THE IMPACT OF FORMAL AUTHORITY IN LATIN AMERICAN CONSTITUTIONAL JUSTICE

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A Dissertation

Presented to

the Faculty of the Department

of Political Science

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In Partial Fulfillment

of the Requirements for the Degree

of Doctor of Philosophy

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By

Susan Achury

May, 2019

THE IMPACT OF FORMAL AUTHORITY IN LATIN AMERICAN CONSTITUTIONAL JUSTICE

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ACKNOWLEDGEMENTS

This dissertation started as an academic endeavor but in the process has become a personal journey with an unquantifiable value for me as a person. For that, I would like to begin by thanking the people who help me to face the most personal obstacles. A Rubén, gracias por creer en mis sueños y por enseñarme a celebrar los pequeños triunfos como grandes pasos para la humanidad. A la pequeña Amalia, a quien no le hace falta hablar ni sostener un pincel para pintar mi vida de sonrisas. A mis padres, por enseñarme a asumir los retos con coraje y disciplina, y recordarme que la felicidad se esconde en las cosas simples. A mis hermanos Juan, Yesica y Diana por dejarme ser su hermana mayor.

I want to give Lydia Tiede a special thank you for helping me to build a research agenda at the intersection of law and political science. You believed in this project before it even existed. You helped me to realize what I can offer in the subject of Latin American courts. You showed me that the pursuit of big questions is only possible when they are reframed into tiny pieces. You have transformed a dreamer into a scientist: dreamer with a method. Thank you.

Thank you to committee members Eduardo Alemán and Tanya Bagashka for the insightful comments on my work, for setting an example as comparativists, and teaching me the value of the research design. Thank you to Julio Ríos-Figueroa for your work on Latin American courts. As it is clear in the reference section, you inspired me to write this dissertation.

My gratitude goes to Susan Scarrow for the coffee afternoons at the Black Hole. Right when I needed the most, you helped me to find my own voice, provoking me to think ever more deeply about what I need to succeed in academia. I also want to thank Francisco Cantu and Justin Kirkland for their guidance and advice during my career.

I want to thank my colleagues from the program, thank you for being my extended family at Houston: I will treasure all the moments we shared at PGH and its surroundings. Thank you to my Musketeers Margarita Ramirez and Veronica; thank you to my dearest friends Kim Mahn, Scott Hofer, Jonathan Solis, and Matt Ward, thank you for keeping me alive in Houston. Thank you to Freke Ette for being yourself.

Finally, thank you, Kerly, Mauricio, Camilo, and Ivan, because I can't tell my story without reflecting about that time when we were dreaming about who we want to be. You have taught me that true friendship will always survive the distance and the different paths we have chosen will be always intertwined in some way.

This project was supported by the Dissertation Completion Fellowship, awarded by the College of Liberal Arts of The University of Houston.

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ABSTRACT

This dissertation provides a comparative study of Latin American systems of constitutional adjudication and a case-study of Peru to explore when and how the institutional design of constitutional review affects the ability of high courts to influence public policy. This study focuses on how rarely studied judicial institutions shaping the type of cases that courts hear and affecting courts' discretion to respond to constitutional challenges account for differences among levels of courts' assertiveness. I argue that these rules, conjunctively, encourage courts' assertiveness and moderate the negative effect of government concentration of power.

In the first part of the dissertation, I present the index of Formal Authority for Constitutional Adjudication which I created by aggregating 12 different characteristics of constitutional review, using Multiple Correspondence Analysis. To construct this index, I collected original data on multiple instruments through which constitutional review operates within countries in a sample of 18 Latin American countries. This index improves the existing literature, capturing the full range of within-country variance as well as using an aggregation method that allows the data to inform the model about the weight of each component into the final index.

Next, I re-examine previous literature related to the constraining effect of power concentration on the willingness of courts to influence public policy. I use case outcomes of the Peruvian Constitutional Tribunal to show that power concentration in government affects the likelihood of unconstitutionality through three different causal mechanisms. I find that executive control over the legislature and its partisan support within the court decreases courts' assertiveness, while concentration of power in the legislature has the opposite effect.

Finally, I use constitutional review decisions adopted by courts of last resort from nine Latin American countries to show that granting courts greater formal authority increases judicial assertiveness and moderates the effect of power concentration on courts' behavior. These findings suggest that choices in the design of courts generate costs and benefits affecting when and how courts assume active roles as policymakers. This research identifies a combination of rules that encourage courts to check other political actors and protect constitutional rights, and in so doing, it suggests the best practices for institutional design.

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Chapter 1. Introduction

Constitutional review is a standard feature of contemporary constitutions and arguably, the most politically controversial power granted to courts. To date, across democratic and non-democratic regimes, over 80 percent of constitutions have explicitly granted courts the power to invalidate legislation and executive orders that are in conflict with constitutional prescriptions (see Figure 1). However, not all systems of constitutional adjudication are alike, nor all courts willing to invalidate public policies. Figure 1 presents a myopic picture of the institutional contexts in which constitutional courts decide. It portrays constitutional review as a homogenous institution but, in fact, conceals significant institutional differences in the way in which courts participate in the public policy process. Likewise, it not only obscures differences across countries but also ignores the fact that constitutional review operates within countries, through a variety of procedures, here called instruments, that shape the courts' jurisdictions within particular cases. Methodologically, both types of variance are relevant to comparative analyses.

Notwithstanding the influence of the US and the European systems in the diffusion of the constitutional review (Ginsburg 2008), countries have adopted innovative combinations of the features of these systems (e.g., in Latin America Navia and Ríos-Figueroa 2005; in Eastern Europe Schwartz 1992; in Asia Ginsburg 2003). Thus, little can be learned about the effects of institutions on the courts' willingness to invalidate public policies if the comparisons across countries rely on such imprecise characterization. [1]

[1] Moreover, as Da Silva (2019) suggests, the use of the US and the European models as units of analysis more than a methodological mistake is 'a vestige of colonialism.'

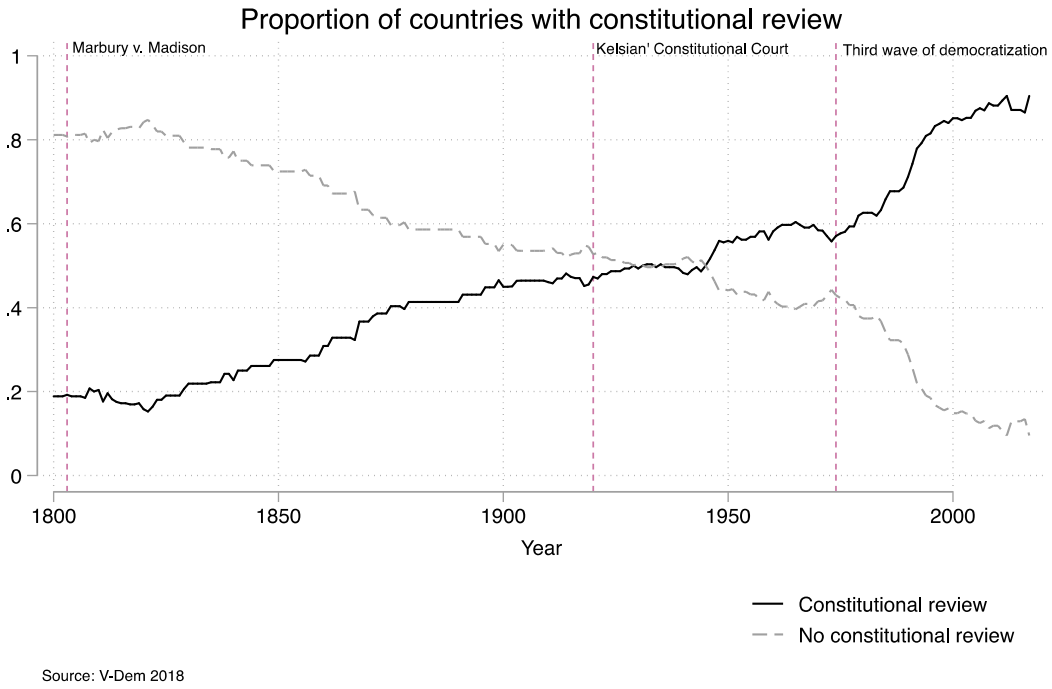


Figure 1-1. The expansion of constitutional review

This dissertation seeks to address this lacuna in the literature by focusing on explaining courts' assertiveness in Latin America, as an example of democracies of the third wave of democratization. Although constitutional review in this region has a longer history, this institution was a central part of the changes introduced with democratization at the late 20th and early 21st centuries. The focus of the study is the behavioral consequences of rarely studied institutions defining courts' formal authority in constitutional adjudication. In particular, I analyze how the set of rules affecting the type of cases that courts hear (demand) and courts' discretion to respond to constitutional challenges (supply) accounts for differences among courts' assertiveness in constitutional cases. The institutional variance analyzed includes rules determining: 1) The access to constitutional review, whether citizens have legal standing to bring cases to courts or whether it is limited to political actors; 2) The scope of courts' decisions, that refers to whether a decision affects broad policy or only the parties of the cases; 3) The

broadness of the justiciability, that indicates the extent to which some conflicts are excluded from the courts' review; and 4) The high courts' voting rules that determine the level of internal consensus needed to find laws unconstitutional. I argue that, in democracies, these rules—here aggregated under the concept of formal authority of constitutional review, matter in explaining the frequency in which courts rule against governments' preferences—judicial assertiveness. Furthermore, from the contextual perspective, I assess how concentration of power in government affects judicial assertiveness through different and simultaneous mechanisms and more importantly, how formal authority moderates judicial deference in situations of concentrated power in government. From here on, the term 'power concentration in government' refers to the political context in which policies reflect the preferences of a dominant political actor without contestation from others.

What Is Constitutional Review? Variance in The Institutional Environment of Constitutional Adjudication Within and Across Countries

Constitutional review, as an institution, refers to multiple independent instruments enacted with the purpose of preventing or repairing violations to constitutional provisions. It includes "all jurisdictional activity to defend constitutional norms and principles against laws or rules of a similar hierarchy or against any act, fact or omission from public entities or private persons, is performed by any court, special or ordinary, although, in the latter case, when said control of constitutionality is carried out by special instruments, that is, by any that has as its sole or principal purpose such defense" (Canova Gonzales 2012, 26).[2]

[2] This definition responds to a functional approach to constitutional justice. Alternatively, formal definitions refer exclusively to the review of legislation (Kelsen 1942); and subjective views refer to the functions granted to constitutional courts. For a further discussion, see Canova Gonzalez (2012, 21-22).

Understanding constitutional review as a set of procedures is critical to explaining the effect of rules on courts' behavior because it accounts for how courts may have a greater authority in some procedures than in others.[3] While current comparisons of constitutional adjudication systems overlook this within-country variance, there are good theoretical and empirical reasons to take this variance into account. It is common to find systems of constitutional review that granted courts extensive authority in some areas but restricted it in others –i.e., electoral issues or other judicial decisions. Therefore, from a theoretical point of view, much analytical value can be gained by considering all procedures that lead courts to gain competence over a case and constrain the way they decide. Empirically, including this variance provides a comprehensive and more accurate comparison of formal authority across countries.

In this dissertation, I argue that, to capture the effects of formal rules on judicial decisions, it is necessary to identify a myriad of rules that define constitutional review and ultimately courts' authority. I propose a reconceptualization of formal judicial authority analyzing how formal rules provide avenues for the supply and demand of constitutional justice. The intent of this exercise is to provide a framework to identify the rules which determine the courts' formal authority and how they affect policy. This reconceptualization is applied to 18 Latin American constitutional courts and is used to examine the extent to which it captures the latent variable of formal authority in constitutional adjudication. To do so, I have identified and coded 12 characteristics of constitutional review and classified all procedures in which courts review the constitutionality of policies, here called instruments, aggregating them to provide an index based on Multiple Correspondence Analysis (MCA).

[3] The differences in courts' authority across those instruments are often overlooked because they are established in norms lower in the legal hierarchy and not in the constitutional text. As a result, legal dispersion and the absence of available English translations make it more challenging to pinpoint, code, and classify original sources.

The Effects of The Institutional Environment for Constitutional Adjudication on Judicial Assertiveness

Judicial assertiveness is one manifestation of the 'judicialization of politics.' Some activist high courts such as in Colombia and Costa Rica are now recognized in the literature as important political actors, empowering underrepresented sectors of the society to protect constitutional rights and solving problems related to the distribution of power (Ríos-Figueroa 2011; Wilson 2005, 2009; Wilson and Rodriguez-Cordero 2006; Gloppen et al. 2004). On the other hand, high courts in Argentina and Chile are perceived as more passive, and usually deferential to the government preferences (Hilbink 2007; Couso 2005; Couso and Hilbink 2011). While judicialization of politics refers to "the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies" (Hirschl 2008),[4] I focus on the frequency in which courts issue decisions that modify the policy outcome, judicial assertiveness, as a manifestation of the judicialization of politics.

Scholars have identified at least two categories of factors that affect judicial assertiveness: the institutional environment for constitutional adjudication and the political contexts in which courts operate. First, building on the ability of institutions to create incentives and opportunities for the interaction between branches of power, as well as expectations in regard to the reaction of other actors,[5] institutional studies suggest that rules granting courts' independence increase judicial assertiveness (Ferejohn, 1999; Epstein and Knight, 1998; Segal

[4] Hirschl (2008) identifies three processes in which judicialization of politics materialized: 1. The use of legal arguments in the political discussion and policy-making; 2. The degree to which judicial decisions determine public policy outcomes; and 3) The intervention of courts in 'mega-politics' such as those beyond the adjudication of fundamental rights and rules of federalism, to include more politicized areas such as electoral processes, imposing constraints over public budgets and national security, etc.

[5] See North (1990) and Ostrom (1986).

and Spaeth, 2002). Current institutional explanations are focused, almost exclusively, on the degree to which elected branches influence courts' composition (i.e., judicial nominations, appointments, and impeachments): formal independence.[6] However, institutional safeguards of independence seem to be inadequate to prevent courts from adopting survival strategies of deference to elected branches (Hilbink 2012). Brink and Blass (2017) highlight this point arguing that even "the most autonomous and unaccountable court in the world will not be an influential political force if it is difficult to access or lacks the tools to act decisively on a wide range of issues" (311).

While the literature on the institutional environment in which constitutional adjudication takes place points out the fundamental distinction between rules related to the courts' composition and rules related to courts' authority (Rios-Figueroa 2011; Brinks and Blass 2017), there is still little empirical research that uses this conceptual distinction to account for the willingness of courts to use constitutional review to influence policy. This dissertation attempts to advance the study of judicial behavior by isolating the causal links of these two sets of institutions on the high courts' ability to limit elected political actors. I argue that choices in the design of constitutional review generate different costs and benefits affecting when and how courts assume more active roles as policymakers.[7] My research identifies which combinations of rules encourage courts to check other political actors and protect constitutional rights, and in so doing, it suggests best practices for institutional design.

[6] Also, identified as *de jure* independence, which focuses on rules that make courts more or less independent, as opposed to *de facto* independence, which focuses on how courts in fact act (Feld and Voigt 2003). See, for exceptions Ríos-Figueroa, 2011; Melton and Ginsburg, 2014; and Brink and Blass (2017).

