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**THE INFRASTRUCTURE OF JUSTICE:
INSTITUTIONAL DETERMINANTS OF HIGH COURT
DECISION-MAKING IN ARGENTINA AND VENEZUELA**

*It is impossible to govern if the Supreme Court is against all of the Executive's political initiatives
and might declare all the laws implemented by it unconstitutional.*

Raúl Granillo Ocampo, a top official in the government of Carlos Menem,
offering an informal rationale
for the government's initiative to enlarge the Argentine Supreme Court¹.

(The Venezuelan Supreme Court has) committed suicide in order not to be assassinated.

Former Venezuelan Supreme Court Chief Justice Cecilia Sosa, upon resigning from the Court after
it ruled that designating a Commission of Judicial Emergency tasked
with reorganizing the judiciary
did not exceed the powers of the Constituent Assembly².

Introduction

During the last two decades, social scientists have begun to examine the links between law and legal systems, and the broader political and economic changes that are transforming developing democracies. In comparative politics and public law debates on democracy, legal issues raised by national and transnational human rights movements, and the rule of law, have become prominent concerns. With the spread of neoliberal economic reform and with new pressures from the world economy, property rights, commercial law, and the predictability of legal systems have become dominant themes in the work of legal scholars and students of political economy. One primary goal of these evolving research agendas is to assess whether legal institutions are proving to be a catalyst, or an obstacle, to deepening democracy and economic innovation.

¹ International Commission of Jurists 1990: 1, cited in Helmke 2000: 140.

² As quoted in Pérez Perdomo 2003c: 468.

Within this growing research program straddling law, political science, and economics, a central sub-set of scholarship focuses on judicial politics in developing democracies. A majority of these studies examine judicial independence or judicial decision-making, and a central finding has been that high courts in many young democracies around the globe have begun to flex their muscles by ruling against the interests of power holders in politically and economically important cases. Nonetheless, they are doing so selectively, a phenomenon that is both the result and the cause of the difficulty of establishing the rule of law in newly transitioned, or unstable polities. Cross-national, cross-issue, and over-time variation in the willingness of high courts in developing democracies to challenge power-holders raises a politically important and theoretically interesting question that has not been fully addressed in the literature: *why do high courts in new democracies rule as they do on politically and economically significant cases?*

This paper seeks to address that question. The paper presents a comparison of selected justice sector and judicial institutions – referred to as the “infrastructure of justice” – in Argentina and Venezuela from 1983 to 2003, and suggests how those institutions, and variation in them, might affect high court decision-making. Argentina and Venezuela make an interesting pair of cases in which to study high court decision-making for a number of reasons. First, Argentina and Venezuela initiated two of contemporary Latin America’s first and largest externally funded judicial reform projects, and two of the region’s broadest institutional reform efforts (Ungar 2002: 10-11). Secondly, the two countries exhibit fascinating over-time and cross-issue variation in the degree to which their high courts challenge the central government. Finally, while both countries have been considered electoral democracies during the period under study, each has experienced moments of political uncertainty (and longer periods of what might be called “de-democratization”), as well as significant periods of economic upheaval, since 1983; importantly, in each country, the high court has been actively engaged in conflict resolution during such periods. Examining high court decision-making in politically and economically volatile contexts offers a unique opportunity to broaden our understanding of both the determinants of high court decision-making, and the contribution high courts can make to political and economic development in new or unstable democracies.

Extant theorizing and justification of an institutional approach

Much of the literature on judicial politics in developing democracies focuses directly on explaining judicial decision-making, and the recent extension of courts’ authority into the political realm, or what Tate and Vallinder (1995) call the “judicialization of politics.” These arguments can be placed in three categories: cultural explanations, explanations that point to attributes of the judiciary as an institution, and those that portray judges as strategic actors.

Many scholars of Latin American judiciaries highlight cultural factors to explain the functioning of courts and, specifically, the lack of judicial activism in the

region. Karst and Rosenn (1975) are just two of many researchers who argue that judicial activism is impeded by the formalistic (or literalist) nature of Latin American legal culture. According to Hilbink (1999) and Frühling (1984), judicial reluctance to challenge legislation on constitutional grounds in Chile results from the traditional training of Chilean judges.

Other scholars emphasize attributes of the judicial or legal system in explaining why judges make the decisions they do. Some stress the importance of judicial legitimacy to judicial activism; in examining the Mexican case, for example, Staton (2002) found that the willingness of the Mexican Supreme Court to challenge the authority of elected officials was positively correlated with the Court's public legitimacy. Others suggest that constitutional courts are more likely to exercise judicial control of the constitution than are supreme courts granted constitutional review powers (Ginsburg 2002). Still others make the argument that judicial activism results from the "demand" for a particular court: courts are increasingly likely to be activist the more societal organizations actively attempt to use litigation as a strategy for social change (Epp 1998). Others point to "supply," suggesting that courts to which cases can arrive for decision more easily are more likely to be activist (Ginsberg 2002). The emphasis on judicial reform in much of the recent literature on Latin American courts (Hammergren 1998; Prillaman 2000; Ungar 2002) suggests a last hypothesis: courts are more likely to be activist when they have been assigned additional roles, jurisdictions, or funds, or been awarded expanded formal independence, through judicial reform.

The final sub-set of studies paints judges as strategic actors whose rulings are guided by the opportunities and constraints in the political system within which they operate. Based on their study of the Russian Constitutional Court, Epstein, Knight, and Shvetsova (2001) suggest that courts *postpone* activism if they anticipate it will generate legitimacy-robbing confrontation with, or non-compliance on the part of, executives or legislatures, in an effort to *build* legitimacy. Cooter and Ginsburg (1996) agree that courts grow more reluctant to issue rulings as the probability of non-compliance with those decisions, executive retaliation to them, or legislative repeal of them increases. Other scholars point to party system determinants of strategic rulings. For instance, some hold that courts are more activist in countries with inchoate party systems in which legislation is more difficult to pass and legislative repeal is less likely (Cooter and Ginsburg 1996; Ríos-Figueroa 2003). Still others propose that courts in countries with greater alternation of parties in power may be more independent, and thus more activist (Ramseyer, 1994). Helmke (2002), in a study of the Argentine Supreme Court (1977-1995), found that judges in uncertain institutional environments rule against a sitting government more often as it becomes increasingly weaker towards the end of its tenure, in an effort to gain the support of the incoming administration. Based on their analysis of the Argentine Supreme Court (1935-1998), Iaryczower et al. hold that the probability that Argentine justices will vote against the constitutionality of a federal law or presidential decree rises with their degree of opposition to the sitting government, and falls with the degree of control the executive retains over the legislature (2000: 1).

This paper builds on the second approach: it analyzes the impact of certain structural and procedural aspects of justice sectors and judiciaries on high court decision-making in Latin America. As the above review suggests, there is a marked lack of detailed institutional analysis in the literature on Latin American judiciaries. While this might seem to represent a significant theoretical gap, scholars who study courts in the region have shied away from institutional analysis for good reason: they doubt that studying the “formal rules of the judicial game” will yield useful theories given the instability in judicial institutions in the region, and the vast gap that often exists between formal institutions and informal (but nonetheless “institutionalized”) practices (O’Donnell 1996, Helmke 2000: 21, 248). Theories that highlight the importance of institutional features cannot completely explain judicial decision-making in Latin America. However, that insufficiency does not make studying institutions unimportant.

I offer four justifications for institutional analysis. First, judicial institutions represent a crucial baseline; examining 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. Second, 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 Latin America they make certain behaviors more probable than others.

Third, from a methodological point of view, the empirical variation that characterizes judicial institutions in Latin America may facilitate the generation and testing of interesting institution-based explanations. Finally, as analysts have suggested (Larkins 1998a, Louza 2002b) and the following analysis reveals, the Argentine and Venezuelan judiciaries, and their high courts in particular, have been granted a broad range of powers. Consequently, they hold tremendous potential to be politically consequential should they evolve into more independent institutions whose rulings firmly regulate the behavior of those who hold political power (as well as those who do not). We cannot assume that judiciaries in Latin America will evolve in any direction at all, let alone that their power will increase. Nonetheless, in the event that the power of these judiciaries does increase, it is crucial that we understand how their institutions and structures influence the rulings of their high courts on the politically important cases that will no doubt continue to come before them.

The infrastructure of justice in Argentina and Venezuela

Judicial reform efforts in Latin America over the past two decades have aimed to improve access to the region’s judiciaries, as well as their transparency, accountability, efficiency, and independence (Skaar 2001: 1). While experiences differ substantially from country to country, the main components common to most reform programs are the revision of basic codes (especially the codes and procedures of criminal justice); the improvement of training and education of judges; the depoliticization of the system for appointing lower and appeals court judges and high court justices; the securing of

a guaranteed budget for the judiciary; the increase in funding allocated to the public prosecutor's office (*Ministerio Público*) and its all-around strengthening; the creation of judicial councils; and the creation of a constitutional court or a constitutional chamber within the high court (Hammergren 1998: 267; Skaar 2001: 16). Some of these reforms were carried out through constitutional revision while others were executed through the passage of separate judicial reform legislation.

