemporary Latin

¹⁶ Such scenarios were very frequent before transitions from democracy in several Latin American countries – for example, in Mexico before 1994, and in Brazil during the military dictatorship.

American countries, as we saw, the widespread presence of *amparo*-like individual mechanisms ensures that, at least in principle, at least some cases involving the constitutionality of laws will reach the high courts. Institutional design, however, can still have a relative impact on judicial power.

Second, it is the combination of guarantees of independence, the scope of the court's decision, and the feasibility of amending the constitution that will define the "safe" space for judicial intervention. Along these lines, existing scholarship has shown both that fragmentation of powers matters (Chávez, Ferejohn & Weingast, 2011; Scribner, 2011; Landau, 2015), and that it is neither necessary, nor sufficient, for judicial action. Indeed, several studies have led to observations that did not quite follow the direction predicted by these theories; even judges empowered to act both by design and by political fragmentation have sometimes refrained from intervening in politics¹⁷. In their analyses of the Chilean case, for example, Couso & Hilbink (2011) have shown that the Constitutional Court's traditional outlook -its judges' professional understanding of their own role- has prevented the institution from exercising a more significant role in performing constitutional review for more than two decades after the system was put in place. Moreover, conversely, some studies have shown multiple counterexamples where unfavorable balance of power does not prevent judges from deciding against government interests (Helmke & Staton, 2011).

Consider, for example, these multiple episodes of political attacks on high courts, ranging from pressure to resign and actual or threatened impeachment trials to court-packing and dissolution. The Argentinean Supreme Court was packed by President Carlos Menem in 1990, in spite of having the higher average of independence rates in the region (Ríos-Figueiroa, 2011). Chilean Presidents Aylwin and Frei made several attempts to remove Pinochet-era judges from power, and even more radical attempts have happened from governments in Ecuador, Bolivia, Honduras, and Venezuela against previously appointed judges (Helmke & Staton, 2011). In all these scenarios, we still see judges deciding against the government -either immediately or in the near future, but still when the recent past should have informed strategic decision making and counseled prudence. For example, five years after the dissolution of Peru's Congress and Constitutional Court with the "*Autogolpe*" (self-coup) in 1992, the new Court refused to allow Alberto Fujimori to change the constitution and run for a third term (Helmke & Staton, 2011). Other examples of courts' resistance to government in delicate political situations can be found in several other countries such as Venezuela, Ecuador and Bolivia (Pérez Liñán & Castagnola, 2011).

In all these episodes, then, political attacks were not completely unforeseeable by the judges -on the contrary, judges must have understood that the looming threats were credible. They made aggressive decisions anyway and ended up suffering the consequences. This puzzle, which has been recurring in Latin America, has led

¹⁷ This is especially true once we factor in the distinction between vertical (rights adjudication) and horizontal (arbitrating inter-branch conflict) (Helmke & Ríos-Figueroa 2011, pp. 7-8); in some countries, in periods of divided government, courts have still been reluctant to protect rights and/or act as arbiter in inter-branch conflicts.

to several tentative explanations. One possibility is that judges are motivated not only, or not even primarily, by their stability in office -meaning the value they give to their seats, salaries, prestige, accessibility, and power over public policy (Helmke & Staton, 2011; Ginsburg, 2003)-, but also by their preferences over policy outcome. Kapiszewski (2013), moreover, notes that, although we typically consider confrontation as the sign of an independent court, sometimes judges might get confrontational precisely because they have been politicized by previous governments.

3. Building judicial power: reconsidering the role of the opposition

3.1. Institutional redesign by judicial interpretation

As we saw in the last section, one of the key lessons of studies of judicial politics in Latin America is the insufficiency of design to explain the role that courts play in national politics. Indeed, under certain conditions, formally powerful and independent courts might still be less relevant players in the political arena. The two main explanations for this phenomenon lie in different understandings of judicial behavior. On the one hand, in some cases, scholars argue that, given a modest set of assumptions about judges' interests in retaining their offices and preserving standing of their court, the political environment outside the court might signal that decisions that constrain the other branches of government can lead to retaliation. Sometimes, then, judges will be silent because they are behaving strategically.