[7] Notice that the argument connecting the formal authority with courts' assertiveness is different from the previously stated effects of formal rules determining courts' composition as a facilitator of coordinated behavior of elected branches to threaten or sanction courts (Melton and Ginsburg 2014; Carrubba et al. 2015).

The second category of studies on judicial assertiveness focuses on how the political context affects judicial behavior. This literature argues that concentrated political power, meaning the alignment of preferences and interests in the executive and legislature, increases judicial deference to government because it facilitates coordination among the elected branches to retaliate against assertive courts (Epstein, Knight, and Martin, 2001; Ferejohn, Rosenbluth, and Shipan, 2009; Vanberg, 2015). Specifically, scholars in this camp emphasize courts as policy-motivated actors that incorporate executive and legislative policy preferences into their decisions because they recognize that judicial decisions need the elected branches for their implementation (Gely and Spiller 1990; Rogers 2001; Vanberg 2004). In other words, courts anticipate the response of the executive and the legislature and adjust their preferences to avoid being overruled or ignored (Rosenberg 2008). In contrast, other scholars suggest that courts are more assertive when power is concentrated in government because such contexts promote more contested policies; therefore, courts are more likely to intervene. My research provides empirical evidence for the multiple causal mechanisms in which the concentration of power within and across the elected branches affects judicial assertiveness. I use data from the Peruvian Constitutional Tribunal to show that concentration of power triggers courts' strategic deference to government at the same time that it produces policies that are more likely to be contested in courts.

Moreover, the proposed research aims to integrate institutional and contextual factors affecting judicial behavior into the analysis by identifying how rules related to courts' authority moderate the effects of concentrated power and encourage courts' assertiveness. I use case-level data from nine Latin American countries to provide some evidence that courts with greater

formal authority are better equipped to act as an effective veto player under contexts of concentrated power in government.

Dissertation Outline

In chapter 2, I provide a scheme to compare and measure differences across the institutional arrangements of constitutional review. I present an original database of the institutional features of constitutional review which classifies 162 instruments across 12 institutional characteristics (variables), in 18 Latin American countries, using original sources such as constitutions, laws, legal studies. I use Multiple Correspondence Analysis (MCA) and information from 2003 to 2017 to estimate the courts' formal authority for constitutional adjudication as a latent variable. The resulting measure shows a wide variation not captured by existing measurements of formal authority, contributing to the comparability of constitutional review systems.

In chapter 3, I explore the different causal mechanisms in which power concentration in government affects judicial assertiveness in a single court study. I argue that multiple causal mechanisms with different timing may be at stake. Using data from the Peruvian Constitutional Tribunal, I show that power concentration in government triggers strategic deference to the government policy preferences to the extent that this influences the composition of the Tribunal. However, distance in the ideological preferences of the court to the government curbs this effect. Indeed, the Tribunal is more assertive when facing the concentration of power in the legislature, suggesting that the uncontested origin of the policies produced in such political contexts activates the role of the court as a veto player. The results show that judicial deference to the government as a consequence of power concentration is limited. Instead, the relationship

between the concentration of power in government and judicial assertiveness is conditioned on the timing in which different causal mechanisms interact with particular institutions, especially those related to judicial selection.

In chapter 4, I analyze case outcomes of constitutional review in nine Latin American countries to assess the impact of the institutional and political contexts in which adjudication takes place. The main purposes of this analysis are twofold. First, the work provides evidence of courts' assertiveness from a region largely studied through single-countries studies, yet under-studied cross-sectionally. Second, the chapter sheds light on the effects of the institutional environment on constitutional adjudication, advancing the debate on judicial assertiveness. In particular, the chapter focuses on the impact of institutional choices affecting the supply and demand of constitutional justice—including rules defining the accessibility, scope, and voting rules of courts—to analyze whether variance across these crucial features of constitutional review explains different patterns of courts' willingness to intervene in the public policy process.

Chapter 2.

Formal Authority of Latin American Constitutional Courts

As guardians of the constitutions, why are some high courts better able than others to influence policy? Specifically, how do differences in the procedures through which constitutional challenges are raised affect judicial behavior? These questions are critical for understanding the role of courts in the consolidation of constitutional democracies. However, researchers continue to face difficulties in finding a comparative scheme that differentiates the institutional environment of constitutional review. While much attention has been given to the study of rules about courts' appointments, nominations, and sanctions as potential sources of the influence of politics on the judiciary, little research has focused on making comparable the array of institutional choices defining the cases constitutional courts hear and their discretion in deciding them.[8] A central obstacle is that constitutional review is exercised through a varied range of instruments that are difficult to compare. Previous attempts have relied on generalizations to measure differences across countries that are inappropriate either because they obscure most of the variance or because they require subjective classifications. To better compare constitutional jurisdictions, this chapter offers a scheme that incorporates all instruments of constitutional review and applies it to 18 Latin American countries from 2003 to 2017.

Instruments of constitutional review vary in many aspects. Yet, comparisons across models of constitutional review have been generally oversimplified to the study of two

[8] Instruments of constitutional review here refer to the diverse types of procedures through which controversies reach the courts. Ríos-Figueroa (2012, 31) lists as examples instruments such as *Amparos*, habeas corpus, habeas data, actions of unconstitutionality, and constitutional controversies. See also Brewer-Carías (2009, 265).

institutional choices: Is constitutional adjudication concentrated in a court with original jurisdiction and monopoly over all controversies (centralized or diffused system) and is there a requisite for a factual context to exercise constitutional control (concrete or abstract review). These dichotomies are problematic as most constitutional systems have implemented a mixture of these characteristics (Da Silva 2018). I expand the comparison of constitutional review mechanisms to analyze rarely studied rules that grant courts broad formal powers to intervene in policy (Ginsburg 2003, 2008; Hirschl 2004). The selection of such rules reflects the definition of courts' formal authority as their "capacity to intervene efficiently and decisively in a broad range of politically significant disputes on behalf of a broad range of actors" (Brinks and Blass 2017, 299). The comparison incorporates institutional choices that directly affect the accessibility (who can initiate a complaint), scope (broadness of courts' jurisdiction), and decisiveness of constitutional courts[9] (internal voting or decisional rules) as previous measures have identified. I reconceptualize these choices into a scheme that distinguishes between rules affecting the type of cases that courts hear (demand) and courts' discretion to respond to constitutional challenges (supply).

I analyze those institutional choices using Multiple Correspondence Analysis (MCA). This data technique is suitable for categorical variables such as those describing differences in institutional choices. Additionally, this technique informs the model about the relationship between instruments and their characteristics rather than assuming them. The result is the index of the Formal Authority for Constitutional Adjudication (FACA) for 18 Latin American countries between 2003 and 2017. Capturing the variance across the instruments of constitutional

[9] I consider constitutional courts, all courts that have the ability to decide a constitutional controversy, including specialized courts, such as constitutional tribunals, or ordinary courts, such as Supreme Courts.

review has important advantages for comparing the courts' ability to affect policy. It increases transparency and replicability of the measure because it links specific rules to the measure. Moreover, by fully accounting for the existence of multiple instruments within countries, it improves the construct validity and comparability across countries. Also, it enhances the ability to examine how institutional environments in which cases are discussed affect case outcomes, providing a more accurate way to assess the effect of institutions on judicial behavior.

The remainder of the paper is organized as follows: Section 2 lays out the foundation to compare constitutional jurisdictions. It summarizes what rules shape both the demand and supply of constitutional justice and how they determine the courts' ability to participate in the policy-making process. It also identifies the limitations of existing measures of courts' formal judicial authority. Section 3 describes the variation across instruments of constitutional review across the 18 Latin American countries. Section 4 presents the correlation with existing measurements of judicial authority and autonomy to test the construct validity of the index. Finally, Section 5 concludes with the relevance and appropriateness of the proposed measurement.

Comparing systems of constitutional adjudication

Comparing judicial institutions is often subject to unforeseen challenges (Voigt 2013). Analyzing courts' formal authority to exercise constitutional review, arguably the courts' most political role, is no exception. The main challenges to compare systems of constitutional adjudication are selecting the institutional choices that define the contour of judicial intervention and determining whether there are some rules with greater importance than others to create a meaningful scale.

The existing approaches to compare systems of constitutional adjudication have failed to meet these challenges. Instead, scholars have resorted to broad typologies of constitutional review (Shapiro and Stone-Sweet 2002; Tushnet 2009; Young 2010; Colón-Ríos 2014) or combinations of these typologies aggregated in additive indexes (Ríos-Figueroa 2012, Brinks and Blass 2017). Ultimately, scholars have widely employed measures that include institutional features related to both judicial independence and authority (Feld and Voigt 2003; Voigt, Gutmann, and Feld 2015) or that aim to capture the power that courts actually exercise (index for de facto independence) rather than the formal aspects (e.g. Latent Judicial Independence—LJI, by Linzer and Staton 2015; Cingranelli and Richards Judicial Independence—CIRI 2014).

To the extent that the comparability is limited, our ability to understand the impact of institutional choices on judicial behavior is also constrained (Woods and Hilbink 2009). Current studies which focus on the effect of judicial institutions on policy have relied on dichotomies.[10] They often overlook the fact that some of those categories are in large part inadequate for differentiating across countries. Most countries, for instance, have adopted systems in which traditional categorizations coexist. For example, mixed systems have included instruments for both abstract and concrete review, have centralized some but not all instruments in specialized courts, decide some cases in en banc and others by panels, as well as other mixtures of institutional choices. While mixed systems of constitutional adjudication are the most prevalent across the globe, comparative work needs to substitute categorizations that are either idealistic such the comparison between the US model versus the European model, or apparent as they are

[10] See for example, studies about the effects of creating specialized courts (Garoupa and Ginsburg 2011), exercising abstract review versus concrete review (Sadurski 2008, Garoupa and Ginsburg 2011, Ríos-Figueroa 2012), allowing courts to review law before its enactment (Stone-Sweet 2000; Magalhães 2003), providing courts with docket control and discretion (Pozas-Loyo and Ríos-Figueroa 2017), and organizing courts *en banc* or in panels, with qualified majorities, or with public dissents.

unable to distinguish across countries (Da Silva 2018). To do so, it is necessary to focus on the degrees in which instruments of constitutional review vary.

True comparative work should, for example, differentiate the degree to which systems of constitutional adjudication allow abstract review, the extent of government actions that courts review before their enactment, and how constitutional justice is more (or less) accessible or more (or less) decentralized in some countries than in others. Current measurements of courts' formal authority do not provide such comparability. The scheme proposed here incorporates all instruments that provide courts with the ability to strike down government actions, allowing a more accurate comparison of the institutional features of constitutional review across countries.

Other advantages of this scheme include the possibility of ranking countries on particular institutional choices. Creating an overarching measurement of formal authority is useful to compare across countries, but specific research questions may require the inclusion or exclusion of particular types of instruments. For example, researchers interested in the ability of courts to limit the executive abuses of emergency decrees may exclude instruments for the constitutional review of regular legislation. To this effect, the proposed scheme can be re-estimated to compare subsets of instruments (see appendix 4). Moreover, looking at the instruments also makes it possible to analyze actors' choices. For example, researchers studying the effects of judicial institutions on actors often neglected in judicial politics, such as lawyers, interest groups, and victims, can look at institutional variance across instruments within and across countries.

Defining courts' formal authority: the supply and demand of constitutional review

Courts' formal ability to invalidate government policies on the grounds that they violate a constitutional provision can be understood as the result of two factors: 1) the degree in which

societal actors can challenge government policies and, 2) the courts' ability to affect the general policy in response to the facts and legal considerations argued in each case. This scheme corresponds with the most basic portrayal of courts as third-party dispute settlers (Shapiro 1981) where courts' interventions are motivated by the demand of parties, and their jurisdiction limits their responses. On a closer examination, some institutional choices might affect both the supply and demand of judicial influence on policy. However, for the analytical purposes of determining what rules affect formal judicial authority, the institutional choices included in this analysis are presented as influencing one of these factors: supply and demand.

Rules shaping the demand of constitutional review

Courts have more opportunities to rule over pressing issues in a society when diverse and politically marginalized actors can voice their policy preferences using constitutional review (Wilson 2009; Brinks and Gauri 2008). Institutional choices that facilitate courts to function as 'fire-alarm' mechanisms of horizontal accountability (McCubbins and Schwartz 1984) also allow citizens to seek judicial intervention to affect policy. The more diverse the sources of information, the better the ability of courts to control policies as government outcomes, unduly constraining constitutional rights. (Ríos-Figueroa 2017; Pozas-Loyo and Ríos-Figueroa 2017). The four generally applicable criteria for identifying the choices that affect the demand of constitutional review are: who, what, when, and how constitutional conflicts get to the courts. These criteria determine the breadth of judicial scrutiny; and to that extent, the chances of courts to intervene in the public policy-making process.

First, the rules determining the accessibility to constitutional justice, usually in the form of requirements for gaining legal standing in a particular controversy, determine who has access

to the court. A very accessible system of constitutional adjudication would allow citizens to raise constitutional questions using instruments such as the Costa Rican or Colombian public action of unconstitutionality. A less accessible court such as in Mexico, only allows legislators to formulate this kind of abstract challenge.

A second aspect affecting the demand for constitutional justice refers to the rules defining the justiciability of a dispute. Justiciability refers to the set of rules determining what and when an issue is susceptible to constitutional review.[11] For each instrument of constitutional review it is possible to determine the breadth of the justiciability by asking two questions: 1) Are there restrictions on the type of laws subject to constitutional control? (Limits to policy) and 2) Are there restrictions on the constitutional prescriptions that can be protected? (Limits to grounds).[12] These two rules determine what conflicts are subject to constitutional review.[13] The existence of rules limiting the policy subject of constitutional review and the grounds that can be used to challenge the constitutionality of government actions creates an area of policy that courts cannot influence.

The third aspect of the demand for constitutional review deals with when claims of constitutional review can be raised. Two formal aspects determine the timing of constitutional review: 1) Is it possible to review the law before its enactment, a priori review, or when they

[11] Here justiciability refers only to 'institutional justiciability,' meaning whether courts have "the authority to determine a dispute, or whether it is more appropriate that the dispute is determined by another institution, such as the legislative or the executive authority." (Bendor 1996, 315-16) It does not refer to 'normative justiciability' or whether there is a legal answer to a controversy. For more about this difference, see Bendor (1996). Also, it excludes rules related to legal standing because they were analyzed as rules related to access.

[12] This category refers, for example, to rules that limit particular instruments to the review of violations of specific sections of the constitution, or that broaden it to rights protected in international treaties, and legal development. It also refers to the possibility to use the constitutional law to solve dispute between private persons, also denominate radiating effect (Grimm 2005).

[13] This is an innovative way to look at the justiciability of a dispute, usually measured by comparing the list of constitutional rights across countries (Brinks and Blass 2017). About the rationale for using a different approach, see Appendix 2.

have entered into force, a posteriori review? And 2) Is there a time limitation for presenting the constitutional challenges before the courts or can these claims be brought at any time? These rules shape the demand of constitutional review. In the first question, a priori review allows courts to prevent a government from dictating norms that transgress the constitution.[14] Meanwhile, in the second question, having no time limitations increases the opportunities to access constitutional justice for those that eventually could be affected or interested in the policy.