In general terms, the judicial reforms that occurred in Argentina during the decade of the 1980s emphasized the modernization of criminal and penal laws. Subsequent reforms through the 1990s, including the 1994 amendment to the Constitution of 1853³, and the passage of a variety of legislation relating to the judiciary, often replicated reforms that had already occurred in provincial judiciaries. The main reforms targeted the inefficiency of the judiciary (including the expansion of public defense agencies and the augmentation in the number of administrative clerks), its lack of independence (including reforms to the process of choosing judges), and its ineffectiveness (including the introduction of changes such as Alternate Dispute Resolution mechanisms) (Ungar 2002: 10-11; 145-148)⁴.

While judicial reform was on the political agenda in Venezuela beginning in the mid-1980s⁵, real reform efforts did not get underway until the 1990s. In 1992, Venezuela became the first Latin American country in which the World Bank established a program devoted solely to judicial reform (the Venezuela Judicial Infrastructure Project) (Lawyers Committee for Human Rights 1996: i), and additional World Bank sponsored projects aimed at modernizing the justice sector were implemented in the late 1990s. In general, reform emphasized augmenting the accessibility of the judiciary, increasing court discipline, improving government policies, and strengthening community justice systems (Ungar 2002: 10-11). However, as the following analysis reveals, the institutional overhaul that occurred in Venezuela beginning in 1999 overshadowed these earlier efforts, and were far more dramatic than those that occurred in Argentina during the 1980s and 1990s. In short, through the promulgation of the Constitution of 1999 and a diverse array of legislation, President Chávez sought to completely revamp Venezuela's political infrastructure.

All of these reforms are important to improving the performance of justice sector institutions in Argentina and Venezuela. However, this paper will focus only a narrow sub-set: reforms to the justice sector institutions and rules that may affect Supreme Court decision-making in politically and economically important cases. For

³ The 1994 charter is not a "new" constitution: the first article of the Declaratory Law calling for the formation of a constitutional assembly to reform the Constitution passed by Congress and promulgated by President Menem in December 1993 expressly noted the need to "partially reform" the 1853 charter; the Constitution of 1994 was not referred to as a "new" constitution in any part of the reform legislation (Finkel 2001: 92; Helmke 2000: 190).

⁴ These reforms were supported by loans from a variety of international financial institutions including the Inter-American Development Bank (1993, 1998), the World Bank (1992, 1998, 2002) and the United States Agency for International Development (1991). The Inter American Development Bank's project in Argentina was one of the largest judicial reform initiatives planned by an international financial institution, and the 1992 World Bank project was the first of such initiatives to be suspended in Latin America (Ungar 2002: 10-11).

⁵ President Jaime Lusinchi's (1984-1989) Presidential Commission for the Reform of the State (COPRE), created in 1984, considered reform of the judicial sector an important priority.

each, it will offer some very general thoughts on how the nature of the institution could affect judicial decision-making, and then describe cross-time and cross-national variation with regard to that institution⁶.

Justice sector and judicial institutions

1. *Institutional stability*: The frequency with which, and degree to which a country's general political and judicial structure – as reflected in its laws and constitutions – changes could very well affect both justices' in-depth knowledge of the statutes and constitutional clauses that they are charged with applying, and their investment in ensuring that societal actors adhere to those rules. Institutional instability could also affect justices' knowledge of the rules and procedures that are to guide their own behavior, and their willingness to abide by those.

Argentina and Venezuela exhibit striking variation with respect to constitutional stability. Argentina has operated under the Constitution of 1853 (to which significant reforms were made in 1860 and 1994) since that charter's promulgation (with the exception of the period from 1949 to 1956, during which Argentina was governed under Perón's constitution) (Chavez 2001: 52). On the other end of the spectrum, by 1961, Venezuela had been governed by more written constitutions than any other Latin American country; the Constitution of 1999 was Venezuela's 26th or 27th charter, depending upon whether one counts certain versions of the Constitution as reforms of existing charters, or completely new constitutions (Kornblith 1991, 62-3)⁷. Between 1983 and 2003, as noted above, constitutional change in Venezuela (1999) was much more dramatic than that which occurred in Argentina (1994)⁸. Finally, statutory change that went into effect in Venezuela between 1999 and 2003 was more profound quantitatively and qualitatively⁹ than that which occurred between 1983 and 1998 in Venezuela, or between 1983 and 1998, or 1999 and 2003 in Argentina.

2. *Federalism*: Whether a country has a federal political system¹⁰ may have a significant effect on high court decision-making on politically important cases in at least two ways. First and most obviously, if there is a parallel provincial justice system, politically significant cases (that do not deal directly with officers, laws, or decrees of the federal government, for these would be handled by the federal system) may be resolved in that system, meaning that fewer such cases would reach the federal system,

⁶ The main idea is to encourage and facilitate hypothesis-generation that considers institutional independent variables.

⁷ An interesting related question is whether this instability suggests that the Constitution, and "getting the institutions right," matters less – or more – in Venezuela. Scholars such as Kornblith (1991) and Darenblum (2003) advocate the latter interpretation.

⁸ One analyst suggests that the Constitution of 1999 introduced such significant change with respect to the judiciary because it was the most questioned and inefficient of the branches of government: critics had gone so far as to refer to it as "*la cinicienta de los poderes*" ("the ashtray of the governmental branches") (Louza 2002a: 3).

⁹ Change more often involved writing new or replacement legislation rather than revising existing laws.

¹⁰ Federalism is understood here to be a form of government characterized by the division of power between central and regional authorities, and most importantly for my purposes, in which each of a country's provinces has a separate judicial system.

and the national Supreme Court. Second, as Martin Shapiro has suggested¹¹, Supreme Courts in federal systems may serve the function of keeping provincial governing authorities (executives, legislatures, and judges alike) “in check” – that is, as Shapiro whimsically analogizes, they may serve as the central government’s “junk yard dog.” Given a high court’s knowledge of the utility of the disciplining service they provide for the central government, Shapiro reasons, a high court that performs that function may feel more at liberty to challenge the central government (“bite the junkyard owner”) from time to time, gauging that a central government so indebted to the Court may be less inclined to punish it.

Argentina has been a fully federal system throughout the time period of interest. There are 25 “separate judiciaries” in Argentina: the federal judiciary, the “national,” “ordinary,” or “common” judiciary of the Federal Capital¹², and one judiciary for each of the country’s 23 provinces. The provincial system handles most of the ordinary litigation (Bergoglio 2003, 27). While most Venezuelan constitutions have indicated that Venezuela has a federal system of government, the existence of separate judicial systems in each of the country’s provinces has varied over time. However, since 1945, no province has had a separate judiciary, and all of the country’s judges are federal judges (Brewer Carias 1985 in Molinelli et al. 1999: fn p. 638).

3. *Judicial Branch – Court Structure*¹³: The degree of centralization, the number of “layers” of courts that exist beneath the Supreme Court in the federal judiciary, and the existence of a sub-system of administrative courts (and their jurisdiction) could affect the number of politically significant cases that arrive to the Supreme Court for resolution¹⁴.

In Argentina, through the time period of interest, the courts of the federal judiciary were organized in three levels: the Supreme Court, federal appeals courts, and first instance courts¹⁵. A separate sub-system of administrative courts headed by the *Cámara Nacional de Apelaciones en lo Contencioso – Administrativo Federal* (a federal appeals court) handles administrative cases and cases in which charges are made against public administrators (Ungar 2002: 122). The Argentine constitutional reforms

¹¹ Presentation, “On Prediction and Comparison in the Study of Legal Institutions,” May 5, 12: 30-1: 45, Seminar Room, University of California, Berkeley Center for the Study of Law and Society.

¹² While in some senses the judiciary of the Federal Capital was, through the 1990s, just one more provincial judiciary, in other senses, it operated as an adjunct system to the federal system. For example, until 1999, the judges in this judiciary were designated and removed using processes similar to those used in the federal judiciary, and their salaries were part of the national budget. The granting of autonomy to the City of Buenos Aires that occurred via the 1994 Constitutional reform has led to the initiation of a progressive transfer of jurisdiction from this “national judiciary” to the Autonomous City of Buenos Aires (Bergoglio 2003: 27).

¹³ From 1983 to 2003, the Argentine federal judiciary was one of three branches of the central government (the others being the executive and the legislature). Until 1999, the Venezuelan federal government also consisted of three branches: the executive, legislative and judicial. However, the Constitution of 1999 established two additional branches of government, the citizen branch and the electoral branch (Venezuelan Constitution of 1999, Title V, Chapters IV and V). The federal judiciary, consequently, is now one of five branches of government in Venezuela.

¹⁴ Although not considered here, the ease with which cases can move through the judicial system (that is, the ease with which appeals are requested and granted) could also be an important factor. See Helmke 2000 (269-270), for a discussion of the three types of appeals that were available in Argentina during the time period under study: *recurso ordinario*, *recurso extraordinario*, and *recurso de queja*.