In other scenarios, scholars have advanced alternative explanations that center on the insufficiency of the political context itself to explain judicial behavior, pointing to the influence of sincere judicial preferences either on substantive policy views held by the judges ("outcome" preferences), or their conceptions of the proper scope of judicial intervention in politics ("role preferences"). Indeed, the very first wave of studies on the judicialization of politics worldwide understood that, for judicial participation in politics to happen, judges must have both (i) expansive role preferences and (ii) outcome preferences that do not perfectly match those of the elected political branches (Tate, 1995). If (i) is absent, judges will not consider that they *should* second-guess decisions made by politicians. According to Couso & Hilbink (2011), this is the case of the Chilean Constitutional Court from its creation to the middle of the 2000s. When (ii) is absent, judges will largely agree with the political branches and therefore not *need* to challenge their policies. According to Brinks (2004), this is, in part, what we see in Argentina in the 1990s, and to some extent Brazil in the 1990s as well.

These possible combinations have been mapped in many of the existing case studies on Latin American countries. However, while existing studies tend to look for judicial preferences manifesting themselves in how judges *use* the powers they have, it is also possible that they influence how judges *interpret and define* the powers they have. In this second case, preferences can become institutional design. Consider, for example, how the first generation of Colombian Constitutional Court

justices significantly expanded the (already significant) powers they received from the 1991 Constitution. First, the court granted itself the power to vacate decisions by lower courts by allowing *tutela* to be filed against judicial decisions; in doing so, it expanded access to its jurisdiction while at the same giving itself an effective mechanism to enforce its views of the constitution on the lower courts (Uprimny, 2006). Second, it expanded the effect of decisions on individual *tutelas*, announcing that they could have effect beyond the parties of case, depending on certain circumstances (Espinosa & Landau, 2017). Third, it granted itself the power to review the substance of executive decrees related to state of siege provisions of the constitution. Fourth, it fashioned a doctrine of constitutional “unamendability” -the “constitutional replacement doctrine”- and placed itself as the guardian of the substance of constitutional changes¹⁸.

The Colombian constitution-makers designed a powerful court, but the first generation of constitutional judges greatly expanded on this already generous blueprint. But *restrictive* role preferences can have similar impacts on institutional design. In the late 1980s and early 1990s, in a series of cases after the enactment of the new constitution, the SFT interpreted many of their own constitutional powers in restrictive ways. First, they restricted *access* to the *Ações Diretas de Inconstitucionalidade* (ADIs), the main abstract review mechanism created by the constitution. They did so by requiring that certain plaintiffs granted standing to use ADIs by the constitutional text actually only challenge laws that had a substantive connection, or “subject-matter pertinence” (*pertinência temática*), with the plaintiff’s primary institutional activities. In this class of second-class plaintiffs, the SFT placed the only two non-state, strictly societal actors to which the constitution had granted standing (Arguelhes, 2014)¹⁹. Creating such a distinction between plaintiffs makes little sense in a system of abstract constitutional review in which, in theory, the court’s jurisdiction is triggered as an objective defense of the constitutional order against unconstitutional laws, not to protect a given entity’s rights or interests.

Second, they restricted the *scope* of the ADI by establishing that these lawsuits could not be filed against statutes created before the new constitution (which included all the laws created by the outgoing military dictatorship). The compatibility between pre 1988 statutes and the new constitution could only be challenged within the decentralized system of judicial review, which typically meant starting at trial courts and filing several appeals over several years, before the Court would finally decide on that case. In practice, then, the court drastically changed the design

18 Following Uprimny (2006): “*The interpretation made by the CCC of its own competences has also been criticized in the realm of judicial review of the Constitution reforms carried out by Congress and attacked by citizens. This is so because the Constitution grants the Court a restricted competence, according to which it can only decide upon the formal vices of formation of those reforms*”. See also Bernal (2013).