Finally, the demand for constitutional justice is also affected by rules determining how constitutional challenges get to the courts. Are challenges built contrasting the policy with the constitutional prescription (abstract review), or as concrete violations where the case facts provide a context in which the application of the law is unconstitutional (concrete review). Requesting a case and controversy reduces the probabilities of constitutional challenges. It imposes the burden of proving a particular violation, thus affecting the accessibility to courts. For example, in instruments of concrete review experts in particular policies are not allowed to challenge them directly. In contrast, citizens with access to instruments of abstract review can successfully build a case without having to prove they have been directly affected.[15] Moreover, because it imposes a requirement for admitting cases, courts could use it strategically to avoid difficult decisions. Arguably, it also affects the supply of constitutional review. Granting citizens access to abstract review may also lead courts to use atypical decisions, those that are not limited to declare the constitutionality, but that condition the policy application to hypothetical factual

[14] On the effect of *a priori* review on the legitimacy and behavior of courts in Central and Eastern Europe, see Sadurski (2008).

[15] Other procedural rules, such as those related to the clarity of the argument and lack of legal representation, may also be used by courts to avoid deciding the substance of a case. In any case, requirements related to the existence of a case and controversy create a higher standard for admissibility. See more about courts' adoption of avoidance techniques in high-profile clashes in Chilton and Versteeg (2018).

contexts.[16]

Rules shaping the supply of constitutional review

Responses to claims for constitutional justice vary across courts. A central cluster of institutions in this regard include those defining: the effect of judicial decisions, judicial discretion, as well as the organizational setup through which constitutional justice is adjudicated.

Courts' influence increases when decisions affect a broader range of actors, including, for example, those that are not parts of the judicial process –decisions with erga omnes effects. Arguably, it also affects the demand as courts may be considered a more effective actor to litigate a right when they can nullify a policy. In any case, court decisions with erga omnes effects make it possible for courts to influence the way policies are applied to people that have not reached the court directly. In contrast, court decisions with inter partes effects only affect the parties in a particular case. Although decisions with inter partes effects may have an indirect repercussion on similar cases,[17] in this institutional setting, courts do not have the discretion to change the policy status quo without the intervention of the government. Moreover, citizens affected by the unconstitutional application of the law need to bear the costs of an additional claim.

Judicial discretion is conceptualized using two formal features of constitutional review: the courts' control of their dockets and the amount of discretion granted to courts to furthering the case beyond the parties' requests (Ríos-Figueroa 2017, 30). Allowing courts to select what

[16] Atypical decisions in constitutional review are those in which courts neither declare the constitutionality or unconstitutionality of the law, but interpret, substitute, add, reduce, or condition the application of the law in order to declare it entirely or partially constitutional. In these decisions, courts influence the substance of a policy without confronting directly political actors as with the declaration of unconstitutionality. For more about atypical decisions, see Landa (2010).

[17] For example, in countries in which courts' decisions have the force of the precedent.

they get to decide means that courts can fill the gaps in plaintiffs' arguments and avoid dismissals of the case. Moreover, they can expend their resources deciding cases they consider relevant. This attribution of discretion plays a decisive role in comparing the courts' ability to influence policy through constitutional review because it eases procedural burdens such as those in standards of admissibility and affects their ability to forward the courts' agenda (Fontana 2011).

Finally, another critical distinction among courts exercising constitutional review refers to their organizational setting with respect to the other courts. This includes their location and instances of review within the judicial hierarchy, as well as the voting rules in the court of last resort for adopting a decision. Centralization or diffusion of constitutional review determines which court is allowed to decide a particular case and whether that decision can be reviewed by higher courts (centralized or diffuse court system). This institutional choice, for example, influences the cost for a party to reach a final decision. Allowing lower courts to decide cases of constitutional review makes it costlier for parties to go through all appeal procedures. It also generates levels of judicial insecurity as there would be multiple judges deciding similar cases that can contradict one another. Other problems arise when courts do not have docket control. In centralized systems, the lack of docket control may create workload overflow, thus threatening courts' efficacy. Meanwhile, in diffused systems, it can create redundancies, thus making high courts waste resources reviewing easy cases. In both cases, lack of docket control can also put courts at risk by making them decide controversial cases when the political environment can

coordinate retaliations against the court.[18] In any case, choosing a centralized or diffused system affects how courts respond to the demand for constitutional justice.

Finally, how courts make decisions also impacts their ability to influence policy. Requiring a higher level of internal consensus to declare the unconstitutionality of a law decreases the possibility of affecting the policy preferences of the government. Imposing unanimity or supermajorities rather than simple majorities reflects different normative ideas about the source of judicial authority. While declaring the unconstitutionality of a law is, in essence, a contra-majoritarian decision, rules requiring courts' supermajorities conceive constitutional review as an instrument of check and balance where the source of the judicial authority to overrule a policy enacted by the other two branches of government emerge from the qualified procedures with which the court adopted the decision. On the other hand, the source of judicial legitimacy for courts deciding with simple majorities emerges from the content of the decision and not from the majorities that adopted it.

Other formal aspects affecting the supply of constitutional review are related to the decisive capacity of the court. In particular whether courts have control over their dockets and whether their decisions are adopted in panels or en banc. These procedural rules aim to solve the tradeoff between the efficacy of courts and their accessibility. They attempt to deal with case overload by allowing the courts of last resort to allocate their resources in relevant cases and admitting internal divisions of the work. Whether these procedures increase the de facto authority of the courts is part of a different debate concerned with the legitimacy of en banc

[18] Whether it is possible to find a "sweet spot" between access and decentralization to maximize the effectiveness of judicial intervention in policy is still a question that can only be tackled with a measure that examines the joint effect of these two institutional choices (Taylor 2006, 2008; Sweet 1992, 1995).

decisions and incentives for courts to decide not to hear a case in order to avoid threats from the political branches.

Modeling choices

To construct an index that reveals the differences across systems of constitutional adjudication, I made four fundamental choices: 1) what indicators (rules) to include, 2) on what courts to focus, 3) what method of aggregation to use, and 4) on what countries to apply the comparative scheme.

Indicators of courts' formal authority

The index incorporates institutional choices overlapping existing measures of formal authority.[19] It also adds overlooked institutional features that have a straightforward influence on either the type of cases that reach courts (demand) or their discretion deciding constitutional controversies (supply).[20] Table 1 describes the 12 indicators.

Courts included

Centralization in courts of last resort for constitutional issues is part of the institutional design of constitutional control. Research about constitutional review is usually limited to

[19] Appendix 1 summarizes these institutions. The index excludes some institutional features included in the existing measurements such as those rules empowering courts to perform functions other than constitutional review or the count of constitutional rights. Also, the index includes formal aspects of constitutional review that have been overlooked, such as whether the decision is adopted in panel versus *en banc*. To facilitate the comparability with the indicators selected by previous measures, see Table 1 in Appendix 1. Also, Appendix 2 describes the data collection process, including the identification of the instruments of constitutional review.

[20] Appendix 3 provides the descriptive statistics of the indicators used in the construction of the FACA index.

comparisons of the instruments decided by the high court for constitutional issues. This approach is problematic for comparing the formal authority across systems of constitutional review because it excludes instruments for diffuse systems. Institutional arrangements of constitutional adjudication vary greatly across countries. While some countries have one high court serving as court of last resort for both ordinary and constitutional issues, other countries have specialized constitutional courts that are at the same level of their Supreme Courts. Even among courts in the latter category there exist important differences. Chile, for example, has a specialized constitutional court, but it has some instruments of constitutional review that remain under the jurisdiction of the Supreme Court.

If we were to compare the systems of constitutional adjudication, using only constitutional to select the instruments for the comparison, the sample would be biased. Instead, the scheme proposed here includes all instruments of constitutional review even if they are decided by different courts. Further applications and re-estimations of this index for studying the behavior of a particular court are found in Appendix 4.

Aggregation method

The index is aggregated using MCA.[21] Alternative methods of aggregation, such as Principal Components Analysis (PCA), factor analysis (FA), and Item Response Theory models (IRT) are not adequate as they rely on the assumption that the distance between the categories is equivalent. MCA provides significant advantages in cases in which this assumption is violated given the nominal nature of the indicators selected.[22] This method allows the creation of a

[21] For conducting MCA, I used the Stata package 'mca' with the joint method. This method responds to initial critics to MCA based on the inertia optimization (Greenacre, 2010, Camiz and Gomes 2013, 2016).
[22] MCA allows the aggregation of any mixture of indicators –i.e., categorical, discrete or continuous variables, without any of the distributional or linearity assumptions on which correlation coefficients rely

continuum measure capturing the degree to which a set of indicators, across instruments, are more or less correlated.[23]

The MCA is particularly useful to measure formal authority because it identifies how the indicators are related to one another, rather than assuming that all indicators equally increase courts' authority. By exploring the internal structure of a covariance matrix and estimating the additive decreasing disaggregation of the total variance (inertia) of the matrix, the index ranks the similarities of the constitutional justice systems across countries by year. This aspect is an advantage of the proposed measure over existing measures, which use additive or compensatory aggregation methods. The index was estimated cross-sectionally to maximize the correlation among countries. This choice is the most adequate when the final objective of the measurement is to compare countries at one point of time. However, this decision impairs the use of the index for dynamic analyses.

(Greenacre, 2010). For further information about the limits of PCA for categorical variables, see Kolenikov (2004).

[23] See advantages of this data reduction process in measures created to capture latent variables for poverty and health (Asselin and Anh 2008; Kohn 2012).

Table 2-1. Indicators and dimensions of the FACA Index [24]

Dimensions	Indicators	Description	Type of indicator
Rules shaping the demand of constitutional review	1. Accessibility	Who has legal standing to initiate a constitutional challenge? [25]	Nominal: 5 categories
	2. Type	Does the constitutional challenge need a case and controversy (concrete) or not (abstract)?	Nominal: 2 categories
	3. Limits to policy	Are there restrictions to the type of norms subject to constitutional control?	Nominal: 2 categories
	4. Limits to grounds	Are there restrictions to the type of norm invoked to support the constitutional violation?	Nominal: 2 categories
	5. Limit in timing	Are there restrictions to the time in which it is possible to initiate the action?	Nominal: 2 categories
		Is it possible to question a law before enacted—a priori review?	Nominal: 2 categories
Rules shaping the supply of constitutional review	6. Docket control	Does the court of last resort have the discretion to select the cases to decide?	Nominal: 2 categories
	7. Scope of the decision	Does the decision of the court affect citizens beyond the parties of the case?	Nominal: 2 categories
	8. Centralization	Does the court of last resort have original jurisdiction over the cases?	Nominal: 2 categories
	9. Effects of the decision	Does the decision have mandatory effects or is the decision a mere recommendation?	Nominal: 2 categories
	10. Ex officio discretion	Do courts have the power to decide beyond the parties' request?	Nominal: 2 categories
	11. Courts majorities to decide	Dummy variable that takes the value of 1 if the court requires a simple majority to rule a case or 0 otherwise.	Nominal: 2 categories
	12. Panel v. en banc decisions	Dummy variable that takes the value of 1 if the court decides the case as a panel or 0 if the court decides it en banc.	Nominal: 2 categories

[24] Table 3 in Appendix 2 provides additional details on the coding of these indicators.

[25] I create a five-category variable to capture whether the instrument is restricted to political actors or accessible to citizens that distinguished among cases in which a petitioner is required to be affected directly for the policy challenged, as well as when courts' intervention is mandatory.

Countries included

I apply the comparative scheme of formal authority in 18 Latin American systems of constitutional adjudication in Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, The Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela from 2003 to 2017. Focusing on this region serves the purpose of showing the ability of the measure to differentiate countries among a wide variety of institutional arrangements, as this region presents the "most active constitutional experimentation in the world" (Brinks and Blass 2017, 312). In the 1990s and 2000s constitutional reforms across Latin America, known as 'neo-constitutionalism,' reconfigured the institutional setting of the judiciary (Navia and Ríos-Figueroa 2005; Elkins et al. 2009). At the core of such reforms, all constitutions broadened the catalog of protected rights and strengthened the mechanisms for their judicial enforcement through specialized procedures, here called instruments. However, in each country, citizens and other political actors have different options to use courts in defense of their rights. This variation makes the region a natural laboratory to investigate differences in the institutions framing the exercise of constitutional review.

Also, applying the comparative scheme to Latin America permits the empirical assessment of the advantages of this approach with respect to existing measurements of formal authority that are only available for countries in this region.

Describing variation across instruments of constitutional review in Latin America

I classify 162 unique instruments of constitutional review, using the 12 indicators described above retrieving constitutional prescriptions that establish judicial procedures for their

enforcement.[26] Each instrument represents a specific procedure through which courts can change policy, either by striking out legislation or executive orders or by changing its particular application in a case.[27] The list is exhaustive and includes all instruments of constitutional review regardless of the court that rules on the case, the origin of the right protected, or the effect of the decisions. Because constitutional reforms or new laws created and eliminated instruments during the time period of this study, there is unevenness in the number of instruments included each year and in the number of instruments across countries. To deal with this condition of the data, variance across countries is estimated as a supplementary profile that provides an index ranking for countries by year.

The data reveal important patterns. Figure 1 summarizes the number of instruments for abstract and concrete review available in each country,[28] showing the diversity and complexity across systems of constitutional adjudication. Ecuador, for example, stands out for having a specialized constitutional review, with over a dozen instruments for abstract review and nine instruments for concrete review. In contrast, Uruguay has the most simplified system with two instruments, both of which only allow concrete review.

[26] Appendix 2 describes the data collection process, including the use of original and secondary sources and elaborates about the advantages of this approach regarding the transparency and replicability of the index.

[27] Appendix 4 presents the IHCFA values for each country and its changes from 2003 to 2017.

[28] The list with the name of the instruments by country is provided in Appendix 2. Details of the indicators, Table 1. Instruments of constitutional review by country and type.

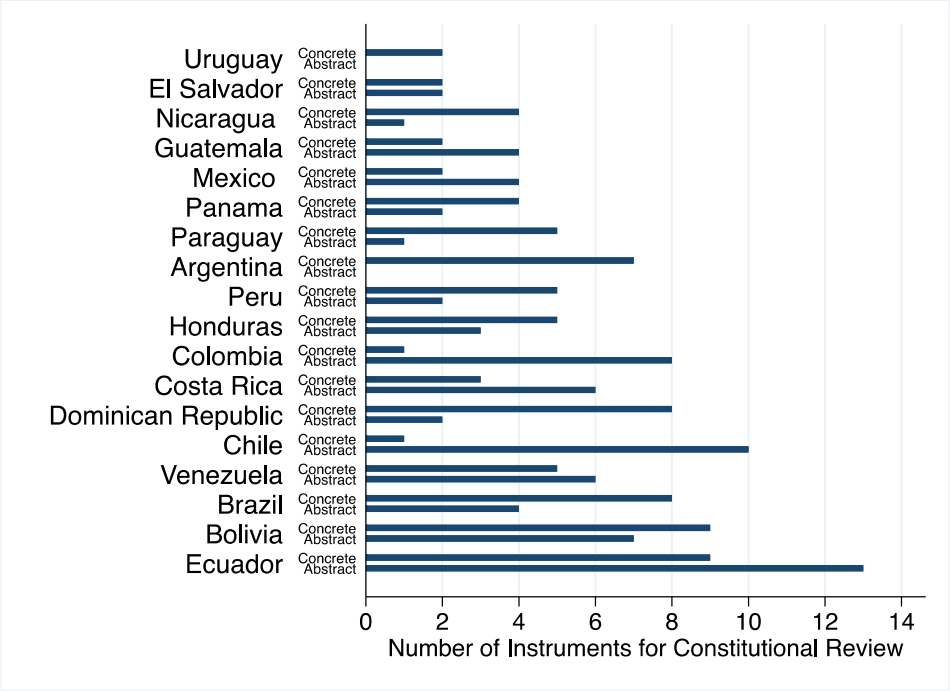


Figure 2-1. Number of instruments for constitutional control by country-type, 2017

It also shows that in most constitutional adjudication systems in Latin America instruments for abstract and concrete review coexist.[29] Except for Argentina and Uruguay, where, like in the US, constitutional review requires a 'case and controversy,' all other systems are built as a combination of both abstract and concrete review. Such differences are likely to affect the supply and demand for constitutional review.