¹⁵ In the late 1990s, there were 24 appeals courts and 343 first instance courts (Helmke 2000: 267).

of 1994 did not modify either the structure of the federal judiciary or its extremely centralized nature. The Venezuelan Constitution of 1961 also established a very centralized court structure consisting of the Supreme Court, superior (appellate) courts, first instance courts, municipal courts (known as district courts or, in the capital district, department courts until 1996), and parish courts (known as municipal courts until 1996)¹⁶. The overhaul of the federal judiciary in 1999 changed this overall structure very little: the number of courts at the higher levels increased, all existing parish courts were renamed *juzgados de municipio*, and some of these courts, denominated *juzgados ejecutores de medidas*, were charged with enforcing judgments from other courts (Pérez Perdomo 2003c: 470). The *Ley Orgánica del Poder Judicial* (1998) mandated that the *Corte Primera de lo Contencioso Administrativo* (High Administrative Court) adjudicate cases concerning the government and established its status as second to that of the Supreme Tribunal of Justice¹⁷.

4. *Judicial Branch Involvement in Appointment of Lower Court Judges*¹⁸: In countries where a judicial career exists, the involvement of judicial branch institutions in the appointment of lower court judges may have an important indirect effect on high court decision-making: whether the high court itself, a separate judicial branch organ, the executive, or the legislature appoints, sanctions, and removes judges at the lower levels of the judiciary will have a significant effect on the political and jurisprudential leanings of the pool of judges from which high court justices are ultimately drawn¹⁹.

Prior to the 1994 reform of the Argentine Constitution, first instance and appellate level federal judges were chosen by the President and confirmed by the Senate (Finkel 2001: 99)²⁰. That constitutional reform created a Judicial Council as a permanent organ of the judicial branch of government, with the aim of decreasing the discretion of the executive with respect to judicial appointments and dismissals. Since then, the Judicial Council has been charged with conducting written exams for posted judicial openings on appeals and first instance courts, and nominating judges for

¹⁶ The number of superior and first instance courts also grew substantially prior to 1999 while the number of municipal and parish courts stayed relatively stable between 1961 and 1999 (Pérez Perdomo 2003b: 6).

¹⁷ In addition, the 1982 *Ley Orgánica de Salva del Patrimonio Público* established the *Tribunal Superior de Salvaguarda del Patrimonio Público* (TSS), mainly a court of appeal that had original jurisdiction over cases involving allegations of embezzlement and corruption on the part of high-ranking officials. The partisan nature of appointments to the Tribunal, however, resulted in paralyzing political rivalries and conflicts; the court handled few cases, while its jurisdiction prevented other courts from hearing cases (Ungar 2002: 128, Pérez Perdomo 2003c: 452; Pérez Perdomo 2003b: 9).

¹⁸ The existence and effectiveness of a Judicial School, charged in those Latin American countries where it exists with the training and formation of judges, could also be important. No national Judicial School appears to exist in Argentina. A Judicial School administered by the Judicial Council was established in Venezuela 1982, closed in the mid-1980s, and reopened in 1990 on a limited basis (Lawyers Committee for Human Rights 1996: 49). The School underwent reorganization and expanded in the late 1990s, was subsequently made autonomous from the Judicial Council in hopes it could become financially solvent (Ungar 2002: 153), and finally came under the direction of the Supreme Tribunal with the Constitution of 1999. Most accounts consider the School to be ineffective, and note that it has not found a way to distinguish its offerings from those of university law schools.

¹⁹ For example, as Hilbink describes the situation in Chile, 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).

²⁰ While a 1992 law introduced public hearings into the judicial nominating procedures, such hearings were not consistently held during the 1990s (Smulovitz 1997: 8).

presidential appointment and Senate approval²¹; the Council is also charged with promoting, disciplining, initiating proceedings to investigate alleged misconduct on the part of, and removing lower court judges²² (Larkins 1998a: 183-4; Finkel 2001: 99-100). The 1994 constitutional reform also called for the creation of a *jurado de enjuiciamiento*, a special nine-member jury to participate in the selection, trial, and removal of lower court judges (Chavez 2001: 53-4)²³.

Venezuela has moved in the opposite direction to some degree. The Venezuelan Constitution of 1961 (Article 217) established a Judicial Council as a functionally autonomous body (i.e. separate from each branch of government, including the judiciary), in hopes of increasing the independence and efficacy of the judiciary and guaranteeing the judicial career²⁴. The Council was charged with appointing, evaluating, promoting, and disciplining judges (formerly the responsibility of the Ministry of Justice) (Louza 2002b: 2)²⁵. The Council's ineffectiveness (it sanctioned few judges, became embroiled in party warfare, and was laced with clientelism) led to efforts to reformulate and strengthen it in 1988 and 1998 (with the *Ley Orgánica del Consejo de la Judicatura*), and finally its abandonment in the Constitution of 1999 (Pérez Perdomo 2003c: 443-50; Ungar 2002: 174; Louza 2002b: 21). That Constitution and a flurry of legislation²⁶ over the next two years mandated that entrance into and promotion within the judiciary would occur via public contests before panels of judges (Constitution of 1999, Article 255), and created a variety of (often overlapping) bodies involved in the appointment, promotion, discipline and removal of lower court judges²⁷. Nonetheless, each of those bodies is either part of, or depends upon and answers to, the Supreme Tribunal of Justice, to which final responsibility for all appointments falls²⁸.

²¹ Once confirmed by the Senate, judges have a lifetime term, given continued "good behavior."

²² The Council consists of 20 members (which include representatives of the executive, legislative, and judicial branches, lawyers, and academics) elected to four-year terms with the possibility of reelection for one additional term (Finkel 2001: 100).

²³ As is well-documented elsewhere, subsequent wrangling over the composition of the Council held up the enactment of implementing legislation until December 1997; neither the Judicial Council nor the special jury for judges came into existence until November 1998 (Ungar 2002: 179-180; Molinelli et al. 1999: 657).

²⁴ Venezuela's Judicial Council was the first such organ established in Latin America (Hammergren 1998: 92).

²⁵ In addition, the Law of Judicial Careers (1980) regulated entrance competitions and established clear criteria for evaluating, promoting, and sanctioning judges. However, Venezuela's "archaic" system of judicial administration made the procedures mandated by the statute difficult to implement (Pérez Perdomo 2003c: 443, 450).

²⁶ This included promulgation of the rigorous *Reforma Parcial de la Normas de Evaluación y Concursos de Oposición para el Ingreso y Permanencia en el Poder Judicial* (March 13, 2000), which regulates public contests and evaluation of judges (Louza 2002b).

²⁷ The two most important are the *Comisión Judicial del Tribunal Supremo* (which comes the closest to substituting for the Judicial Council) and its immediate hierarchical inferior the *Dirección Ejecutiva de la Magistratura* (which aids the Supreme Tribunal in directing, governing, administering, and inspecting the judiciary); both form part of the Supreme Tribunal (Pérez Perdomo 2003b: 15).

²⁸ As intimated in the opening paragraph of this sub-section, these rules and institutions are of greater importance in countries where a judicial career exists. Argentina and Venezuela also differ on this point. There is effectively no judicial career in Argentina (Government of Argentina 2002: 23). In Venezuela, the judicial career has been regulated by the Constitutions (1961 and 1999) and the Judicial Career Laws (1980 and 1998) from 1983 to 2003; throughout the period, judgeship has been an administrative career involving progressive ascension through the four levels of the Venezuelan judiciary; through 1998, judges were required to spend four years at each level before ascension and were required to retire after 35 years of service (Judicial Career Law of 1980, Articles 7 and 8). The tremendous judicial reorganization that occurred in 1999 interrupted the flow of many judges' careers, however.

5. *Judicial Branch Budgetary Autonomy*²⁹: Whether or not the amount the judiciary is allocated from the annual federal budget is fixed, and if it is not, who is involved in the process of making decisions regarding the allocation of funds to the judiciary, and who controls the sub-allocation of those funds throughout the federal judiciary are factors that could affect high court decision-making. Other things being equal, it seems logical that if consistency in allocation is not guaranteed, and if the high court has little autonomy over the administration of its budget, the high court is more beholden to the government that holds and manages its purse strings, and may less often dare to challenge that government.