19 According to Koerner & Freitas (2013, p.165-167), most members of the constitutional convention had expansive views on how access to abstract review should be designed. This can in part be explained by the desire of different potential political minorities to secure access to the court in the future (Carvalho, 2010, p. 196). Granting social organizations standing to file abstract review lawsuits was less consensual, but it still obtained a majority of votes, especially after a popular petition with almost 40.000 signatures was presented to the constitutional convention (Koerner & Freitas, 2013, p.167).

of its own powers: instead of abstract, centralized review, it determined by pre-transitional laws could only be challenged by means of concrete, decentralized review²⁰.

3.2. *Building power, using power, and the role of the opposition*

Changes in these preferences occur over time as generational changes, judicial career reforms, and alternation of power lead to judicial appointees with different views. In turn, this leads to new frameworks for judicial behavior and can help explain variations in patterns of judicial behavior over time (see, e.g., Nunes, 2010a, 2010b). However, when the preferences of a particular generation become institutional design, future judges might not necessarily be equally able to change these designs back, or to change them to a new arrangement. What are the conditions under which these changes in design can happen? Existing scholarship seems to have treated this question as the equivalent to asking when judges will *use* their powers in certain ways. Conflating the two questions, however, is problematic.

Strategic incentives, including the effect of political fragmentation, modulate the judges' outcome preferences and role preferences in different ways. Role preferences might greatly transform institutional design without requiring a strong stance against the government in a given case. Strategic models (realistically) assume that political actors will react to the *outcome* of judicial decisions, not to the reasons and legal interpretations that judges adopt to reach that outcome. As long as the outcome of the decision is within what the other branches consider acceptable, a decision that expands judicial power will typically fly under the radar -or, even when perceived as a power grab, will rarely become a sufficient focal point for political actors to mobilize and retaliate (Ginsburg, 2003). After all, judges gave them what they wanted²¹.

Perhaps here we can find one potential factor that often leads lawyers and social scientists to diverge on their assessment of the power or relevance of a given court. In 2008, in Brazil, Oscar Vilhena Vieira wrote a seminal essay calling attention to what he labeled "Supremocracy" (*Supremocracia*): the accumulation of authority, in the hands of the SFT judges, both horizontally (against the other branches) and vertically (against other Brazilian courts). As evidence, he points to the fact that the court was expanding the scope of its competences -even if, at that point, there were no landmark cases that could provide a "smoking gun" for charges of activism. Instead, Vilhena Vieira (2008) pointed mostly to cases in which the court had agreed with the elected branches. But this agreement came not out of deference, but rather with the SFT judges agreeing with the content of the policies enacted by politicians on a variety of divisive moral and political issues. The SFT was already expanding its own powers, even if the outcome of most of these cases did not stir much political attention of legal controversy²².

20 See Couso & Hilbink (2011, p. 104) for a similar pattern in the Chilean case.

21 The famous U.S. Supreme Court *Marbury v. Madison* is arguably the paradigmatic example of such a decisional technique: a reasoning that greatly transforms the court's power in the long run, combined with an actual outcome that, in the short run, gives current powerful actors what they want (see Ginsburg, 2003).

22 For a discussion of more recent episodes of the SFT's expansive interpretations of its own competences

At the time, the Brazilian Supreme Court was still very cautious when facing policies of the executive branch (Brinks, 2011), but Vilhena Vieira's diagnosis focused instead on the concentration of power and authority. Power without use can still matter for how institutions behave and interact. More specifically, power matters for understanding patterns of interaction between judges and politicians, in at least two ways. First, all other things being equal, courts that have already announced certain powers might be in a better position when they finally use them. Doctrines will have been discussed, normalized, and legitimized in the discourse of legal scholars and practitioners; legalistic judges can point to a long line of precedents stating that the court has long enjoyed these expanded powers (see Uprimny, 2006, for the Colombian case). Legal scholars and practicing lawyers will have been trained to accept these possibilities as part of the legal system and will have worked to legitimize these ideas in their professional activities. The expansion of judicialization in many other countries depends on these interactions between the legal community and judicially developed doctrines over time (Sweet, 1999, 2000).