A preliminary view of the data confirmed striking differences across all 12 indicators. Table 1 provides a summary of the statistics of the institutional choices included in the Index for 2017. This description of the rules for constitutional adjudication in the region provides some methodological and substantive insights. Methodologically, it confirms that the type of review for comparing courts is inadequate to compare courts because the percentage of abstract review

[29] The judicial literature has referred to these systems as mixed (Navia and Ríos-Figueroa 2005) or dual or parallel (Belaúnde 1998).

does not reflect the percentage of other attributes. There exists significant variation across the indicators within the category of abstract versus concrete that has been overlooked and requires an analysis of the instruments.

Substantively, Table 1 serves as a map that highlights the difference in the institutional environment of constitutional justice across countries. For the rules affecting the demand for constitutional review, it shows that countries with more instruments for abstract review, such as Chile, Costa Rica, Colombia, and Ecuador, are below the regional average of accessibility. It confirms previous analysis pointing out that restrictions on legal standing are mostly for abstract review.

Differences in the controversies that courts decide (demand) are also displayed by rules limiting the policies that can be challenged, the grounds to challenge the constitutionality of policies, and the timing in which those challenges are admissible. They signal differences across the formal power of constitutional adjudication in the region. For example, Argentina, Bolivia, Brazil, Costa Rica, Chile, the Dominican Republic, Ecuador, Nicaragua, Paraguay, and Uruguay, have excluded the revision of courts' decisions.[30] Likewise, countries like Argentina, Brazil, Dominican Republic, El Salvador, Honduras, Nicaragua, Panama, Paraguay, Peru, and Uruguay have excluded any automatic review for laws before their enactment.[31] Also, countries have adopted specific rules excluding specific issues. In Chile, for instance, presidential decrees

[30] This type of rule is a mechanism to protect the res judicata or claim preclusion doctrine that prohibited the parties from raising the same issue in the courts. The countries in which it is possible to review the constitutionality of judicial decision have implemented a general requisite of the exhaustion of ordinary challenges (see Brewer-Carías 2015).

[31] Colombia and Costa Rica have limited automatic and *a priori* review to organic laws and international treaties. The equivalent to Chilean organic laws is Colombian statutory laws. They are usually adopted with qualified majorities in the legislature and refer to those regulating fundamental rights.

declaring states of emergency are beyond the competence of the Constitutional Tribunal.[32] These rules restrict the type of law that courts review.

Likewise, narrowing the window of time for constitutional review limits courts' intervention. Mexico and Peru have the highest percentage of instruments with time restrictions in the region. In Peru, for example, laws cannot be questioned after a particular period of time following their enactment, meaning that the Constitutional Tribunal often reviews only newer government actions. Also, countries like Argentina, Brazil, Nicaragua, Panama, Paraguay, Peru, and Uruguay limit courts' review to once laws have been enacted,[33] while the rest of the region allows courts to intervene during the legislative discussion, at least for some type of laws. Rules narrowing the timing for courts' intervention decrease the opportunity for questioning the law, and more importantly, the likelihood of judicial decisions against the enacting government when this is still in power. About the rules affecting the supply for constitutional justice, the data also shows that in the region, docket control is unusual. Courts in Argentina, Brazil, Colombia, the Dominican Republic, Ecuador, and Mexico have docket control only over some of the instruments, most of them concrete review.[34]

There are also important differences about the levels of centralization of constitutional review. Argentina is the only country that has a completely diffuse system, while Costa Rica is the only country with complete centralization. This means that the Argentinian Supreme Court hears all cases as appeals, in contrast to the Supreme Court in Costa Rica (Sala IV), which serves as the unique instance for all instruments of constitutional adjudication. Yet, for most of the

[32] See more about Chile in Silva Irarrázabal (2018). For a comparative perspective, see Fix-Zamudio (2004).
[33] Among the countries in which courts can review the constitutionality of laws before their enactment, Guatemala is the country with the largest proportion of this type of instrument with 43%, and the Dominican Republic is at the bottom with only 11%.
[34] Notice that the list of countries includes federal and unitary systems of government.

countries, centralization is a matter of degree: How many instruments are exclusively decided by the court of last resort?

Moreover, the data show that instruments of constitutional review are not decided exclusively by one court. In Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Paraguay, Peru, and Uruguay, different courts decide the last instance in constitutional issues.[35] For these countries, there is not a single court delivering the last decision across all instruments, which may create tensions in the inter-courts relations as different interpretations of constitutional provisions may emerge. Despite the potential relevance for assessing courts' formal authority, this is a dimension of decentralization often overlooked in comparative analyses of constitutional justice.

Other rules affecting the way in which courts respond to the demand for constitutional review are those related to the internal structure of the court. First, in countries like Brazil, Chile, the Dominican Republic, Ecuador, Honduras, Mexico, Nicaragua, and Peru, some decisions of unconstitutionality require supermajorities. Second, the format that courts use to adopt decisions varies across instruments. Some of them require the participation of all courts' members, while others are decided in smaller groups. Countries like Bolivia, Chile,[36] Colombia, the Dominican Republic, Ecuador, Honduras, Nicaragua, and Peru have created smaller groups to make decisions in some of the instruments for constitutional review, usually cases of concrete review.[37]

[35] For example, in Chile *habeas corpus* and *Amparo* are decided by the Supreme Court and only after the 2005 reform *requerimientos de inaplicabilidad* were assigned to the competence of the Constitutional Tribunal.
[36] In Chile, the habeas corpus and the Amparo are decided in panels that are part of the Supreme Court jurisdiction.
[37] This distinction is made regardless of whether the constitutional judges belong to the Supreme Court, like in Costa Rica, El Salvador, Paraguay, and Venezuela.

Table 2-2. Means of the indicators included in the FACA Index for 2017

		Rules shaping the demand of constitutional review						Rules shaping the supply of constitutional review					
Country	N*	Type: Abstract	Accessibility	Limit: Type of law	Limit: Violation invoked	Limit: Timing *A priori*	Limit: Timing Prescription	Docket control	Unique instance	Decision effect: *Erga-omnes*	Discretion	Simple majority	Court size
Argentina	6	0.00	3.17	0.17	2.67	0.00	0.33	0.17	0.00	0.00	0.67	1.00	1.00
Bolivia	16	0.44	2.13	0.13	0.06	0.31	0.56	0.00	0.69	0.63	0.25	1.00	0.69
Brazil	11	0.36	2.55	0.27	0.27	0.00	0.00	0.09	0.36	0.55	0.91	0.64	1.00
Chile	13	0.77	1.82	0.38	0.15	0.31	0.62	0.00	0.85	0.85	0.31	0.85	0.85
Colombia	13	0.67	1.73	0.27	0.20	0.33	0.60	0.07	0.67	0.73	0.93	1.00	0.77
Costa Rica	8	0.63	2.13	0.38	0.00	0.38	0.50	0.00	1.00	0.63	0.75	1.00	1.00
Dominican Republic	9	0.22	2.67	0.33	0.00	0.11	0.56	0.44	0.33	0.22	1.00	0.00	0.89
Ecuador	22	0.59	2.05	0.14	0.09	0.23	0.45	0.32	0.77	0.59	0.59	0.95	0.73
El Salvador	5	0.40	3.00	0.20	0.00	0.20	0.20	0.00	0.80	0.60	1.00	1.00	0.00
Guatemala	7	0.57	2.29	0.00	0.00	0.43	0.57	0.00	0.57	0.57	0.43	1.00	1.00
Honduras	7	0.43	2.71	0.14	0.00	0.14	0.57	0.00	0.71	0.43	0.71	0.00	0.00
Mexico	6	0.57	1.71	0.29	0.43	0.14	0.71	0.29	0.71	0.86	0.86	0.00	1.00
Nicaragua	5	0.20	3.20	0.60	0.00	0.00	0.60	0.00	0.60	0.20	0.40	0.60	0.20
Panama	6	0.33	2.83	0.33	0.00	0.17	0.17	0.00	0.50	0.67	0.33	1.00	1.00
Paraguay	6	0.17	2.83	0.33	0.00	0.00	0.67	0.00	0.83	0.50	0.33	1.00	0.00
Peru	6	0.29	3.14	0.43	0.00	0.00	0.71	0.00	0.14	0.29	1.00	0.17	0.17
Uruguay	4	0.00	3.25	0.25	0.00	0.00	0.25	0.00	0.50	0.00	0.50	1.00	1.00
Venezuela	10	0.50	1.80	0.20	0.00	0.30	0.40	0.30	0.70	0.70	0.90	1.00	0.00
Total	160	0.46	2.33	0.25	0.18	0.20	0.48	0.12	0.63	0.55	0.65	0.77	0.66

*Refers to the number of instruments included in the Index by country

Admittedly, the data displayed in Table 1 show some trends, but it is inadequate to capture the way in which specific instruments and their institutional characteristics grant formal authority to constitutional courts. The next section provides the results of applying the MCA model to the variation described here.

The FACA Index for Latin America

The MCA estimations show that the first dimension of the data explains most of the variance (inertia) is 82.5% while the second dimension only contributes to explain the 8.5%. As a consequence, I constrained the estimation of the index to the first dimension. Table A3-2 in the Appendix provides the details of the Multiple Correspondence Analysis for 2017. The contribution of each indicator to the overall index confirms arguments in the relevant literature regarding the most relevant characteristics that differentiate the systems of constitutional adjudication. It suggests that the type (concrete versus abstract) the timing (a priori versus a posteriori), the accessibility (5 categories indicating the broadness of the legal standing) and the centralization of the instruments for constitutional review (indicating whether the court of last resort for constitutional cases know the disputes in unique instance v. courts of appeals) are the most influential indicators. Furthermore, the MCA estimations indicate that the categories that have been considered as granting greater authority to the courts are in fact those more relevant for ranking the countries towards the same end of the scale constructed by the FACA index. In that sense, instruments of abstract and a priori review, which are accessible to citizens and reviewed by the court of last resort for constitutional issues in a unique instance contribute in the same direction to the discrimination across countries.

Contrary to the expectations, the indicator that identifies whether the court has docket control over particular instruments are contributing to the FACA index in the opposite direction, raising questions about whether this formal feature of constitutional review is actually a source of formal authority. It is possible, for example, that because courts granted with such power are accountable to the elected branches for the decision to intervene in a particular policy, whereas courts lacking such control are not.

The outcome of the MCA was rescaled from 0 to 1 to facilitate the interpretation. Also, the scale was reversed, so lower scores indicate lower formal judicial authority and higher values indicate greater formal judicial authority. Figure 2 shows the country FACA scores for 2017. Notice that the index ranks countries showing that Costa Rica and Colombia are entitled with powerful mechanisms to exert constitutional control (Ríos-Figueroa, 2011; Wilson, 2005, 2009; Wilson and Rodríguez-Cordero, 2006; and Gloppen et al., 2004). It also reflects the latest improvement in the constitutional design of constitutional control in countries such as Mexico and Chile, gaining places in the ranking in comparison to previous indices.[38]

[38] To see more about Chilean reforms: Navarro Beltrán (2011) and Tiede (2016). Also, for qualitative descriptions of formal changes of constitutional review in Mexico, see Fix-Fierro (2003).

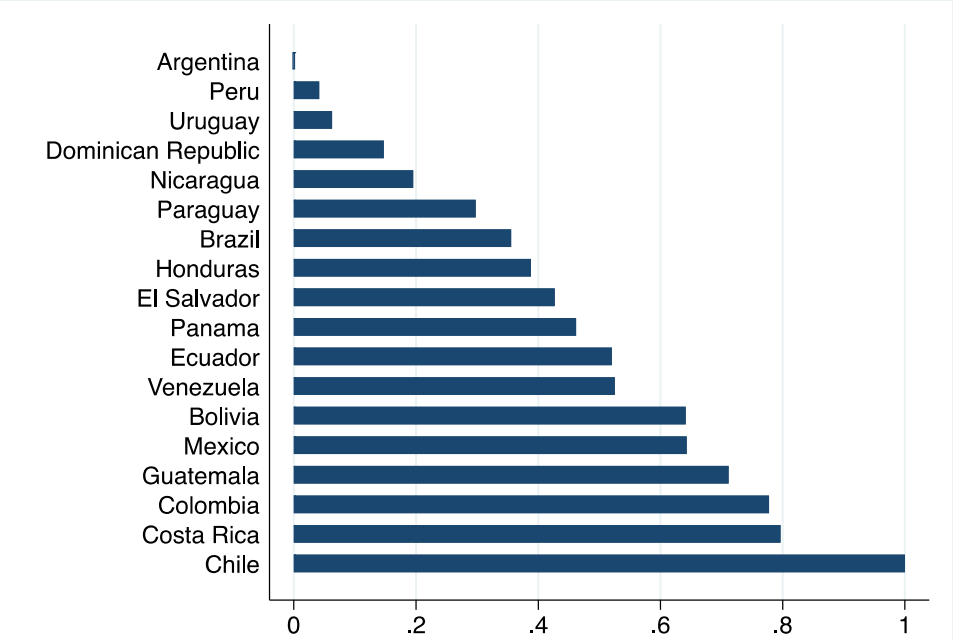


Figure 2-2. FACA Index by country 2017

At the bottom of the ranking, Argentina and Uruguay have the lowest scores, primarily because of the absences of instruments allowing abstract and a priori constitutional review. At the same time, differences among these two countries are mostly related to different levels of decentralization: the Uruguayan Supreme Court has original jurisdiction for the actions and exceptions of unconstitutionality while its Argentinean counterpart knows all cases as appeals because, like in the US, lower judges participate in the adjudication of constitutional justice.

Using instruments as the unit of analysis also allows comparison across subgroups of instruments. For example, the FACA scores can estimate the courts' formal power only among instruments of abstract review (See Appendix 4). This exercise shows a significant variation in countries' rankings between estimations based on abstract review and concrete review. A similar exercise is possible for other subgroups such as estimations of the index based on the subset of instruments for a priori review. Because the purpose of this chapter is to describe the overall

difference across countries, the analysis presented here focuses on the index aggregating all instruments of constitutional review.