The Argentine judiciary does not receive a fixed percent of national budget, and its allocations have varied over time³⁰. While the judicial budget has traditionally been prepared by the executive, Law 23,853 (the Law of Economic Self-Sufficiency, 1990) afforded the Supreme Court the power to develop the first draft of the judicial budget³¹, and left at its disposal the regulation, collection, and management of the federal judiciary's assets. The Constitution of 1994 gave the Judicial Council the authority to execute the budget and manage the assets of the judiciary (Gershanik 2002: 25). Similarly, through 1999, the Venezuelan judiciary did not receive a fixed percentage of the national budget, and its allocations were typically quite small³². However, the 1999 Constitution (Article 254) mandated that the *justice system* (which includes a wide gamut of institutions beyond the federal judiciary, see below) would receive no less than two percent of the national budget, and dictated that said percentage could be neither reduced nor modified without the authorization of the National Assembly. From 1983 through 1999, the Judicial Council and the Supreme Court elaborated the judicial budget for subsequent approval by the Venezuelan Congress, and the Judicial Council administered the budget for the national judicial system (Pérez Perdomo 2003b: 1)³³. Since the promulgation of the Constitution of 1999 (Article 267), the above-mentioned *Dirección Ejecutiva de la Magistratura* elaborates and administers the budget of the judiciary (including the budget of the

²⁹ Points four and five raise the larger issue of the degree to which the Supreme Court is involved in the administration of the judicial branch of government. This could matter to high court decision-making in a very simple way: a high court that is busy executing administrative functions may have less time to resolve court cases. In Argentina, the Supreme Court administered the judiciary until the Judicial Council (a judicial branch organ) began to do so after its creation in 1998. In Venezuela, the opposite occurred: the autonomous Judicial Council administered the judiciary until its abandonment in 1999; beyond that point, the Supreme Court and its various administrative and consultative adjuncts have been charged with that duty.

³⁰ The constitutional reform of 1994 did not change this situation. Low and high points of the contemporary period are as follows: the judiciary was allocated .79% of the national budget in 1984, and 3.8% in 1990; the judicial budget declined from 1992 through the end of the century (Ungar 2002: 150).

³¹ According to Ungar, this reform was inconsequential, as throughout the 1990s the executive continually lowered the budgetary figure proposed by the Supreme Court, a revision that Congress did not question (2002: 150).

³² The percentage of the national budget the judiciary received varied between 0.5% and 1% between 1961 and 1998, with an average of 5% from 1971 to 1993. The percentage increased significantly from 1998 to 2001, then fell in 2002 (Pérez Perdomo 2003b: 18).

³³ The Treasury, however, which actually dispersed the funds, exercised considerable discretion (Pérez Perdomo 2003b: 4).

Supreme Tribunal), although that budget must still be approved by the National Assembly³⁴.

6. *Existence and Role of Extra-Judicial Branch Justice Sector Institutions*: The existence of four specific types of extra-judicial justice sector institutions, and their degree of independence from the popularly elected branches of government, might affect the types of cases that come before the Supreme Court: the Ombudsman's office, the General Comptroller's office, the National Public Prosecutor's office, and the National Public Defender's office. The effectiveness of the Ombudsman's office and of the General Comptroller's office can influence the number of cases that have the potential to come up through the court system. The efficacy of the National Public Prosecutor's Office and the National Public Defender's office, and the effectiveness with which the National Public Prosecutor and National Public Defender argue their cases before the high court may have a direct effect high court decisions.

These four institutions have undergone important change in Argentina in the 1990s. The National Ombudsman's office was first created by Congress in July 1993 (Law 24.284), and acquired constitutional status (Article 86) in 1994 as an independent organ in the congressional realm, charged with defending and protecting the constitutional and legal rights and guarantees of the citizenry against acts and omissions of the administration. The General Comptroller's office, part of the legislative branch, is charged with the external control of the national public sector in its patrimonial, economic, financial and operational aspects (Constitution of 1994, Article 85). While the Public Prosecutor's office has long existed, the 1853 Constitution had no clause for it, which generated substantial confusion in doctrine, legal norms, and jurisprudence (Iaryczower et al. 2000: 14). With the constitutional reform of 1994, the office gained constitutional status as a bicephalous independent body including the National Attorney General's Office (which prosecutes criminal, civil, and commercial offenses on behalf of the state) (Ungar 2002: 18), and the newly formed National Public Defender's Office (which directs and coordinates the work of all the public defenders and acts in defense of legality and the general interests of society) (Gershanik 2002: 20); the 1998 *Ley Organica del Ministerio Público* further strengthened the agency (Ungar 2002: 46).

In Venezuela, there was no Ombudsman's Office until the 1999 Constitution created it in the Citizen branch of government³⁵, and charged it with receiving and investigating complaints of the state's violation of constitutional rights (Pérez Perdomo 2003c: 469). The Comptroller's office, before 1999 considered an auxiliary organ of Congress, and after that year's constitutional reform an organ of the Citizen branch, has played an increasingly important role in the control of the government and corruption (Pérez Perdomo 2003b: 1). The 1961 Constitution made the National Public

³⁴ On a more micro-level, the degree to which justices' salaries are protected might influence their willingness to challenge those who write their paycheck. In Argentina, Article 96 of the 1853 Constitution (and Article 110 of the 1994 reform of that constitution) indicates that justices' salaries cannot be reduced while the justices continue to sit on the Supreme Court. There appear to be no similar guarantees regarding Venezuelan high court justices' salaries.

³⁵ See footnote 13 for an explanation of the five branches of government in Venezuela under the 1999 Constitution.

Prosecutor's office independent from the other organs of state and empowered it to oversee the state's rights and obligations (it functioned as both prosecutor and ombudsman until the 1999 constitutional reform); the 1999 reform reestablished the office in the Citizen branch of government and further empowered it with respect to its prosecuting duties. The Office of the Public Defender has also long existed in Venezuela as part of the Executive Branch, though its operation has been impeded by poor funding and a lack of cooperation from other governmental entities (Ungar 2002: 55).

7. *Jurisdiction of Military Courts*: If we assume that judicial jurisdiction and judicial power are zero-sum, the greater the jurisdiction of military courts and the more power they wield, the smaller the jurisdiction of civilian courts (including the high court) and the less power they enjoy. The power military courts wield has been an important issue in Latin America given the region's history of military intervention in politics. Further, while both Argentina and Venezuela were democracies during the entire time period under study, military uprisings have not been unknown: Argentina experienced a (brief and unsuccessful) military rebellion in early December 1990, Venezuela witnessed two unsuccessful coup attempts in 1992³⁶, and in April 2002, President Chávez was removed from office in a successful coup led by a coalition of military and business leaders (though he regained power within days).

The situation in Argentina and Venezuela with respect to the jurisdiction and strength of military courts exhibits interesting variation. In Argentina, unlike the situation in other Southern Cone countries that recently transitioned from authoritarian rule, democratization resulted in the drastic curtailment of military justice: citizens were excluded from the jurisdiction of military courts during peacetime, military courts were subjected to rigorous civilian review³⁷, and cases involving the commission of nonmilitary crimes by military and police personnel were moved to the jurisdiction of civilian courts (Pereira 2001: 557). In Venezuela, by contrast, military courts have been increasing their jurisdiction since the early 1980s (Lawyers Committee for Human Rights 1996: 47). Further, the Venezuelan civilian and military court systems' jurisdiction over cases are intertwined, and at least until 1999, the Venezuelan high court was empowered to choose between the two systems when it was unclear in which system's jurisdiction a certain case fell (Ungar 2002: 128).

The Supreme Court

8. *Structure and Size*³⁸: The organization and size of the high court could affect its propensity to issue decisions that challenge the sitting government. The justices that

³⁶ As is well known, the first of those coup attempts was led by current President Chávez.

³⁷ Specifically, all cases within the jurisdiction of military courts could be appealed to civilian courts, which could also assume jurisdiction of military cases if they considered military courts to be excessively slow in handing down rulings (Pereira 2001: 557).

³⁸ While this point is not analyzed here, given the important role that the leaders of high courts often play, it may be useful to examine how those leaders are chosen. In Argentina, the Justices of the Supreme Court elect the President, who serves a three-year term. In Venezuela, internal contests elect the *Junta Directiva*, composed of a President, Vicepresident, and Second Vicepresident, all of whom must be members of different chambers (Louza 2002b: 7-8).

populate the different chambers of larger high courts that are organized into chambers, for instance, may eventually become more familiar with the laws, constitutional provisions, and existing jurisprudence in the subject matter with which their particular chamber is charged; this may lead those justices to feel that they are standing on firmer legal ground, and thus in a stronger position to challenge to the powers-that-be. On the other hand, the number of judges that sit on smaller courts generally exceeds the number of judges that constitute a chamber in larger ones; to the degree that there is power in numbers, courts that handle crucial political questions *en pleno* may be more willing to hand down rulings that challenge the interests of the sitting government.