Second, the (public, official) existence of certain judicial powers changes the dynamics in the political arena. Whatever the effects of fragmentation of powers are in the likelihood of a judicial stance against the government, studies of judicialization of politics in many countries have suggested that, if the means are available, the political opposition will almost always litigate when defeated on an important policy dispute. Courts that publicly signal expansive powers also enlarge the possibility of what losers in the political arena can at least *try* to judicialize. Indeed, the litigants' use of existing jurisdictional mechanisms is shaped by what they perceive to be the possible outcomes and benefits they might obtain in going to court.

For example, more than a decade after the transition to democracy, the Chilean Supreme Court was publicly perceived as immersed in professional culture that discouraged judicial involvement in political conflicts and rights adjudication (Couso & Hilbink, 2011). Political actors could not count on the court on rights guarantees or to check the political power of the government. When the lower court judges started to clash against elected officials and the Supreme Court started to intervene in a series of public issues, the litigants knew that a new opportunity had arisen, and patterns of judicialization changed. In addition, in Brazil, the Supreme Court's reversal of its restrictive interpretations of the standing rules and scope of certain mechanisms of judicial review has been correlated with drastic changes in the court's workload, as litigants respond to the signals (Arguelhes & Ribeiro, 2016)²³.

and of the effects of its decisions, see Arguelhes & Ribeiro, 2016; Arguelhes & Ribeiro, 2018.

23 See also Arguelhes & Ribeiro, 2018 (discussing how the SFT's decision on same-sex marriage, in 2011, paved the way for increasingly expanded uses of an abstract review mechanism, the "ADPF", giving the SFF in practice the power act as the first and only legislative chamber in many cases)

4. The case of the *Mandados de Segurança* (MS) in Brazil

These points we made in the previous section can be illustrated by the ongoing development, in the last two decades, of the Brazilian *Mandado de Segurança*, an *amparo*-like constitutional remedy that any citizen can use to obtain an injunction protecting his or her fundamental rights from being violated by a state actor. It was designed several decades ago as a *habeas-corpus*-like procedure for immediately neutralizing rights violations that are so evident so as not to require relevant discussions of evidence²⁴. According to the Brazilian Constitution, the Supreme Court has direct, original jurisdiction over MS against acts by the heads of Congress (the President of the Senate and the President of the Chamber of Deputies)²⁵.

In theory, MS can only be used for *ex post* review, by individuals, with *inter partes* effects, and only in the case of a clear violation of an individual right, and (with the exception mentioned above) they typically only reach the SFT by moving within the system of decentralized review. In practice, however, things look very different. Because of expansive interpretation by the SFT, the MS has become a decisive tool in the hands of individual politicians, allowing them to obtain injunctions from the court that shape public policies in ways that would not otherwise be available to them. While the MS can be filed by any deputy or senator with a seat in Congress, abstract review lawsuits (ADI) can only be filed by the political parties. Individual politicians have managed to alter the timing, the scope, and sometimes even the output of legislative procedures by using MS *during* congressional deliberations, before any statutes have been enacted.

Already in the early 1980s, it was established in the SFT's case law that members of parliament had *an individual right to the constitutionally prescribed legislative process*. That is, the court accepted that, were a senator or representative to believe that his or her House of Congress was acting in violation of the constitutional rules of legislative procedure, he or she could file an MS to obtain, from the court, an injunction halting the whole procedure. In the early 1980s, however, the Court took a great step in expanding this power, from purely procedural questions to substantive ones. In a landmark decision in 1980, the judges noted that the 1969 Constitution established certain "eternity clauses" on which Congress "would not deliberate". This, said the court, was actually a procedural requirement, and individual congressmen had the right not to deliberate on a constitutional amendment proposal in violation of the unamendable clauses.