Descriptive statistics in comparison with existing measures of formal authority

The descriptive statistics presented in this section compare the time period overlapping across the studies. The FACA score and Brinks and Blass are continuous variables from 0 to 1 whereas Ríos-Figueroa is an ordinal variable from 1 to 4. For all indices, high values represent greater formal authority, which facilitates the interpretation of the correlations between the measures.

The FACA index provides a more normal distribution of the latent variable than the previous measures of formal authority in terms of the asymmetry of the distribution. Brinks and Blass' Index is strongly skewed towards strong authority while Rios-Figueroa's index is skewed toward weak authority, as shown in Table 3. This is particularly important in assessing the performance of the index because skew variables moving from a value of .1 to .2 may represent a different change than those moving from .8 to .9.

In terms of the Kurtosis, the values for Brinks and Blass are higher than the range between -2 and +2, and therefore cannot be considered acceptable in order to prove normal univariate distribution (George and Mallery 2010; Gravetter and Wallnau 2014). Because kurtosis measures the propensity of the data-generating process to produce outliers (Westfall 2014), producing an index such as FACA improves the Kurtosis to the range of normally distributed variables and thus better recovers the similarities across systems of constitutional review in the region. Finally, the main purpose of the FACA is to represent the institutional variance across countries. In fact, the index outperforms Brinks and Blass but underperforms Ríos-Figueroa.

Table 2-3. Comparison of the descriptive statistic between FACA index and existing measures of Formal Authority

	FACA index (2003-2013)	Brinks and Blass (2003-2009)	Rios-Figueroa (2003-2013)
Mean	.4442747	.4887125	2.929293
Skewness	.0071743	.9768451	-.6612922
Variance	.0772239	.0433937	.8883761
Kurtosis	2.204095	3.594276	2.611499

The FACA and other indices of formal authority should correlate to the extent that they aggregate similar characteristics. Table 4 presents such correlations as well as the correlation with two other types of similar concepts: de jure independence that aims to capture the degree to which rules limit political influence on the court (i.e. those rules affecting courts composition such as judges' appointment, nomination, and sanction) and de facto independence, which represents the actual performance of constitutional control. The correlation matrix shows that the FACA index is closer to Ríos-Figueroa's approach, which is explained by the fact that, conceptually, both estimations are built on the comparison of instruments.

Negative correlations with indexes of de jure independence corroborate the appropriateness of using different measures to compare the institutional environment in which courts exercise constitutional adjudication: one that reflects choices that affect courts' authority and another that focuses on courts' formal capacity to intervene in the policy-making process. Also, the FACA index shows more consistency in describing the relationship between formal authority and neighboring concepts. For example, while Brinks and Blass's authority has mixed correlations across measures of de jure independence, the FACA index is in all instances negative related to them.

Table 2-4. Correlation between FACA index, existing measures of Formal Authority, and de jure and de facto judicial independence

	FACA	N	Time period
Other measurements of formal authority:			
Brinks and Blass	0.2728	126	2003-2009
Ríos-Figueroa	0.5186	198	2003-2012
Measures of de jure independence:			
Ex-ante (Brinks and Blass)	-0.2441	126	2003-2009
Ex-post (Brinks and Blass)	-0.0911	126	2003-2009
Feld and Voigt de jure independence	-0.4866	17	2003
Measures of de facto independence:			
Polity (xconst2)	-0.0638	180	2003-2013
Linzer and Staton Latent Judicial Independence	0.1164	180	2003-2013
Feld and Voigt de facto independence	-0.2000	17	2003

Conclusions

Comprehensive data about the institutional design of constitutional review is a necessary condition to improve comparative research. This study proposes a new scheme to compare courts' formal authority in constitutional review. It empirically shows that current comparative schemes based on generalizations about the type and centralization of constitutional review are inadequate to capture the complexity of the institutional environment of constitutional justice. Instead, mapping the procedures and instruments by which courts hear constitutional controversies facilitates the comparability of the systems. Building on previous research, the comparison of courts' formal authority was advanced by contrasting the institutional choices affecting the supply and demand for constitutional justice. The result is the FACA index that ranks 18 Latin American systems of constitutional adjudication during the last 12 years. This

index aggregates information about 162 instruments of constitutional review from the largest assemblage of constitutional and national laws.

In comparison with existing measurements of courts' formal authority, the FACA index presents two advantages. First, this approach reveals the complexity of some systems of constitutional adjudication by incorporating information about all instruments of constitutional review, regardless of the court with jurisdiction to decide. By doing so, it sheds light on the understanding of the effects of rarely studied judicial institutions on the courts' ability to shape policy. Second, it estimates the similarities across systems of constitutional adjudication using Multiple Correspondence Analysis (MCA) rather than previous additive techniques that mistakenly assume all characteristics have the same ability to distinguish the formal authority of constitutional courts. Comparing the rules that affect the supply and demand of constitutional justice provides a powerful conceptual framework to examine differences across the institutional design of constitutional review so further research may reassess their effect on judicial behavior. For example, it may guide institutional studies towards a deeper understanding of the causal mechanisms at stake: Do courts have a greater political influence because there is a higher request for their intervention or because they are more assertive when they are consulted? What makes citizens and other social actors bring constitutional issues before the courts rather than the legislature? Does more access to constitutional justice hinder or promote courts' legitimacy?

These results suggest a need to reconsider empirical and theoretical research that hinges on the conceptualization of a constitutional review as a single institution, especially that linking institutional design with courts' behavior. For example, further research should use the FACA index to reassess key questions in judicial studies, such as whether and under what conditions courts are more likely to strike out legislation or government actions, when government are more

likely to retailed against courts, or when citizens are more likely to seek policy changes through courts rather than in the legislation, and generally those questions that affect the courts' ability to protect the constitutional rights. Also, this approach increases the transparency for coding changes across time and between countries because it avoids subjective decisions needed when the classification is based on generalizations about groups of diverse instruments.

Finally, the discussion about comparability across constitutional justice and the empirical finds about differences across Latin America countries highlight the need to decisively abandon analyses based on generalizations about the type and centralization of constitutional review. This decision will elicit a deeper understanding of how the design of constitutional review affects choices of those participating in the policy-making process, including citizens and victims of government abuse, as well as how the exercise of constitutional review allows courts to improve the rule of law. More importantly, at a very minimum, it would contribute to identifying the role of constitutional design in constitutional success, suggesting new answers for broader questions in the field of constitutional studies: how legal frameworks of constitutional review can target and achieve specific goals of democratic constitutionalism. In doing so, this approach contributes to understanding the relationship between the separation of powers, democratic accountability, and the quality of democracy.

Chapter 3.

Reassessing the effect of power concentration in government: Constitutional adjudication under different political contexts in Peru

Constitutional review is typically portrayed as an institution to control government abuses, holding political actors accountable for acting beyond their constitutional powers or in violation of constitutional rights (Gloppen, Gargarella, and Skaar 2004). A vast literature has examined the institutional and contextual conditions in which courts serve more effectively as veto players in the public policy process (for a recent review see Brouard and Hönnige 2017). The prominent perspective in studies analyzing the effect of the political context on judicial behavior expects constitutional courts to be particularly deferent to power concentration in government. This relationship shows a problem: when the concentration of power in government tests the limits of democratic institutions, courts become less effective in preventing the excessive and unlimited exercise of power by elected branches.

Understanding the effects of power concentration in government on judicial behavior has important implications for the ability of constitutions to shape politics, including, for example, constraining political actors, organizing politics, and legitimizing governments (Whittington 2003). Power concentration in government is not an uncommon scenario for courts to operate. In fact, despite democratic institutions aiming to enhance participation and representation, constitutional courts often work under constraining political context, where the legislature and the executive can threaten to either interfere in the application of the decision or the composition and integrity of the court (Iaryczower 2002; Helmke 2005; Carrubba et al. 2008). In short, if courts are responsive to the political context, we should expect substantive differences in the

willingness of courts to use the constitutional review as an instrument to influence the policy outcomes.

The effects of the distribution of power on judicial behavior have been studied from a variety of angles. The dominant position in the existing literature asserts that courts are deferent to the policy preferences of government in the context of power concentration because they fear sanctions. When the political context facilitates coordination against the court in retaliation for unfavorable decisions, courts adapt their preferences to the government to avoid court-curbing and court-packing actions (Epstein and Knight 1998; Epstein, Knight, and Martin 2001; Ferejohn, Rosenbluth and Shipan 2007; Vanberg 2015). Still, others believe that courts are deferent to power concentration in government because, in such political contexts, the government is more likely to shape the preferences of the court through the nomination process. Studies on the role of courts as veto players argue that because of the ideological alignments, courts are more likely to reflect the preferences of the political regime when the judicial nomination process is co-opted by the ideological preferences of a dominant actor (Tsebelis 2002).

On the contrary, a less explored argument expects that power concentration in government increases courts' assertiveness. Stone Sweet, analyzing the extent of the judicialization of parliamentary governance in Europe, suggests that the concentration of power in government influences judicial behavior because it affects the types of legislation produced. The author indicates that when the legislative process "is less centralized and more veto-laden will produce fewer controversial bills, compared with systems where the process is more centralized and relatively veto-free" (2000, 54). In this context, the author argues, the opposition will have greater incentives to use courts to achieve their policy preferences (see also Carrubba

et al. 2008). Similarly, the lack of political contestation during the legislative process produces more drastic and vaguer policies (Sundquist 1988; Howell et al. 2000), than in turn, incentivize the use of constitutional review not only as a check and balance institution but also in the degree to which judicial interpretation fill the gap of inexplicit legislation.

To date, however, none of these works have addressed the central question of how these alternative expectations are mutually exclusive or complementary. In this chapter, I fill this gap by assessing different types of power concentration in government and their impact on judicial assertiveness. Specifically, I focus on how differences in the causal mechanisms at stake determine the overall effect of the political context on courts' behavior. Through close examinations of strategic[39] and new institutionalist[40] approaches to judicial behavior, this chapter argues that the power concentration in government affects courts' assertiveness through multiple causal paths. By identifying their complementary effects, I aim to harmonize the seemingly contradicting expectations in the literature. Ultimately, this article shows that overlooking the various paths in which political concentration affects constitutional courts may be the main factor explaining the inconsistent results in large-N quantitative studies across countries.

This article explores this issue by examining the case of Peru, where patterns of assertiveness in the Constitutional Tribunal presents an interesting puzzle. The PCT seems to be at odds with the dominant arguments linking political concentration in government and courts' behavior. Under periods of higher power concentration in government, the Tribunal is less deferent to the government preferences than when it makes decisions under greater fragmentation in government. Similarly, the behavior of the PCT appears to be at odds with the expectation from the ideological alignment (Tsebelis 2002; Brouard and Hönnige 2017). During the period of

[39] Epstein and Knight (1998).
[40] Brouard and Hönnige 2017; and Aydin-Cakir (2018).

time in which the Tribunal's ideological preferences were located within the range of the Congress and the President, the PTC was more deferent than when preferences were outside the range (see Table 1). The Peruvian Constitutional Tribunal is an ideal case to assess the effect of the different causal paths in which political concentration in government impacts their assertiveness because different types of power concentration –across branches and within the legislature, can be identified with the causal mechanisms.

This article combines case-level data on the decisions adopted in abstract cases by the PCT (Tiede and Ponce 2014) with data from the Parliamentary Elites of Latin America Survey (PELA) on the political preferences of the different political actors. I start by identifying three possible causal paths in which power concentration in government affects judicial behavior. I proceed to test whether those potential casual paths are mutually exclusive or complementary to estimate the overall impact of power concentration in government on judicial behavior.

Disentangling the effects of power concentration in government on judicial assertiveness: three causal mechanisms

The concept of power concentration in government, as opposed to political fragmentation, is a crucial notion that describes the distribution of political power comparatively. Concentrated power in government indicates the level to which policies reflect the preferences of a dominant political actor without contestation from others. At the other end of the spectrum, a lower concentration of power in government indicates that policy is achieved through political bargaining across different ideological preferences. This concept is broadly used to study the inter-branch dynamics between the executive and the legislature (i.e., the length of government

formation, the stability of government coalitions, the effect of electoral systems on the number of elected parties).

Conventional wisdom about judicial behavior suggests that the power concentration in government triggers courts' deference to the elected branches of power (Ferejohn 1998, 2002; Epstein and Knight, 1998; Segal and Spaeth 2002). This expectation builds on the assumption that courts are policy-motivated actors that consider the possible reaction of other political actors and adapt their preferences in response to that potential reaction. Power concentration creates judicial deference because it facilitates political coordination for court-curbing practices, including packing the court with ideologically aligned justices, reversing court' decisions by passing new laws or amendments, or failing to implement court rulings (Gely and Spiller 1990; Rogers 2001, 84; Vanberg 2005, 14).

This expectation has been empirically tested across different regions, legal traditions, and systems of judicial appointment. However, the results found are mixed. Using legislative fragmentation[41] to account for the different levels of courts' assertiveness in post-communist countries, Herron and Randazzo (2003) find no empirical support for the legislative fragmentation argument, while Bumin (2017), using a larger sample of the region, finds evidence for the opposite relation, supporting the idea that fragmented legislatures increase the probability of decisions that strike down legislation.

Moreover, the use of multiple measurements of power concentration in government to examine its effect on courts' assertiveness has increased the uncertainty about courts behavior under constrained political.[42] Differences in the measurements selected as proxies of political

[41] The effective number of parliamentary parties Laakso-Taagepera index (1979)
[42] For example, power concentration in government has been measured as the extent of the legislative support of the executive (Iaryczower et al. 2002; Hilbink 2012); the cohesiveness of legislative majorities (Chavez 2003); the distance between the ideological preferences of the executive and the median

concentration in case studies can be justified as they aim to capture the specificities of institutional environments, such as the structure of separation of power or the mechanism for judicial appointment. However, I argue that instead different aspects of political concentration are indicators of different causal paths. Specifically, in this section, I present the differences across the causal mechanism at stake that has been argued in previous literature to support the fact that, rather than being the case of measurement error, it is a case of different causal mechanisms working simultaneously but affecting the courts at different times.

Changes in the political contexts, especially power concentration, may affect courts' behavior in different ways. Previous studies have highlighted three possible ways in which political concentration affects courts' assertiveness in times in which they operate facing power concentration in government: 1) strategic behavior to avoid sanction, 2) ideological alignment, and 3) characteristics of the law formation process.

Strategic behavior to avoid sanction

Courts incorporate the policy preferences of the government into their decisions because they recognize elected branches may act against the court in retaliation of unfavorable decisions by threatening the integrity of the court or the implementation of the decision. Political fragmentation arguments suggest that a unified government affects judicial behavior by facilitating coordination between the legislature and the executive. Therefore, courts anticipate the response of the executive and the legislature and adjust their preferences (Rosenberg 2008).

legislator (Segal, Cameron, and Cover 1992; McCubbins, Noll and Weingast 1995; Sánchez, Magaloni, and Magar 2011; Leiras and Giraudy 2015); and, the dispersion of the ideological preferences represented in the legislature (Herron and Randazzo 2003).