The Argentine Supreme Court has consisted of a single chamber through the time period under study. With respect to the number of justices (which is regulated by legislation rather than the Constitution, facilitating its modification), there has been greater instability. As has been well-documented elsewhere³⁹, on April 5, 1990, at the behest of Argentine President Menem, the lower house of the Argentine Congress⁴⁰ passed the *Ley de Ampliación* (Law of Expansion), which increased the size of the Argentine Supreme Court from five to nine justices (Finkel 2001, 81). The Venezuela Constitution of 1961 and the *Ley Orgánica de la Corte Suprema de Justicia* (1976) created one high court⁴¹, the Supreme Court of Justice, divided into three autonomous chambers (the *Sala Político-Administrativa*, the *Sala de Casación Civil, Mercantil y del Trabajo*, and the *Sala de Casación Penal*) each including five justices. The Constitution of 1999 (Article 262) and a decree issued by the National Constituent Assembly in 1999 created the Supreme Tribunal of Justice and modified the high court's structure, dictating that it would function in six chambers (*Constitucional, Político Administrativa, Electoral, de Casación Civil, de Casación Penal, and de Casación Social*) each with three justices (with the exception of the constitutional chamber which would include five justices), for a total of 20 justices⁴².

9. *Jurisdiction*⁴³: It seems logical to assume that the greater the jurisdiction a high court enjoys, the more cases it has the potential to hear, the more cases it decides, and the greater the number of opportunities it thus has to challenge the sitting government. Nonetheless, broad jurisdiction can also generate possibilities for the Court to delay (perhaps indefinitely) dealing with the most politically salient controversies to come before it⁴⁴.

³⁹ See Chavez 2001; Finkel 2001; Helmke 2000; Larkins 1998 and Ungar 2002.

⁴⁰ The Senate had approved the bill in September 1989.

⁴¹ The 1961 Constitution effected the fusion of the two previously existing high courts, the Federal Court and the Court of Cassation. In Venezuela, as in Argentina, the number of justices on the high court is regulated by legislation rather than the Constitution.

⁴² In 2002 and 2003, in discussions in the National Assembly regarding the forthcoming *Ley del Tribunal Supremo de Justicia* (which would replace the *Ley de la Corte Suprema de Justicia* of 1977), legislators have considered expanding the Supreme Tribunal of Justice to 30 justices (*Economist*, Nov. 20, 2003).

⁴³ Note that administrative jurisdiction was handled very briefly in footnote 39 above; this sub-section deals only with jurisdiction in terms of which cases the high court is empowered to consider.

⁴⁴ An important facet of jurisdiction not fully considered here is whether the high court is also a court of cassation charged with rationalizing legal interpretation throughout the judicial system by reviewing how lower courts apply the law to the cases that they adjudicate (Couso 2002: 337); while the Argentine high court was not formally denominated a court of cassation across the time period under study, the Venezuelan Supreme Court was established as a court of cassation in 1961, and the Supreme Tribunal of Justice created in 1999 retained that power.

The Argentine Supreme Court has ordinary jurisdiction over all federal matters. Specifically, it has appellate jurisdiction over 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. It has original jurisdiction over a more limited set of cases: those concerning ambassadors, ministers, foreign consuls, and cases in which a province is a party (Constitution of 1853, Articles 100 and 101; 1994 reform, Articles 115 and 116). The Court has extraordinary jurisdiction over 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, 639-650)⁴⁵.

The Venezuelan Supreme Court and Supreme Tribunal of Justice have both been charged with hearing a wide gamut of cases; the range of cases that come before them may be even wider than that which comes before the Argentine Supreme Court considering that the provincial judicial system in Argentina may act as a filter. For this analysis, one of the two most important chambers of the Venezuelan high court is the *Político Administrativa* chamber (which existed both before and after the 1999 restructuring of the Court)⁴⁶, it has the power to annul illegal administrative acts; order the payment of monetary sums and the reparation of harm and danger caused by the government; and hear claims regarding the provision of public services (Constitution of 1999, Art. 259, 266).

10. *Docket Control and Case Load*: Whether or not a high court has control over the cases that it hears might affect its decision-making regarding politically salient cases in two ways. First, a high court that can choose the cases it hears has a greater ability to “grab” or “duck” such cases at will. Second, Courts that are unable to filter cases and must hear all those that come before them may end up hearing an extraordinary number of cases, the possible effects of which were discussed in the first paragraph of point nine above.

The Argentine Supreme Court has traditionally been unable to control its docket. While several changes have occurred during the time period under study to afford the court the power to hear *more* cases⁴⁷, the Supreme Court still lacks the power to issue *certiorari* decisions – it must hear those cases that come before it (Iaryczower et al. 2000: 4). Similarly, neither the Venezuelan Supreme Court nor the Venezuelan Supreme Tribunal of Justice has had the ability to choose which cases it will hear; the jurisdiction of each chamber, practically all-encompassing in combination, is defined in the constitution and the *Ley Orgánica de la Corte Suprema de Justicia*. Perhaps partially as a result of this lack of docket control, an extraordinary number of cases have entered and been decided annually by these two high courts during the period under study.

⁴⁵ The jurisdiction and functioning of the court with respect to constitutional matters will be reviewed below.

⁴⁶ The other is the constitutional chamber: its powers are reviewed in detail below.

⁴⁷ The procedural code was modified to afford the Court extraordinary jurisdiction in 1990 (Helmke 2000: 173; see “Jurisdiction” above), and the Court appeared to adopt the norm of *per saltum* in its July 1990 *Aerolíneas Argentinas* ruling (Helmke 2000).

11. *Internal Organization and Case Review Procedures*: How cases move through the high court, which high court personnel contribute to the opinion that is written on them and in which order they do so, and other features of the court's internal organization can exert considerable influence on the rulings that it eventually hands down. For instance, 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)⁴⁸.

In Argentina, each case arrives in one of the eight offices of the Judicial Secretariat (*Secretaria Judicial*), each of which deals with a different branch of law. That office drafts an opinion and sends the case to the office of a justice (which includes the justice's own *Secretarios* [the equivalent of appeals court judges] and *Prosecretarios Letrados* [the equivalent of first instance judges]). That justice's office writes another draft of the opinion, and the case and that opinion then proceeds into circulation for sequential consideration according to a written schedule established by the President of the Court. Each justice reviews the case and the opinion to determine whether he wishes to sign the opinion, amend it, concur separately, or include a dissent with the draft opinion. The Court President rules last and determines whether the Attorney General should also write an opinion. Justices meet in weekly or bi-weekly sessions to discuss and sign opinions on cases that all the justices have already reviewed; drafts and final opinions are anonymous (Helmke 2000: 99, 204, 273-275).

In Venezuela, each chamber of the high court includes, among other personnel, justices, substitute judges (*Suplentes* and *Conjueces*)⁴⁹, *Secretarios de Salas* (elected functionaries who guide the cases through the chamber and write sentences with the magistrates), and *Aguaciles* (elected police functionaries who maintain the internal order of the chamber). With respect to decision-making, one justice (a *ponente* assigned by the president whose identity, in contrast to the Argentinian system, is known by all the justices in the chamber) drafts the original opinion. Also in contrast with the Argentine system, the members of the relevant chamber (or the Court as a whole, if the case is of the type considered *en pleno*) sit together to express their agreement or disagreement with the draft opinion and to decide the case (Louza 2002b: 6-10)⁵⁰.

⁴⁸ As Helmke (2000) quite rightly points out, the internal organization and practices of high courts, at least in the U.S. political science literature on Latin America, are unexplored terrain that is ripe for theoretical development.

⁴⁹ Substitute judges fill in for high court justices when the latter are absent. "*Suplentes*" are appointed at the same time as justices and must have the same qualifications; "*Conjueces*," for whom the requirements are also the same, are designated annually by each chamber (*Ley Orgánica de la Corte Suprema de Justicia* art. 16, 17, 67; Louza 2002b: 7). Substitute justices are also allowed in Argentina.

⁵⁰ If the original draft is not approved by the absolute majority of the justices sitting to decide the case, another *ponente* is appointed to write a second draft. In addition, the high court in Venezuela has become increasingly technologically advanced: while traditionally every piece of information regarding every case was included in a paper "file" (Pérez Perdomo 2003b: 5), since 1999, several courts including the Supreme Tribunal of Justice have begun to utilize a computer system to automate and increase the randomness of the distribution of cases, in hopes of improving the efficiency and augmenting the transparency of the process (Louza, "Justicia y Transparencia," 3).

The Justices of the Supreme Court

12. *Qualifications to be a Justice:* It stands to reason that the more rigorous the requirements to be a Supreme Court justice and the more closely those requirements are adhered to, the better jurists will be appointed to the Court. Strong abilities as a jurist may not necessarily be tightly associated with willingness and ability to challenge the sitting government, or with immunity to pressure from the political powers that be. Nonetheless, it could be that justices with greater jurisprudential knowledge who feel that they are on firmer legal ground when they challenge elected authorities may be more disposed to do so.