This decision was made during the military dictatorship. It did not by any means spark a period of judicial activism. It did, however, create a formally valid channel for individual dissidents in Congress to take certain conflicts to the court *during* legislative deliberations. By the mid 1980s, this power was already well established as a matter of constitutional law, regardless of how little hope one could have that the court would use it to rule against the government. Moreover, as a stable feature of Brazilian constitutional law and legislative procedure, it shaped political strategies and litigation even in the most heated political cases.

24 Brazilian Constitution, Art. 5º, LXIV.

25 Brazilian Constitution, Art. 102, I, d.

One such episode took in 1984, more than one year before the first civilian president was sworn into office. The court had to rule on an MS questioning the decision, by the government's majority in Congress, to consider rejected (on procedural grounds) a proposed constitutional amendment that would have established direct presidential elections in Brazil, arguably the most consequential and delicate political and constitutional question in the country at the time. Unsurprisingly, the court accepted the majority's rejection of the amendment. But it did not consider this a political question, neither did it summarily dismiss the MS; it announced it had the power to decide this issue as the guardian of the constitution, while deciding in a way that favored the government.

In practice, such uses of the MS have established a *de facto* mechanism for *a priori* review, in Brazil, even though formal *a priori* judicial review of legislation was discussed and rejected in the constitutional convention of 1987-88 (Sussekind, 2014). Moreover, as we pointed out above, access to this mechanism was very flexible: any single member of Congress could at least try to prevent certain laws and especially constitutional amendments from being enacted, or at least to filibuster the process for a while. Over time, and increasingly so in the last decade, Brazilian congressmen from minority parties realized that an MS gave them a quick and powerful venue to access the court (Sussekind, 2014). Moreover, because the STF has original jurisdiction on this kind of MS against the houses of Congress, the mechanism came with something like *erga omnes* effects in practice -if you can convince the court that an amendment proposal violates eternity clauses, the court will force congress to stop deliberating on that proposal.

Beyond their specific power to hinder deliberations on constitutional amendments, the use of MS has become a tool for politicians to bring the Supreme Court judges into congressional deliberations in real time. During the impeachment process of Dilma Rousseff (PT) and the removal process of the Chamber of Deputies' President, Eduardo Cunha (PMDB-RJ), *Mandados de Segurança* claiming some kind of procedural violation in Congress became very common. The phenomenon has intensified during the recent political crisis, but such uses of the MS were not invented now by judges or politicians. There are many examples from the 1990s -the impeachment of the former President Fernando Collor in 1992, the scandals involving the national budget in 1993, sensitive constitutional amendments proposed by the Cardoso government in 2003, and the congressional investigations of the "mensalão" case in 2005, to name just a few.

Although the rate of success of such lawsuits appears rather low, it is precisely in such scenarios that we can better understand the relationship between judicial power and the political strategies of the opposition. As Taylor (2008) notes in his study of the impact of judicial review on policymaking in Brazil, and as Smulovitz (2005) noted in her study of social movements and courts in Argentina, these actors seek the court's jurisdiction not necessarily because they will win. Even a legal defeat can bring political benefits and victories (Dotan & Hofnung, 2005); in politics, actors are rewarded "for taking positions rather than achieving effects" (Mayhew, 1974) and activating judicial review, regardless of the final outcome, allows for pub-

lic messages to be sent to a much wider audience, and for reputations, discourses, and agenda to be consolidated.

Moreover, depending on the mechanisms by which a particular court controls the timing of its decisions, the judicialization of a cause that is hopeless in its legal merits can still considerably delay or at least increase the costs of implementation of a given policy (Taylor, 2008; Arguelhes & Hartmann, 2017). These multiple objectives, then, have converged to make the filing of MS increasingly irresistible for the opposition in Brazil. Because the cost of filing an MS is very low, most of the time at least one of such potential benefits will be enough to make at least one congressmen file a lawsuit.