Regardless of whether courts face more threats or sanctions during unitary government, power concentration in government may trigger courts' deference as it may signal credible threats to an overactive judiciary. At least two patterns of courts' assertiveness can provide evidence supporting this causal mechanism. First, there is greater overturn of laws during periods of political fragmentation in government (Helmke 2002; Pérez-Liñán and Castagnola, 2009; Chávez, Ferejohn and Weingast 2011). Second, there is greater overturn of laws from prior legislators than current legislators, meaning that in these cases, courts vote more sincerely as the sitting legislation is likely to hold different policy preferences than the enacting legislative majority (Shapiro 2002; see Tiede and Ponce 2014 for evidence in the PCT).

Other contextual circumstances may moderate courts' deference to power concentration in government. Public support for the court or low public support for the government may increase the political cost of the elected branches for acting against the court (Epstein et al. 2001; Vanberg 2001, 2005; Staton 2006, 2010).[43] Also, even under constrained political context, the government may weigh the cost of threatening the court only for salient cases. Rodriguez-Raga (2001) finds that the Colombian Constitutional Court is more deferent to salient cases.

The evidence, however, has not been systematically reviewed. Most of the findings that support this expectation have been provided in countries that use mixed appointment systems in which the president and the legislature are involved (see for example Chavez, Ferejohn and Weingast 2011; Ríos-Figueroa 2007; Magaloni 2003; Scribner 2011).

Moreover, the mere expectation about changes in the government may also trigger strategic judicial deference. Helmke (2002; 2003; 2005) and Helmke and Sanders (2006) show that unstable Argentinean governments trigger the courts' strategic use of the judicial review.

[43] See Tiede and Ponce (2011) provide evidence in support of this argument in Peru.

The authors argue that the court anticipates political changes in the executive, revealing patterns of strategic defection. Consequently, courts' decisions will oppose the current government when they predict the eventual electoral success of the opposition as a strategy to gain respect from the future government.

Importantly, while this account of the effect of the political context on judicial behavior has some different manifestations—some are based on the actual concentration of power and others on the expectation of changes in the preferences of government, they all focus on the idea that courts' fear of sanctions determines their responses.

Ideological alignment

Constitutional courts serve as effective veto players when their policy preferences or ideology diverge from the elected political branches. The elected branches are able to shape the ideological preferences of constitutional courts by appointing judges that are identified with their policy preferences. The seminal argument of Dahl (1957) suggests that the US Supreme Court's deference to government is a consequence of the fact that this court represents the interest of the "political dominant alliance." Both institutional and contextual characteristics of the US political and judicial system may condition this finding.

Comparatively, the ability of the elected branches of power to influence the has been related to rules of judicial selection. For example, rules including multiple political actors in the selection process aim to create courts that are less likely to reflect the preferences of the majority. Diversity in the ideological preferences among the actors involved in judicial selection generate appointees that represent the political compromises needed for a successful nomination; therefore, these judges are less likely to identify with the policy preferences of the government.

However, the efficiency of this institutional mechanism to create judicial independence is conditioned on the fact that those actors hold different policy preferences. When the multiple political actors are involved in the selection process represent the same policy preferences, such an in context of power concentration in government, the multiplicity of actors is not insufficient to provide the desirable political bargaining and compromise in judicial appointments, meaning that the appointees are likely to reflect the government policy preferences. Similarly, greater ideological differences across the elected branches of power allow courts to exert as veto players because the political regimen is constrained in its ability to align with the preferences of the court (rule of absorption).[44] The question then is no longer about whether courts are veto player, but under which circumstances they represent preferences that are not in line with the political regime. If the court identifies with the ideological preferences of another institutional veto player, the court loses in practice its influence over the policymaking process.

Notice also that power concentration in government may increase the probabilities of finding the ideological preferences of the court outside of the 'tolerance interval' created by the ideological preferences of the president and the legislature. In contexts of power concentration in government, the ideological distance across the elected branches is smaller; therefore, the court's decisions are more likely to be located beyond the ideological deviation that the elected branches may be willing to tolerate because the costs associated with challenging the decision are higher than the benefits obtained by altering it (Epstein et al. 2001). Brouard and Hönnige (2017) examine the political scenarios in which the courts' ideological preferences are not absorbed into the pareto-efficient set which encompasses the legislature and the president. The authors find that political influence over the bench is conditioned to the timing of judicial appointments and the

[44] See Tsebelis (2002, 227)

government's ability to fill the vacancies and maintain a majority within the court that reflects their policy preferences.

As a result, the direction of the effects of power concentration in government on judicial assertiveness is not clear. It may increase courts' ideological alignment with the government, increasing judicial deference, but it also may decrease the probabilities of ideological absorption increasing courts assertiveness.

Three empirical implications of the ideological alignment argument have been established in the literature. First, courts are less likely to decide against the government when the legislation under review was enacted by the current lawmaking majority (Dahl 1957, 293; for the case of Peru, assessing the assertiveness of justices see Tiede and Ponce 2014). Second, courts are less deferent to the government when its ideological preferences are located outside of the executive and legislative 'tolerance interval.' And, third, courts' assertiveness may prevail when the institutional design reduces the opportunities for the current government to appoint judges in such a way that allows courts to sustain ideological preferences different to the other political actors.

Characteristics of the legislative process: Deliberative legislation

Studies related to the effects of legislative fragmentation argue that the policy produced under unified government involve lower levels of political compromise and, as a result, the legislation can be more drastic and vaguer (Sundquist 1988; Howell et al. 2000). This type of legislation is, therefore, more likely to violate a constitutional norm (Stone Sweet 2000, 54). Carrubba et al. (2008), for example, argue that compromise and coalition-building produce legislation that is less likely to be influenced by the judiciary via constitutional review because it

satisfies a broad range of political actors, and therefore, it is less likely to be challenged. Bumin (2017) provides evidence that supports this hypothesis in post-communist constitutional courts.

Moreover, political systems in which the executive-legislature conflicts hamper the legislative process create incentives for using courts as forums to obtain policy changes, promoting expansive judicial power (Guarnieri et al. 2002). In this line of thought, Sánchez, Magaloni, and Magar (2011) provide evidence from the Mexican Supreme Court that this type of political fragmentation provides constitutional courts with incentives to assume a more active role in the policy-making process when there is polarization between elected branches and not just political fragmentation.

The Peruvian puzzle: judicial assertiveness under power concentration

The 1993 Peruvian constitution creates the Constitutional Tribunal as a specialized tribunal replacing the Tribunal of Constitutional Guarantees that from 1982 until the self-coup of Alberto Fujimori in 1992 was responsible for protecting the constitution.[45] The Constitutional Tribunal is integrated by seven justices nominated and appointed for a non-renewable period of five years by a two-thirds majority of the legislature (Peruvian Constitution 1993, art. 201). This appointment mechanism aims to provide independence to the constitutional judges by incentivizing greater political bargaining across different interests (Moreno et al. 2003). However, the short tenure of the justices and the concurrence of their selection with changes in government make the Tribunal an unstable institution at risk of political manipulation (Ríos-Figueroa 2017, 102).

[45] For more about the institutional differences between the Tribunal of Constitutional Guarantees (1982-1992) and the Constitutional Tribunal (1993-to present) see Dargent (2009) and Rios-Figueroa (2017).

Institutionally, The PCT was designed to vary simultaneously with the period of the president and Congress. However, de facto circumstances introduced noise to the intendend effects of the institutional design. First, the election of the first court, under the government of Fujimori was contented and it was only fully operative until 1996 (Dargent 2009, 268). Moreover, during Fujimori's government, three judges of the PCT were successfully impeached from his legislative coalition in retaliation for the decision that attempted to impede Fujimori from running for a third presidential term. A decision of the Interamerican Court of Human Rights in 1999[46] ordered their reinstatement, and these justices were part of the court from November 2000 to 2004. As a consequence, the renovation of the PCT does not concur with the changes in the executive and the legislature as intended in the Constitution, although during each presidency more than half of the Tribunal is replaced.

Since its creation in 1993 and up to the Fujimori's fall (2000), the PCT was considered a non-independent court given the lack of political competitiveness in which it operated (Dargent 2009; Ríos-Figueroa 2017). After the restitution of the democratic rule with the election of President Toledo in 2001, the perception of the court changed. The number of cases brought to the PCT significantly increased as a result of the new political context, and the Tribunal issued a higher proportion of decisions striking down policies (Dargent 2009).[47] While the democratization in 2001 increased the de facto independence of the Constitutional Tribunal, the persistence of three institutional factors led to judicial deference: 1) short tenure of the judges, 2) the renovation of a significant number of justices concurring with the term of the executive and the legislature, and 3) Constitutional challenges are allowed only during 6 years after the

[46] http://www.corteidh.or.cr/docs/casos/articulos/Seriec_55_esp.pdf

[47] Besides the changes in the political context, institutionally the PCT maintain the same jurisdiction, except for the rules for adopting their decision. On October 20, 2002, the number of votes to declare the unconstitutionality were reduce from a qualified majority, 6 out of 7, to a simple majority, 5 out of 7.

enactment of the law or the executive action (Art. 51 and 138.2. of the Constitution, and Art. 100 of the Code of Constitutional Procedure). The first two institutional factors increase the possibility for ideological alignment of the court. The latter inhibits the Tribunal's opportunities to revise important parts of the policy.

Patterns of judicial assertiveness in the PCT, however, seem to be at odds with the predictions of the fragmentation theory, or at best, unresponsive to the political context. The top panel in Table 1 shows that the percentage of rulings declaring policy unconstitutional is not consistently higher during periods of higher power concentration in government.

Table 3-1. Patterns of the Tribunal's assertiveness in different political contexts

Political Context		Court Decision: Constitutional	Court Decision: Unconstitutional	Total
Power concentration in the President*	Low	N=128 71.91%	N=50 28.09%	N=178
	Medium	N=37 52.86%	N=33 47.14%	N=70
	High	N=92 62.59%	N=55 37.41%	N=147
Ideological position of the court**	Court Absorbed (García's Presidency)	N= 32 57.14%	N= 24 42.86%	N=56
	Court Veto Player (Toledo and Humala's Presidency)	N= 246 64.74%	N= 134 35.26%	N=380

* Data from Pérez-Liñan, Schmidt, and Vairo (2019)
**Author's estimations based on PELA surveys.

Also, the bottom panel in Table 1 shows that the PCT has been more assertive when its ideological preferences are located within the range of the preferences of the president and the legislature. This trend is at odds with the expectations derived from the potential ideological absorption of the court as veto player (Tsebelis 2002; and Brouard and Hönnige 2017). Figure 1

displays information about the ideological preferences of the three actors: President, Congress, and the PCT.

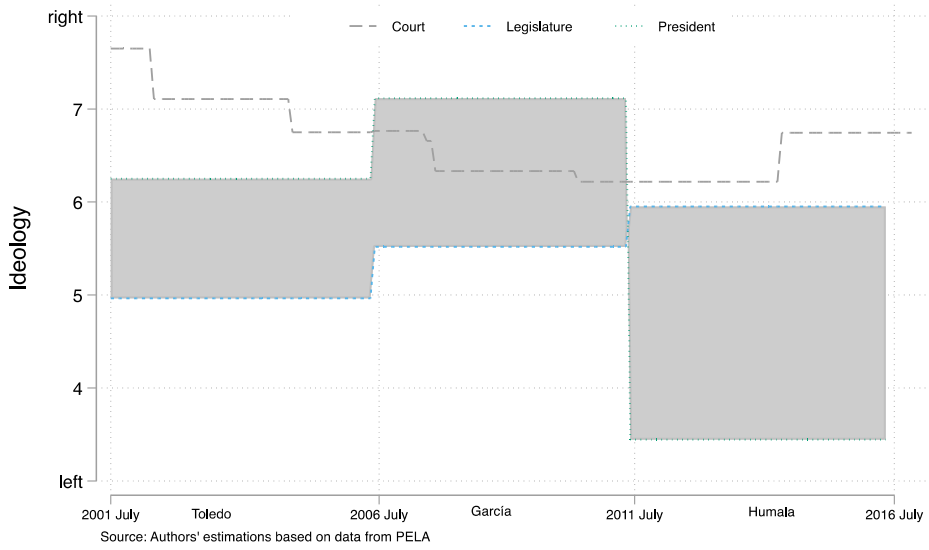


Figure 3-1.Policy preferences of the Constitutional Tribunal and the elected branches in Peru (2001-2016)

The unexpected relationship between the political context and the PCT's patterns of deference to the government cannot be explained by other institutional aspects of the Tribunal related to its accessibility or jurisdictional reach. The PCT is more accessible than its antecessor Court of Constitutional Guarantees, but it is fairly restricted in comparison to other constitutional courts of the region. Rules of legal standing in cases of abstract review restrict non-political actors to access constitutional justice. For example, citizens have legal standing to bring a case to the PCT only if the National Elections Jury certifies five thousand citizens' signatures for cases against national policies or 1% of citizens of the respective territorial area for cases against municipal laws.[48] Also, the PCT does not have power to review norms before its enactment (a

[48] In accordance with Article 203 of the Constitution, the following actors are entitled to bring an action for unconstitutionality: 1) the President of the Republic; 2) the public prosecutor of the Nation; 3) the ombudsman; 4) 25% of the legal number of congressmen; 5) the regional presidents with the agreement of the Regional Coordination Council or the provincial mayors with the agreement of their Council, in matters of their competence; 6) professional associations, in matters of their specialty. The Law No.

priori review), excluding the automatic revision of significant legislative procedures, such as the constitutional amendments and the ratification of international treaties related to human rights,[49] as well as the review of executive actions having the force of law in cases of emergency. Thus, in the Peruvian case, there is no expectation that the array of powers granted to the Tribunal moderates the expected judicial deference under power concentration in government.

The Peruvian puzzle offers an ideal case to assess the possibility of concurrent multiple causal paths linking power concentration in government to judicial behavior. Figure 2 illustrates the three causal paths through which power concentration affects the PCT's decision-making process. As the above discussion indicates, to determine the effects of power concentration in government it is necessary to operationalize the three causal mechanisms. The PCT operates in an institutional setting that allows such differentiation. Particularly, the rules of appointment and sanction indicate that judicial deference to the government should be closely tied to concentration of power within the legislature as this is the institution that has been empowered to such functions -selection and sanction the judges of the PTC.

Moreover, the significant prerogatives of the executive in the law formation allow it to identify the effect of concentration of power across branches with the deliberative legislation causal mechanism. Similarly, by identifying the ideological preferences of each branch and testing its relationship with courts' assertiveness is possible to determine the effect of power concentration in government through ideological alignment. The solid lines represent the effects

30651, enacted on August 20, 2017 amended Article 203 to grant legal standing to the President of the Judiciary, see at https://busquedas.elperuano.pe/normaslegales/ley-de-reforma-del-articulo-203-de-la-constitucion-politica-ley-n-30651-1556523-2/

[49] International treaties are important because they conform the bloc of constitutionality (Constitution art. 200.4). As a consequence, their content has constitutional rank and serves as ground for constitutional interpretation and protection.

of power concentration within Congress and the dashed lines the effect of the power concentration across branches.

The first causal path, fear of sanction, is identified in Figure 2 with a line connecting power concentration within Congress with judicial deference. I leverage the fact that in the Peruvian separation of power rules, the legislature centralizes the institutional mechanisms to retaliate against the Tribunal. Except for the non-compliance, notice that strategies to sanction the court for an adverse decision depend on the legislature, including for example actions targeting the court composition (i.e., impeachment and court packing); threatening to override the court's ruling by drafting new legislation; as well as, those threatening to strip its jurisdiction.