In Argentina, in order to be named a Supreme Court justice, one must have been an Argentinian citizen for at least six years, hold a degree in law from a national university, have practiced law for at least eight years, and be at least 30 years of age (Gershanik 2002: 23). The 1961 Venezuelan Constitution indicated that in order to be a Supreme Court justice, one must be a Venezuelan citizen by birth, a lawyer, and at least 30 years old (Article 213); the *Ley Orgánica de la Corte Suprema de Justicia* added the following requirements: to be a person of recognized honor and competence, to be in possession of one's senses and faculties, to have been active in the profession, and to have been a practicing lawyer or to have taught law in a public or private institution for more than ten years (Article 5). Since 1999, in order to sit on the Supreme Tribunal of Justice in Venezuela, one was required to have Venezuelan nationality by birth and possess no other nationality; to be a citizen of recognized honor; to be a jurist of recognized competence; and to have been a lawyer for at least 15 years and hold a graduate degree in law, or to have been a university professor of legal science during at least 15 years and hold the title of *profesor titular*, or to be or have been a superior judge in the specialty corresponding to that of the open position with at least a 15-year judicial career and recognized prestige in the execution of ones functions (Constitution of 1999, Article 263). In addition, the requirements stipulated by the *Ley Orgánica de la Corte Suprema de Justicia* continue to apply.

13. *Appointment of Justices:* The appointment process has the potential to affect how high court justices rule on politically significant cases in at least two different ways. It is generally one or both of the popularly elected branches of government that appoint high court justices; to the degree that those appointments are partisan, lower court judges who hope to be chosen may harmonize their decisions with the political leanings of those doing the appointing. If justices wish to maintain jurisprudential consistency, and if tenure uncertainty exists on the Court (because politicians have a history of removing justices or packing the Court for political purposes), newly-appointed justices may choose, at least initially, to synchronize their political and jurisprudential views with those of their appointers.

In Argentina, until the 1994 reform of the Constitution of 1853, Supreme Court appointments were made by the President and approved by the Senate; approval required a positive vote by the majority of Senators present at the time of the vote (with quorum) (Molinelli 2000: 656). The 1994 reform to the Constitution changed the process somewhat: thereafter, presidential appointments had to be approved by *two-*

thirds of the Senators present at the time of the vote (with quorum) (Article 99)⁵¹. While the Venezuelan Constitution of 1961 mandated that the National Congress elected the justices of the Supreme Court⁵², the appointment process changed drastically with the Constitution of 1999⁵³. According to that charter, candidates for high court justice would apply to a “Judicial Application Committee” (*Comité de Postulaciones Judiciales*) comprising representatives of different societal sectors which, upon hearing the opinion of the community, would nominate one of the applicants for the position, and present that nomination to the newly formed Citizen branch of government. That branch would then execute a second nomination, and present it to the National Assembly, which would make the definitive appointment (Article 264).

14. *Length of Tenure of Justices*: While it is likely that the different tenure arrangements that characterize high courts have an important influence on high court decision-making, it is not immediately obvious what that effect might be. One might assume that justices with guaranteed life tenure would feel empowered to follow their own political and jurisprudential leanings given the general difficulty of impeaching justices, and given their potential to make a mark on national jurisprudence in view of the length of their tenure. However, the frequency with which extra-institutional appointments and dismissals of justices are made in Latin America might weaken that assumption. For justices guaranteed a shorter term, the interesting variable becomes whether reelection is permitted or not. If it is not, justices may feel empowered to challenge the government: they “lose less” if impeached given the relatively short period for which their appointment is guaranteed. If reelection is permissible, on the other hand, justices might restrain themselves from too often, or too severely, challenging government authorities in hopes of winning re-appointment.

In Argentina, both the Constitution of 1853 and its 1994 reform established life terms for Supreme Court Justices. However, Article 99 of the 1994 reform (which came into effect in August of 1999) required the appointment of justices who reached the age of 75 to be reconsidered and reissued by the Senate every five years (though a subsequent high court case challenged that provision)⁵⁴. In Venezuela, until 1999, Supreme Court justices were elected to nine-year terms with possible reelection (with five justices, or one third of the Court, being replaced every three years) (*Ley Orgánica de la Corte Suprema*, Article 214). The Venezuelan Constitution of 1961 (Article 264), however, mandated that justices would be elected to a twelve-year term without the possibility of reelection.

15. *Removal of Justices*: The more easily justices can be removed, and the greater the involvement of the elected branches of government in the removal process, the more

⁵¹ One interpretation suggests that the goal of this reform was to increase the likelihood that future presidents would propose more centrist judges by increasing the likelihood that ratification would require the nomination to be supported by more than one party.

⁵² Scholar of the Venezuelan judiciary Rogelio Pérez Perdomo emphasizes these appointments were traditionally strongly partisan (2003c: 424).

⁵³ A temporary process not elaborated here regulated the mode of selection and appointment of Supreme justices during the first period of the 1999 Constitution (Louza 2002b: 4-5).

⁵⁴ There has been much more instability with respect to appointments and tenure on the Argentine Supreme Court than one would assume would occur given this constitutional guarantee.

reluctant justices might be to challenge the sitting government. Nonetheless, given that justice removal in Latin America is not always restrained by the existing institutional framework, that framework might have relatively less effect on justices' calculations regarding how they vote on cases.

The Argentine Constitution of 1853, and its 1994 reform, mandated that impeachment of a Supreme Court justice required a vote of two thirds of the members present in the Chamber of Deputies at the time of the vote (Article 45/Article 53), and that removal from office of a Supreme Court justice (already impeached by the Chamber) required a vote of two-thirds of the members present in the Senate at the time of the vote (Article 51/59)⁵⁵. In Venezuela prior to 1999, the Supreme Court was empowered to decide whether accusations against a justice merited a trial, and if so, to pass the case on to the relevant tribunal (in the case of common crimes), or continue hearing the case until arriving at a verdict (in the case of political crimes) (Constitution 1961, Article 215). Since 1999, the Citizen branch hears accusations against high court justices. If the allegations are sufficiently serious, the case passes to the National Assembly, which can remove justices if two thirds of its members vote to do so (Constitution of 1999, Article 265).

16. *Continuity with Respect to Supreme Court Justices*: This institutional feature, which is a reflection of empirical reality rather than a formal law or rule, may have an important effect on Supreme Court decision-making. For instance, it seems logical to assume that the more insecurity justices experience, the less willing they may be to challenge the interests of the central government⁵⁶.

Two of the most dramatic periods of "justice upheaval" on the Argentine Court between 1983 and 2003 have been discussed in detail elsewhere⁵⁷. The 1990 expansion of the Argentine Supreme Court discussed above created four new Supreme Court Justice positions for the Menem administration to fill; however, due to the resignation of one sitting justice prior to, and another in response to, the passage of the expansion law, Menem would appoint six justices (a full two-thirds of the expanded Court) within 11 months of assuming the presidency. Next, as part of the political bargain struck in order to facilitate the 1994 constitutional reform, three Menem appointees resigned between February 1994 and December 1995. Change of almost equal significance was occurred between 2003 and 2004. In early June 2003, approximately one month after assuming the Argentine presidency, Néstor Kirchner called on Congress to reinstate impeachment proceedings against the Supreme Court. One justice resigned shortly thereafter, another resigned soon after the opening of the impeachment process against him, and a third was dismissed by the Argentine Senate in early December 2003. By March 2004, Kirchner appointed one justice (*Terra noticias*, 26 de diciembre, 2003) and nominated jurists for the two other vacancies⁵⁸. While there was relatively little extra-institutional appointment and removal of high

⁵⁵ From 1983 until the events of the second half of 2003 (detailed in point sixteen below), no Argentine Supreme Court justice had been accused, let alone impeached.

⁵⁶ Note that Helmke (2000, 2002) has argued that, under certain conditions, the opposite is the case.

⁵⁷ See again Chavez 2001; Finkel 2001; Helmke 2000; Larkins 1998 and Ungar 2002.

⁵⁸ While Kirchner appeared to be following constitutionally mandated rules for judicial impeachment and dismissal, his motives and methods are questioned by many Argentines.

court justices in Venezuela from 1983 to 1999, a great deal of instability resulted from the judicial reform initiated by the Constituent Assembly in 1999. The Commission for Judicial Emergency dismissed all 15 sitting Supreme Court justices during the Fall of 1999, and in December 1999, the National Assembly appointed 20 provisional justices (selecting esteemed jurists a majority of whom were sympathizers of Chávez) (Pérez Perdomo 2003: 469). By June 2000, the National Assembly had designated the 20 permanent magistrates (Louza, 2002b).

The Supreme Court's Powers of Constitutional Review⁵⁹

The five aspects of constitutional review included in this section will be considered together, as the potential influence each might wield on high court decision-making are more or less parallel. The longer a high court has, in effect, held the power of judicial review, the broader that power, and the greater the number of parties and courts authorized to challenge the constitutionality of government acts, laws and decrees, the greater the constitutional control the high courts ultimately exerts, the more likely constitutional cases are to arrive to it, and the more opportunity that Court has to challenge the interests of the sitting government.