Still, in several cases, some of these MS succeeded in halting deliberations by judicializing, in real time, questions of internal congressional disciplinary and legislative procedures. Moreover, the several MS filed by Presidents Collor and Rouseff during key points in their respective impeachment trials suggests that, beyond congressional minorities, weakened executives have also brought the court into the picture in order to reach their objectives, even if such a move gives judges the opportunity to expand its powers over the legislature²⁶. Judicial intervention, even if not likely, is becoming increasingly possible, and this pattern might be explained in part due to the political context. Indeed, when triggered by weak presidents in a deeply divided government, the court did actually intervene and granted at least part of their requests, reshaping internal congressional procedures. But the powers deployed now, amidst political fragmentation, had been developed years before, in scenarios where, without being able to (or willing to) rule against the government, the court still seized the political invitation to expand its powers.

5. Concluding remarks

In its first waves in the 1990s, the field of judicial politics in Latin America focused largely on the political and social actors who were driving judicialization (Smulovitz, 1995; Vianna et al., 1999; Domingo, 2000). Since then, it has increasingly focused on high court behavior and its relationship with governments. These studies have gone a long way in explaining patterns of high court behavior using different versions and combinations of institutional design, judicial preferences, and political context. In this paper, we have reviewed some of these main contributions, while also highlighting two avenues for research that still merit further conceptual and qualitative exploration.

²⁶ Understanding the motivations and perspectives of these politicians is, in itself, an interesting research question. If they believe that they will be in the majority in the future, then by judicializing these internal procedures now they are empowering the court and, therefore, restricting their own powers as a future majority. Moreover, there is a collective action problem. It might be undesirable for Congress as a whole to give the court this increased control over its internal procedures. However, from the point of view of each individual politician or minority party, it is harder to see in which scenario they are better off considering that some of them might still judicialize their defeats.

The first focuses on what happens inside the court when judges have to interpret and rule on their own powers. These are opportunities for institutional redesign that might make a difference for judicial behavior in the long run, if we assume that something that is considered “settled law” in a given country might in principle change the incentives for the behavior of both judicial and political actors. Since several decades have passed since most of these countries made since their transitions to democracy, this is a feasible, especially when it comes to the most studied cases, like Argentina, Brazil, Chile, Colombia and Mexico.

Second, we argue that these moments of institutional design by reinterpretation must be understood in conjunction with strategies by the political opposition and other minority actors. Provided that there is a minimally open system of judicial review in place, political minorities have incentives to judicialize claims even when they do not think they will win on the merits – that is, even when political fragmentation and judicial policy preferences make judicial intervention less likely. The opening and expansion of such channels can happen through judicial interpretation, even when the court is not otherwise willing or able to intervene. Over time, the interaction between judges and political and social minorities might reshape the system of constitutional review and expand the court’s powers, even if the best conditions for the actual deployment of such expanded powers have not yet been met.

Both ideas require us to take a step back from the focus on the relationship between the court and the incumbent government (and, more specifically, the incumbent president), which has been one increasing trend in this literature. Some of the most sophisticated works in this vein expand the picture to account for the influence of past governments who helped shape the court’s current “character” (Kapiszewski, 2012, 2013). Still, we believe these horizons can be expanded to bring back the role of political minorities and social movements, even when they are not strong enough to create divided government.

The effect of political fragmentation on judicial behavior has been noted by many scholars of judicial politics in Latin America, but this is usually limited to whether the court is dealing with a weak or strong president. The opposition either defines the scenario by dividing government, or it disappears from the picture. However, as we have argued, the opposition – however cornered, however hopeless in the political arena – is the main force reacting to and driving the expansion of judicial power. It will do so because it often has little to lose and much to gain by using the channels made available to and by the court, even when it will most likely lose on the merits as well. If the channels are there, they will be used; if cases are brought forward, courts will have more opportunities to redefine their powers and separation of powers arrangements according to their conceptions of the proper scope of judicial action in the political arena. This partnership between the court and the opposition might seem inconsequential in the short run. As it becomes institutional design, however, it might create more favorable conditions for the future judicial exercise of power.

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