Hence, I expect to find evidence supporting the PCT's strategic behavior motivated by the fear of sanction by looking at the association between changes in the power distribution within the legislature and courts' assertiveness. This expectation does not ignore the power that the president has over the legislative process. Rather, it emphasizes that in a multi-party system with weak party institutionalization, regardless of the extent of the president's support in the unicameral Peruvian legislature, the distribution of power within the legislature better informs the court about the credibility of the threats it may face when deciding against government preferences.[50] I would expect that concentration in power in Congress triggers judicial deference as a strategic behavior of the Tribunal. Accordingly, the first hypothesis of the study is:

[50] Court packing and monetary pressures on the court are more difficult to generate judicial deference in the case of Peru, because constitutional provisions have fixed the number of the member of the Tribunal (art. 201) and empowered the judiciary with control over its budged allocation (art. 145).

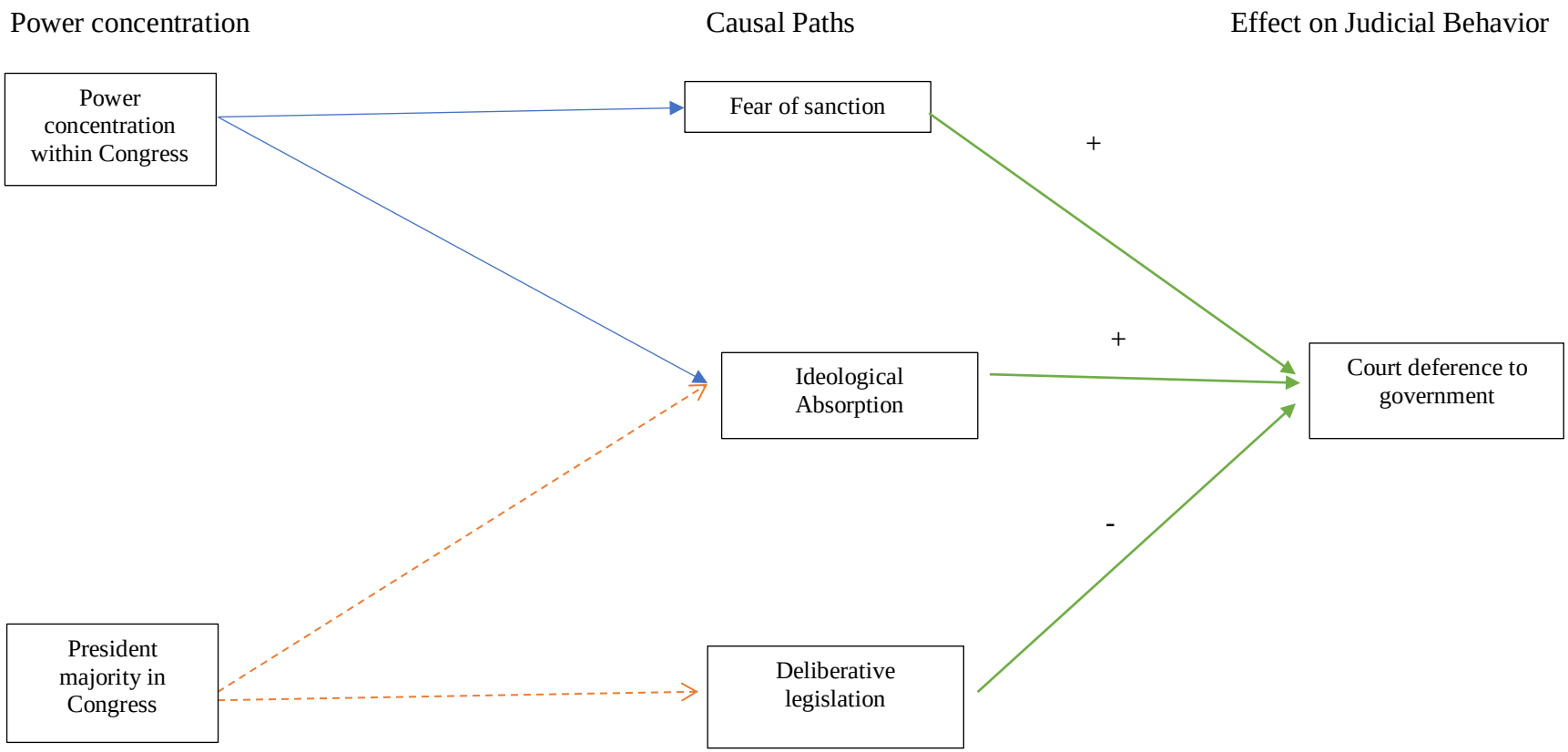


Figure 3-2. Causal mechanisms of the concentration power on court' deference to government in Peru

Fear to sanction hypothesis:

> H1. The larger the effective number of legislative parties, the more likely that the PCT will declare policy unconstitutional.

The second causal path, ideological alignment, further explores power concentration as a context that facilitates the ideological alignment of the PCT with the dominant political regime. Figure 2 includes two lines that indicate the impact of the courts' closeness to the preferences of the legislature and the president. Ideological voting has been found in a wide variety of constitutional courts, including civil law[51] and common law countries.[52] However, Tiede and Ponce (2014) find that the judges' party identification with the sitting president at the time of the decision is not a significant factor in explaining patterns of unconstitutionality in the PCT. The authors further support this finding by acknowledging unique features of the PCT, such as the supermajority requirement in the legislative judicial appointments, and characteristics of the political context such as the fragmented and non-ideological party system. I reassess the impact of ideology in the Peruvian judicial decision-making by measuring the extent of ideological alignment in the Tribunal with an alternative measure of ideological preferences. I expect that to the extent to which the Tribunal sustains similar policy preferences than the government it would be less assertive.

Moreover, as the timing of justices' replacement determines the opportunity of the government to affect the ideological preferences of the Tribunal through the nomination process, I expect that the Tribunal will become more deferent as the number of justices that are replaced

[51] See for example in Norway (Skiple et al. 2016), Germany and France (Brouard and Hönninge 2017), Poland (Kantorowicz and Garoupa 2016), Portugal and Spain (Amaral-Garcia et al. 2009; Garoupa et al. 2012; Hanretty 2013) and Norway (Skiple et al. 2016)

[52] See for example in the UK Hanretty (2013) and in the United States, Canada, India, the Philippines, and Israel Weinshall et al. (2018).

by the current government becomes larger. In this regard, the Peruvian case offers a rare opportunity for research the behavioral consequences of changes in the ideological preferences of the Tribunal. The ruling of the Inter American Court of Human Rights that reinstated to their position the three constitutional magistrates impeached during Fujimori's presidency serves as an exogenous shock that brought significant variation in the ideological preference between the court and the other branches, breaking the direct ideological influence of government on the Tribunal's preferences. More importantly, this ruling altered the timing of the judicial appointments, decreasing the ability of the government to absorb the veto power of the Tribunal through the appointment process. Thus, the second hypothesis suggests:

Ideological alignment hypotheses:

> H2a. The greater the tribunal's ideological distance to Congress, the more likely it will declare policy unconstitutional.
>
> H2b. The greater the proportion of justices that joined PCT during the president's term of office, the less likely the constitutional tribunal is to declare policy unconstitutional.

The third causal path examines how power concentration in government informs the underlying features of the legislation reviewed by the Tribunal and such characteristics may influence the likelihood of judicial intervention in the public policy process. The power concentration across the executive and the legislature allows us to measure by proxy the level of political bargaining between these two branches during the law formation. As mentioned in the previous section, representation of various interests across the elected branches is related to greater political bargaining and as consequence results in more detailed legislation. In that sense, power distribution between the branches affects judicial deference by producing a particular type of legislation and executive actions that are more likely to be unconstitutional.

Notice that this expectation is at odds with Hypothesis 1. In the same line of thought, fragmentation within the legislature can create a type of legislature that is a byproduct of greater debate and scrutiny, and therefore, less likely to be unconstitutional. The hypotheses about the impact of power concentration in government can be stated as follows:

Deliberative legislation hypothesis:

> H3a. The greater the percentage of seats controlled by the president's party, the less likely the constitutional tribunal is to declare unconstitutionality.
>
> H3b. The greater the ideological distance between the president and the legislature, the more likely the constitutional tribunal is to declare unconstitutionality.

In a nutshell, the institutional features in which the PCT operates make it possible to investigate whether judicial deference to elected branches is the result of the Tribunal's strategic behavior to avoid sanction, a consequence of ideological alignment, or a factor of deliberative legislation as a characteristic of the process through which law was enacted. Each of these hypotheses has important implications for understanding judicial behavior under different political contexts. If supported, they imply that the concurrent causal paths are activated and that differences in the timing of those causal paths are likely to explain, at least in part, differences in the overall effect of political fragmentation on courts' assertiveness.

Data, measurements, and models

To test the hypotheses about the causal mechanisms in which power concentration in government affects judicial behavior, I compare patterns of judicial assertiveness across three electoral cycles and eight different compositions of the PCT from 2001 to 2016. I use data from three sources. First, I use data of all abstract review decisions rendered by the Peruvian

Constitutional Tribunal between 2001 and 2016 from Tiede and Ponce (2014).[53] The data set includes cases of unconstitutionality against national and subnational executive actions and legislation (acción de inconstitucionalidad).[54] The dependent variable, strike, is a dichotomous measure that indicates whether the court strikes down the policy under revision in a particular case. The unit of analysis is case-decision, and it is coded as 1 if any claim within the case is declared unconstitutional. It is coded 0 when the Tribunal holds the constitutionality of the policy, as well as when the case is considered inadmissible.

Second, to assess the level of power concentration in government, I use original electoral data from the official website of the Peruvian Congress[55] and the data about power concentration in the executive from Pérez-Liñan et al. (2019). Finally, to estimate the ideological preference of the court, the president and the Congress, I use data from the Universidad de Salamanca's Parliamentary Elites of Latin America (PELA) survey, which provides information about the ideological preferences of parties by elected legislators in a scale from 1 to 10 where 1 is left, and 10 is right.[56] The ideological preferences of the president are measured as the ideological preference for the president' party, the ideological preference of the Congress is an average of the respondents' self-allocation, and the preferences of the court varies across cases as the average of the ideal points for the justices that adopted the decision. The ideological preferences for the justices are measured as the average of the ad-hoc committees formed to create the short-list of candidates from which the plenary of the Congress appointed the members of the PCT (See Appendix 5 to see the estimation of the ideal points of the ad-hoc committees and the

[53] The original data was aggregated at the case level and extended to include decisions up to 2016.
[54] It excludes concrete cases such as: Amparos, writs of mandamus (*acción de cumplimiento*), conflicts of jurisdiction, habeas corpus, habeas data, and remedy of complains (*queja de derecho*).
[55] http://www.congreso.gob.pe/
[56] For a more detailed description of the PELA project, go to http://americo.usal.es/oir/elites/

justices). Notice that while the ideological preferences for the Congress and the President vary for each congressional period, the ideological preferences for the PCT vary across cases according to the justices that participate in each decision.

The key independent variables capture different aspects of power concentration in government and provide information about three electoral cycles from 2001 to 2016 and nine different court compositions. Fragmentation in Congress is measured as the effective number of legislative parties (Laakso and Taagepera 1979). Fragmentation across government is measured using two different operationalizations. First, I look at the aggregate index of presidential hegemony that includes the percentage of seats controlled by the president's party and the percentage of justices that joined PCT during the president's term of office (Pérez-Liñan et al. 2019). I also look at each of the components of the index separately. Second, I look at the ideological distance between the president's party and Congress. Finally, ideological alignment is measured as the distance between the ideal preferences of the judges involved in a particular decision to the preferences of the Congress. As control variables, I included characteristics of the law under review: regional law, as opposed to national law, and legislative law, as opposed to executive orders.[57]

Given the structure of the data, I estimated a multilevel logit regression[58] with random intercepts by congressional period with the following specification:

$$\Pr(Ucp = 1) = \sim Logit\ (\alpha j + \beta 1 FCcp + \beta 2 FGcp + \beta 3 IAcp + \beta 4 Regionalcp + \beta 5\ Legislativecp + \varepsilon cp$$

[57] Summary statistics for all the variables are found in Appendix.

[58] The choice to use multilevel models was made because the possible lack of statistical independence among observations across contextual units (Tiede and Ponce 2014). Beside the characterization of the data as hierarchical given the description of the data generating process, I verify the suitability of the model by using the likelihood-ratio test. The results indicate that it would be a mistake to assume that the cases were uncorrelated within congressional periods.

Where U_{cp} is the binary coding of the case outcome in the case (c) at congressional period (p); α_j is a random intercept at the congressional period; The main explanatory variables are: Fragmentation in Congress(β_1), Fragmentation across government (β_2), and Ideological absorption (β_3); other descriptive characteristics of the case include characteristics of law under review, Regional Policy (β_4) and Legislative Policy (β_5); and ε_{cp} represents the error term.

Results

Table 2 shows the results from the multilevel logistic estimations for the probability of a PCT decision of unconstitutionality. Overall, the results show no support for the fear to sanction hypothesis. Contrary to the expectations, the coefficients for the effective number of legislative parties, a measurement of the fragmentation in Congress, are negative and statistically significant ($p < 001$) in Model 1 and 2, and in Model 3 is still negative but insignificant. The findings suggest that the PCT is more to declare the unconstitutionality of a policy as the concentration of power within the legislature increases.

Findings for the concentration of power across the elected branches reveal that jointly, as the president increases its influence over the legislature and the PCT, the probabilities of decisions declaring the unconstitutionality of a case increase, as it is shown in Model 1. The finding supports the expectation stated in the deliberative legislation hypothesis. Model 2 and 3 desegregate the effect of the components of the index of president's hegemony. Model 2 uses the percentage of seats in Congress controlled by the president's party, and the coefficient is positive and statistically significant. Model 3 uses the percentage of justices that joined PCT during the president's term of office and is negative and statistically significant showing some evidence in support of the fear to sanction hypothesis. Similarly, an alternative measure for power

concentration between the executive and the legislature, ideological distance in government, presented in Model 4 is positive and statistically significant, providing support for the deliberative legislation hypothesis.

Regarding the effects of ideological alignment on judicial assertiveness stated in hypothesis 2, the findings support the expectation of judicial deference to the concentration of power across the different model specifications. The coefficient of the Tribunal's ideological distance from Congress is positive and statistically significant, meaning that differences in the ideological preference of the PCT increase the probability of a decision declaring the unconstitutionality of a law or an executive order. The ideological independence of the Tribunal counteracts the strategic deferential behavior of the court to the elected branches allowing the PCT to be an effective veto player even under periods in which coordination of different factions in the legislature to act against the Tribunal is easier to achieve.

Regarding the control variables, the type of law under review also affects the likelihood of the court's deference to political actors. As expected by the relevant literature, in comparison to laws enacted by Congress, regional laws are more likely to be declared unconstitutional. However, there is no evidence for increased deference to laws enacted by Congress in comparison to executive orders sanctioned either by the President or local authorities.