17. *History of Constitutional Review*: Argentina did not create a constitutional court at any point in its history, and neither the 1853 Constitution nor its 1994 reform explicitly empowers the Supreme Court to exercise judicial review (Chavez 2001: 81). Nonetheless, through its own jurisprudence, the Supreme Court has adopted and developed the power of judicial review based upon 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 to deal with all the points regulated by the Constitution (Helmke 2000: 109; Niño 1993: 316). Legislation through the 1860s made the power more explicit⁶⁰, and during the second half of the nineteenth century, the Court handed down several key rulings that demonstrated its ability to exercise constitutional review⁶¹. From 1903 to 1929, the Court further expanded its power of judicial review (Helmke 2000: 109). Similar to Argentina, a Constitutional Court has never existed in Venezuela. However, at least since the Constitution of 1830, all Venezuelan constitutions have conferred to the Venezuelan high court increasingly broad powers of constitutional review.

18. *Breadth of Constitutional Review*: As noted above, the extent of the Argentine Supreme Court's power of judicial review during the time period under study is not

⁵⁹ The structure of the comparison in this sub-section is inspired by Ginsburg 2002.

⁶⁰ *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 (Niño 1993: 333).

⁶¹ The Court declared the unconstitutionality of a presidential decree in 1863 in *Ríos* (Iaryczower et al. 2000: 5), and in 1887 in *Sojo* (frequently referred to as the Argentine equivalent of the U.S. case *Marbury v. Madison*, 1803) the Supreme Court dealt with the constitutionality of a federal legislative enactment (Niño 1993: 316).

made explicit in the Constitution, and is not clear from the relevant statutes. Nonetheless, it is clear that any judge in Argentina can refuse to apply statutes deemed unconstitutional to particular claimants, and no judge in the country can annul unconstitutional statutes (Chavez 2001: 82)⁶². The Supreme Court's use of the power of judicial review has been relatively restrained over the last decade and a half (Helmke 2000: 21; Nino 1993: 317). In Venezuela on the other hand, the high court's broad power to exercise constitutional review over the last fifteen years has been clearly constitutionally mandated. The Venezuelan Constitution of 1961 (Articles 211 and 215) and the Constitution of 1999 (Articles 266 and 336) empowered the high court to determine the constitutionality of all national, state and municipal laws (and all acts of equal legal standing), state constitutions, and executive administrative regulations, decrees and acts⁶³. In addition, both constitutions empowered the Court to partially or totally annul legislation (at all levels of government) and regulations deemed unconstitutional, and reverse executive and administrative acts that violated the constitution or other laws. The Constitution of 1999 offered the Supreme Tribunal of Justice even greater constitutional control exercised through the newly created constitutional chamber⁶⁴.

19. *Abstract Constitutional Review*: The Argentine Supreme Court cannot exercise abstract review: neither the Constitution of 1853 nor its 1994 reform empowered justices to question the constitutionality of bills before they become laws (Chavez 2001: 82; Helmke 2000: 268). Both the 1961 and 1999 Venezuelan Constitutions (Articles 173 and 214 respectively) afford the high court the power of decide the constitutionality of laws prior to their promulgation when asked to do so by the president.

20. *Standing – Who Can Challenge the Constitutionality of a Law*: In Argentina, only those affected by alleged unconstitutional acts have the standing to challenge their constitutionality (Chavez 2001: 82). In Venezuela, however, any person can request that the constitutionality of a public act (including laws) be reviewed⁶⁵.

21. *Diffuse Control of Constitutionality*: Diffuse control of constitutionality may be an important factor affecting high court decision-making on political questions due to the potential it creates for lower court judges to highlight for the high court the unconstitutionality of certain laws and decrees. In Argentina throughout the time period under study, formal rules established a decentralized system of judicial review in which every court in the federal judiciary was empowered to rule on the constitutionality of laws

⁶² While the *stare decisis* doctrine does not exist in Argentina formally, jurisprudence often behaves as if it did given that, theoretically, if lower courts fail to apply the jurisprudence of the Supreme Court, the affected party can continually appeal their case until they reach the Supreme Court, which can then revoke the lower court rulings (Iaryczower et al. 2000: 4)

⁶³ Any such declarations were and are binding, that is, they had and have effects for all courts and all cases; lower courts attempted and attempt to follow the doctrine so established by the Supreme Court (Gómez, Constitution of 1999, Article 335).

⁶⁴ According to the Constitution of 1999, these new duties include but are not limited to determining the constitutionality of the "organic" of laws thus characterized by the National Assembly before their promulgation (Articles 203 and 215); declaring unconstitutional legislative failure (at any level) to dictate the norms necessary to assure and guarantee the execution of the Constitution (Article 336); and reviewing the constitutionality of decrees issued by the president during states of exception (Article 339).

⁶⁵ I thank Manuel Gómez for explaining this.

and decrees and declare them inapplicable to the case at hand (Chavez 2001: 82; Helmke 2000: 268). Similarly, from 1983 and 2003 in Venezuela, every judge could declare a law unconstitutional and thus inapplicable to the case being considered⁶⁶.

Conclusion

Over the past 20 years, three simultaneous processes have combined to expand the number of disputes potentially subject to legal adjudication, and the potential of judiciaries to resolve them, in Latin America, Central and Eastern Europe, and other parts of the developing world: transitions to democracy, the turn to neoliberal economic policies, and widespread judicial reform. As a result, a panoply of politically and economically important conflicts are currently being played out in high courts around the world. It is consequently crucial that we understand why these courts decide cases as they do. This paper has argued for an approach that seeks to determine how the formal rules and institutions of the justice sector affect high court decision-making in developing democracies. As suggested above, given the large gap that often exists between formal rules and institutions and actual behavior in many new democracies, judicial institutions alone cannot explain judicial decision-making. Nonetheless, these institutions are an important part of the causal puzzle that we have been remiss in not considering more rigorously.

Understanding high court decision-making on politically and economically important cases is a crucial undertaking given the broader consequences that high court decisions on such cases may have for political stability and economic development in young democracies. As scholars have argued, the greatest threat to democracy in parts of the developing world may not be authoritarian 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, et al.). Courts may be able to slow this decay. For instance, by ruling against the state in cases in which it is demonstrated that an elected agent of the central government acted illegally or unconstitutionally (or promulgated unconstitutional laws or policies), and by assisting minorities advancing cases on the basis of civil or political rights, courts have the opportunity to increase the stability and augment the quality of constitutional democracy in newly transitioned polities⁶⁷.

Perhaps less obvious are the pernicious effects that high court decision-making, and the cycle of reactions it has the potential to ignite, might engender⁶⁸. By shirking their duties through refusing to take on politically sensitive cases, by ruling for the state in cases in which an agent of the state has clearly acted illegally or unconsti-

⁶⁶ Gómez, Constitution of 1999, Article 334.

⁶⁷ Some empirical analysis suggests that some Latin American courts do realize this potential: scholar of the Chilean Supreme Court Couso suggests that the opportunity to file writs alleging the unconstitutionality of laws has become an important method for placing new issues on the political agenda in Chile (2002: 287).

⁶⁸ Indeed, another hypothesis, which could be tested through lagged time-series analysis, posits an antagonistic cycle: high court challenges to the central government *lead to* elected authority defiance or manipulation, which in turn leads to further high court challenges, or, alternatively, high court capitulation.

tutionally, or by engaging in behavior that results in retaliatory executive action, high courts can damage the legitimacy of the judiciary, thereby diminishing their ability to compel legal and constitutional behavior. Further, by making rulings that place demands on the state that it cannot possibly fulfill, or that it could only fulfill at the cost of endangering economic and political stability⁶⁹, high courts force central government authorities to make a difficult choice: act illegally, or act irresponsibly. Either option has negative implications for democracy and economic development.

In short, while high courts *have the potential* to have both a positive and negative impact on legality, regime stability, and economic development in young democracies, what sort of impact high courts *do* have is an open, empirical question. By studying high court decision-making, we can begin to address this crucial issue.

Works cited

- Associated Press, December 18, 2002, "Court Takes Control of Caracas Police from Chavez, Restores to Mayor."
- Bergoglio, María Inés, 2003, "Argentina: The Effects of Democratic Institutionalization", In Lawrence Friedman and Rogelio Pérez Perdomo, eds. *Legal Culture in the Age of Globalization: Latin America and Latin Europe*, Stanford: Stanford University Press.
- Bickel, Alexander, 1962, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Indianapolis: Bobbs-Merrill.
- Chavez, Rebecca, 2001, "The Construction of the Rule of Law in Nascent Democracies: Judicial Autonomy in Latin America", Doctoral Dissertation, Political Science, Stanford University.
- Cooter, Robert and Tom Ginsburg, 1996, "Comparative Judicial Discretion: An Empirical Test of Economic Models", *International Review Law and Economics*, Vol. 16: 295-313.
- Couso, Javier Andrés, 2002, "The Politics of Judicial Review in Latin America: Chile in Comparative Perspective, Doctoral Dissertation, Jurisprudence and Social Policy, University of California, Berkeley.
- Darenblum, Naomi, 2003, "Democracy's Pains" (review of *In the Shadow of the Liberator: Hugo Chávez and the Transformation of Venezuela*), *The New Republic*, February 3, 2003.
- The Economist*, September 6, 2003, "A Full Stop Removed."
- The Economist*, August 17, 2002, "Chavez and the judges."
- The Economist*, December 19, 2002, "Trench warfare."

⁶⁹ One example of this could be the Argentine Supreme Court's March 2003 ruling that a 2002 presidential decree that had forcibly converted billions in dollar-denominated bank deposits into pesos was unconstitutional. Were the Court to rule in this direction on the hundreds or perhaps thousands of cases on the issue that have reached or will reach its docket, the Argentine state could not possibly comply with those rulings.

- Eisen, Peter, 1999, "Contract Decision Stands, Venezuelan Court Says", *The Oil Daily*, August 26, 1999.
- Epp, Charles, 1998, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*, Chicago: University of Chicago Press.
- Epstein, Lee, Jack Knight, & Olga Shvetsova, 2001, "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government", *Law and Society Review*, 35: 2.
- Finkel, Jodi, 2001, "Judicial Reform in Latin America: Market Economies, Self-Interested Politicians, and Judicial Independence", Doctoral Dissertation, Department of Political Science, UC Los Angeles.
- Forero, Juan, August 15, 2002, "Venezuela Supreme Court Clears 4 Officers in Uprising", *The New York Times*.
- Forero, Juan, August 27, 2003, "Court Appoints Panel for Recall", *The New York Times*.
- Frühling, Hugo, 1984, "Law in Society: Social Transformation and the Crisis of Law in Chile, 1830-1970", Doctoral Dissertation, Harvard University School of Law.
- Gershanik, Martin, 2002, *Argentina: The Judicial System 2001/2002*, Buenos Aires: Ministerio de Justicia, Seguridad y Derechos Humanos.
- Ginsburg, Tom, 2002, "Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan", *Law and Social Inquiry*, Vol. 27: 763-799.
- Gonzalez MacDowell, Enrique, 2002, "Juridical action for the protection of collective rights and its legal impact: a case study", *Journal of Law, Medicine & Ethics*, Volume 30, Issue 4 (Winter): 644-656.
- 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.
- Helmke, Gretchen, 2002, "The Logic of Strategic Defection: Court-Executive Relations in Argentina", *American Political Science Review*, Vol. 96, No. 2: 291-303.
- Hilbink, Lisa, 1999, "Legalism against Democracy: The Political Role of the Judiciary in Chile, 1964-1994", Doctoral dissertation, Department of Political Science, UC San Diego.
- 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.
- Karst, Kenneth L. and Keith S. Rosenn, 1975, *Law and Development in Latin America*, Berkeley, CA University of California Press.
- Kornblith, Miriam, 1991, "The politics of constitution-making: constitutions and democracy in Venezuela", *Journal of Latin American Studies*, Volume 23, No. 1: 61-90.

- Larkins, Christopher, 1998a, "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.
- Larkins, Christopher, 1998b, "The Judiciary and Delegative Democracy in Argentina", *Comparative Politics*, Vol. 30: 423-42.
- Lawyers Committee for Human Rights, 1996, *Halfway to Reform: the World Bank and the Venezuelan Justice System*, Washington, DC.
- Louza, Laura, XXXX "Justicia y transparencia: perspectiva gubernamental", Texto de una conferencia dictada en la Sede del Tribunal Supremo de Justicia.
- Louza, Laura, 2002a, "La administración pública en el poder judicial", En *Temas de Derecho Administrativo, Libro Homenaje a Gonzalo Pérez Luciani, Tomo I*, pp. 56, Caracas, Tribunal Supremo de Justicia.
- Louza, Laura, 2002b, "El Tribunal Supremo de Justicia en la Constitución de la República Bolivariana de Venezuela", *Revista de Derecho del Tribunal Supremo de Justicia*, Nro. 4: 386.
- Molinelli, N. Guillermo, M. Valeria Palanza, and Gisela Sin, 1999, *Congreso, Presidencia y Justicia en Argentina*, Buenos Aires: Temas Grupo Editorial SRL,
- Pérez Perdomo, Rogelio, 2003a, "La Dimensión Constitucional de la Crisis Venezolana", Freestanding paper.
- The New York Times*, July 16, 1990, "Airline ruling in Argentina."
- The New York Times*, March 31, 1989, "Compensation to Occidental."
- 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.
- Njaim, Humberto, 2003, "La democracia participative en 4 episodios: la práctica de la democracia participativa en Venezuela, Freestanding paper.
- O'Donnell, Guillermo, 2001, "Democracy, Law and Comparative Politics." *Studies in Comparative International Development*, Vol. 36, No. 1, 7-36.
- Perdomo, Rogelio, 2003b, "Reforma Judicial, Estado de Derecho y Revolución en Venezuela", Freestanding paper,
- Pereira, Anthony, 2001, "Virtual Legality: Authoritarian Legacies and the Reform of Military Justice in Brazil, the Southern Cone, and Mexico", *Comparative Political Studies*, Vol. 34, Issue 5, 555-574.
- Pérez Perdomo, Rogelio, 2003b, "Reforma Judicial, Estado de Derecho y Revolución en Venezuela", Freestanding paper,
- Pérez Perdomo, Rogelio, 2003c, "Venezuela, 1958-1999: The Legal System in an Impaired Democracy." In Lawrence Friedman and Rogelio Pérez Perdomo, eds. *Legal Culture in the Age of Globalization: Latin America and Latin Europe*, Stanford: Stanford University Press.
- Prillaman, William C., 2000, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law*, Westport, CT: Praeger.
- Ragin, Charles C., 2000, *Fuzzy-Set Social Science*, Chicago: University of Chicago Press.

- Ramseyer, Mark, 1994, "The Puzzling (In)Dependence of Courts: A Comparative Approach", *Journal of Legal Studies*, Vol. 23: 721-747.
- Richards, Mark and Herbert Kritzer, 2002, "Jurisprudential Regimes in Supreme Court Decision Making", *American Political Science Review*, Volume 90: 305-20.
- Rohter, Larry. May 26, 2000, "Court orders Venezuela to postpone election on Sunday; computerized voting runs into problems, creating uncertainty", *The New York Times*.
- Rohter, Larry, Oct 12, 2002, "Argentina: president fails to unseat court", *The New York Times*.
- Rohter, Larry, February 4, 2002, "Argentina offers economic plan, hoping to sidestep court", *The New York Times*.
- Rohter, Larry, March 6, 2003, "A key policy is overturned in Argentina; court says depositors are entitled to dollars", *The New York Times*.
- Ríos-Figueroa, Julio, 2003, "A Minimum Condition for the Judiciary to Become an Effective Power: The Mexican Supreme Court, 1994-2002", Paper presented at the Congress of the Latin American Studies Association, Dallas, TX, March 27-29.
- Schemo, Diana Jean, 1996, "Ex-Venezuelan chief sentenced to 28 months", *The New York Times*, May 31, 1996
- Scribner, Druscilla, 2003, "Judicial compliance (and defiance): Supreme Court decision making on challenges to exceptional authority in Chile and Argentina", Prepared for delivery at the Western Political Science Association Meeting, Hyatt Regency, Denver Colorado, March 27-29.
- Skaar, Elin, 2001a, "Judicial reform in Latin America, Why?", Paper prepared for delivery at the Norwegian Annual Political Science Conference, Honesfoss, 10-12 January, 2001.
- Smulovitz, Catalina, 1995, "Constitución y Poder Judicial en la Nueva Democracia Argentina. La Experiencia de las Instituciones", In Carlos H. Acuña, ed. *La Nueva Matriz Política Argentina*, Buenos Aires: Ediciones Nueva Visión.
- Smulovitz, Catalina, 1997, "The Discovery of Law: Political Consequences in the Argentine Case", Paper presented at the Conference, "New Challenges for the Rule of Law: Lawyers, Internationalization, and the Social Construction of Legal Rules," organized by the American Bar Foundation and CNRS.
- 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.
- Tate, C. Neal and Torbjorn Vallinder, eds. 1995, *The Global Expansion of Judicial Power*, New York: New York University Press.
- The Oil Daily*, March 31, 1989, No. 9229: 1-2, "Occidental owed compensation, Venezuelan Supreme Court rules."
- The Oil Daily*, November 30, 2000, "Following Action by Venezuela's Top Court, Chavez Prepares Face-off With Union Chiefs."
- Terra noticias*, 26 de diciembre, 2003, "Senado argentino destituye a juez de Corte Suprema Moliné O'Connor."

- Ungar, Mark 2002, *Elusive Reform: Democracy and the Rule of Law in Latin America*, Boulder, CO: Lynne Rienner Publishers.
- Unionradio.net*, 26 de agosto, 2003, "Tribunal Supremo de Justicia designó al nuevo CNE",
- United Nations Development Program, 2003, *Country Profiles: Argentina*, New York: United Nations Development Program.
- Verbitsky, Horacio, 1993, *Hacer la Corte: La construcción de un poder absoluto sin justicia ni control*, Buenos Aires: Espejo de la Argentina (Planeta).