The results are consistent under different specifications for fragmentation across the government and within the legislature: Concentration of power across the government decreases trigger deference in the PCT as the percentage of justices that joined PCT during the president's term of office increases, providing some evidence for the fear to sanction hypothesis. The findings, however, suggest that this is the case when the input of the elected branches through the nomination process keep the preference of the court close to the government. As the Tribunal

stands for policy preferences different from the government, strategic judicial deference has a lower impact on the Tribunal's decision-making. More generally, the concentration of power in government increases the probability of unconstitutionality as the type of legislation produced in a less contested political environment creates space for further deliberation within the judiciary. In sum, the results support the idea that concentration of power in government affects judicial assertiveness through different causal paths and the timing in which these causal mechanisms matter.

To bring further support for the Ideological alignment hypotheses, Models 5 and 6 in Table 3 focus exclusively on the ideological distance between the president, Congress, and the PCT. Model 5 shows support for ideological voting in the PCT, suggesting that it has been exerting as a veto player as being able to maintain ideological independence from the other political actors. Model 6 examines the potential interaction between the ideological distance in government and the Tribunal's ideological distance from Congress.

Table 3-2. Judicial assertiveness and political context in the Peruvian Constitutional Tribunal, 2001-2016

		Model 1	Model 2	Model 3	Model 4
Fear to sanction	Fragmentation in Legislature	-8.591***	-5.595**	-0.867	
		(3.086)	(2.205)	(0.971)	
Ideological alignment	% of justices that joined PCT during the president's term of office			-0.993***	-1.175**
				(0.305)	(0.463)
	Court ideological distance to Congress	0.877**	0.877**	0.877**	0.877**
		(0.443)	(0.443)	(0.443)	(0.443)
Deliberative legislation -	Concentration of power in the President	1.258***			
		(0.386)			
	% of seats in Congress controlled by the president's party		0.385***		-0.0707
			(0.118)		(0.0791)
Origin of the law	Regional policy	0.725**	0.725**	0.725**	0.725**
		(0.315)	(0.315)	(0.315)	(0.315)
	Legislative policy	-0.450	-0.450	-0.449	-0.450
		(0.309)	(0.309)	(0.309)	(0.309)
	Constant	4.863	7.782	12.39**	13.24*
		(4.083)	(4.793)	(6.016)	(6.893)
	Observations	369	369	369	369
	Number of groups	3	3	3	3

Note: The unit of analysis is the Constitutional Tribunal's decision, coded 1 when the court invalidates a law (or a portion of it) or 0 otherwise (including dismissed cases). Standard errors in parentheses * p<0.05, ** p<0.01, *** p<0.001

Figure 3 displays the interaction between the ideological distance of the Tribunal and within the government. It shows that when the distance between the preferences of the Tribunal and the government is small, the effect of ideological distance in government is not significant, but as the courts' preferences move away from the government, fragmentation across the government becomes significant.

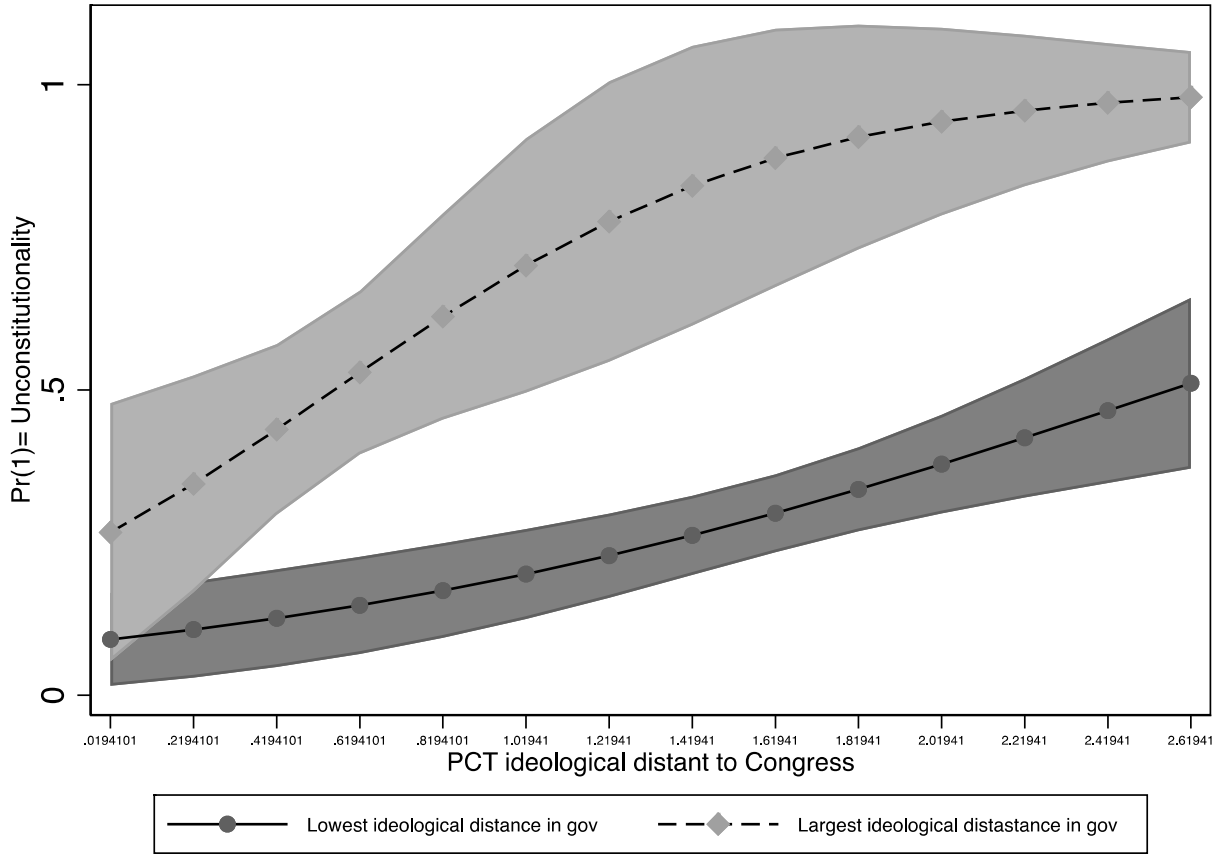


Figure 3-3. Predicted probabilities of ideological distance in government at the highest and lowest distance of the PTC preferences to Congress

Table 3-3. Ideological alignment and judicial assertiveness in the Peruvian Constitutional Tribunal, 2001-2016

		Model 5	Model 6
Ideological alignment	Ideological distance in government	1.457***	1.037*
		(0.403)	(0.555)
	Court ideological distance to Congress	0.904***	-0.129
		(0.262)	(0.967)
Origin of the law	Regional policy	0.727**	0.742**
		(0.314)	(0.314)
	Legislative policy	-0.448	-0.457
		(0.308)	(0.309)
Interaction	Ideological distance in government * Court ideological distance to Congress		0.800
			(0.723)
	Constant	-4.160***	-3.660***
		(0.949)	(1.052)
	Observations	369	369
	Number of groups	3	3

Note: The unit of analysis is the Constitutional Tribunal's decision, coded 1 when the court invalidates a law (or a portion of it) or 0 otherwise (including dismissed cases).
Standard errors in parentheses * p<0.05, ** p<0.01, *** p<0.001

Conclusions

Our understanding of the impact of power concentration in government remains incomplete because the existing research fails to consider how it triggers multiple and concurrent causal mechanisms. The Peruvian case allows us to assess these causal paths further. In the case of Peru, judicial assertiveness during power concentration in government when coordination in retaliation for unfavorable judicial decision is more likely can be explained by the ideological independence that the Tribunal has kept. Specifically, this analysis shows that the PTC has been a veto player during most of its existence after Fujimori's fall, regardless of the variation in the political context in which it operates. Moreover, the results show that courts' ideological distance from the elected branches is key in determining its ability to influence policy through constitutional review even in an environment in which the party system is weakly institutionalized, and the interbranch relationship within government is often portrayed as non-ideological and nonprogrammatic (Alemán et al. 2011; Ponce 2016).

The evidence presented here, however, has to be evaluated under some considerations. Using the PTC to test the effect of different causal paths in which power concentration affect its assertiveness provides a partial picture of the potential impacts of power concentration given the fact that, during the period analyzed, Peru was below the regional average for democracies and semi-democracies (Pérez-Liñan et al. 2019, 8). To fully assess the courts' ability to exercise as veto players, and, in particular, their ability to maintain their ideological distance from the government, it may be desirable to use a sample that includes a wider range of variance in both variables. Nonetheless, the implications drawn from the PTC case provide optimism

for the potential role of constitutional courts under non-favorable political contexts: if a constitutional court can hold different ideological preferences than the government, the effect of the political context is not immediate.

Research on judicial behavior under political constraints should consider the different causal paths in which power concentration in government triggers courts' strategic behavior. According to the findings presented here, expected trends of courts' deference under power concentration in government as a response to the threat of government override or non-compliance are over simplistic. Given the probability that the type of legislation and executive action produced under such environment is more likely to be declared unconstitutional, courts' deference in a politically constrained environment is limited to the ability of the elected branches to fill the courts with ideologically aligned justices. On the contrary, because legislation produced under power concentration across the elected branches of power is either less contested, less specific, or more extreme, courts are more likely to influence policy, functioning as veto players in this environment. The Peruvian case suggests that this is the case as long as the government does not co-opt their political preferences through the appointment process. The ideological distance of the court from the government vastly attenuates the impact of the political context on judicial behavior.

Chapter 4.

Does the formal authority of constitutional courts matter?

Reassessing the explanations for judicial assertiveness

Constitutional review has become a core feature of democracies.[59] It provides a mechanism to settle disputes across different political actors and more importantly empowers a variety of societal voices to play an active role in the process of transforming the written constitution into a meaningful pact. Despite its importance, no attention is usually paid to the variety of institutional arrangements in which courts decide cases and how they may affect their ability to operate as a counter-majoritarian veto player. The literature on the effect of institutions on courts' behavior has focused, almost exclusively, on the rules designed to protect the courts' independence vis-à-vis other political actors.[60] Yet, differences across the institutional environment for constitutional adjudication are not limited to the rules related to formal independence. As discussed in chapter 2, systems of constitutional review also vary across a myriad of institutional features that conjunctively define courts' formal authority in constitutional adjudication (Brinks and Blass 2017, 296),[61]. Thus, our understanding of the courts' influence on the public policy process will remain incomplete until a comprehensive exploration of the variance in the institutional

[59] See Ginsburg (2003).

[60] See, for example, Herron and Randazzo (2003), Smithey and Ishiyama (2002), Hayo and Voigt (2007), Melton and Ginsburg (2014). In the same line, research focused on the impact of *de jure* independence on policy outcomes such as human rights protection has found a positive relationship (Keith 2002; Apodaca 2004).

[61] The few works focused on the effects of the design on how courts affect policy, have been limited to specific characteristics and disperse across different areas of research. See Appendix 3 for a summary of arguments that link specific aspects of constitutional review on judicial behavior.

environment in which courts decide is adopted, especially that related to the variation of courts' formal authority.

Two central deficiencies in the existing scholarship have hampered the analysis of the joint effect of formal authority on courts' assertiveness: the lack of a standard measure of judicial power (Ginsburg 2008, 94), and consequently, the analysis of some of the components of formal authorities in isolation of each other.[62] Regarding the first point, the lack of standard measure, Ríos-Figueroa and Staton (2012) provide evidence for the lack of content validity of some measurements of formal judicial independence[63] that incorporate both institutional features related to extent of political influence on the composition of the court and some formal aspects of formal judicial power (2014, 116).[64] More recent analyses deal directly with this measurement problem and distinguish between autonomy and authority, providing indices that separate these two types of institutional variance (Rios-Figueroa 2011; Brinks and Blass 2017). Yet, this nascent literature has concentrated on the factors explaining the variation in designing constitutional review rather than in the effects of such variation on judicial behavior (Brinks and Blass 2018).

Second, the existing arguments about the potential impact of courts' authority on legal decision-making have analyzed variances across its components in isolation to each other. Difference between abstract and concrete review have centered, for instance, on the asymmetry in the information that courts use to evaluate the effects of law (i.e., Stone Sweet 1992; Vanberg 1998; Rogers and Vanberg 2002; Smithey and

[62] The few exceptions in the literature that have considered the joint effect of rules related to formal authority of constitutional adjudication is focused on explaining the factor that determine such variance—i.e., Brinks and Blass 2018.
[63] Feld and Voigt's (2003) measure of *de jure* independence; La Porta et al. (2004)'s measure of "Judicial Checks and Balances" and Tate and Keith's (2007) measure of judicial independence.
[64] Moreover, the authors show that indices of formal independence are only weakly related to independent behavior (measures as de facto independence).

Ishiyama 2000; Vanberg 2001; Shapiro 1993; Garoupa and Ginsburg 2011). Likewise, analyses of the effect of a priori and a posteriori review on judicial behavior suggest that a priori review allows constitutional courts to become a political actor (Stone-Sweet 2000; Tsebelis 2002). Comparisons on the accessibility to constitutional review suggest that broader legal standing to bring constitutional cases permits courts to participate in a larger number of issues, increasing the number of actors that inform the court about potential policy transgressions to the constitution.[65] The joint effect of those institutional features on judicial assertiveness remains untested. The lack of a comprehensive theory linking a wide variety of rules on different political contexts has affected the ability to determine whether and how this set of institutions matter in explaining judicial assertiveness.[66]

To fill the existing gap in the literature, this chapter shows that institutional choices in the design of constitutional review affect courts' assertiveness. I analyze the institutional choices defining the demand and supply of constitutional justice and how they jointly contribute to understanding judicial behavior. I argue that greater formal authority in constitutional review allows courts to be more assertive because courts incorporate a wider spectrum of arguments in defense of constitutional prescriptions that can be violated by a particular policy. Moreover, it increases the cost for the elected branches to engage in retaliations against the court. I also present the three mechanisms in which power concentration in government affects judicial behavior to illustrate that constitutional courts with higher levels of formal authority are less affected by the political context. This study is one of the few cross-country

[65] See a more detailed summary of this literature in Appendix 3.
[66] See Ríos-Figueroa (2017) for an exception. The author proposes the theory of constitutional courts as mediators applied to the civil-military relations to explain the courts' ability to constrain the government and the military.

studies with case outcomes examining constitutional review in Latin American. While the existing literature has analyzed courts' assertiveness in single country studies, this study assesses the effect of institutions combining cross-country theories with case outcome data.

To test these arguments, I use the CompLaw database (Carrubba et al. 2012) and the measure of formal authority developed in Chapter 1. The empirical evidence presented examines cross-sectional information of the cases of constitutional review decided in 2003 by courts of last resort on constitutional issues and allows me to exploit the institutional variation and political across nine Latin American countries.

The impact of formal authority on courts' assertiveness

Here, I focus on the rules defining courts' formal authority. One might think that, across countries, constitutional review refers to the same jurisdictional power and to that extent there is little variation in its institutional design. This is not the case (Ginsburg 2003, 17; Navia and Ríos-Figueroa 2005). Institutional variation across systems of constitutional review exists and it includes a wide range of rules yet in need to be determined (see discussion in Chapter 1). The central discussion of this chapter aims to determine how this variation helps to explain why some courts are more willing to influence the public policy process than others. Moreover, whether the institutional design helps courts to surmount the constraints imposed by the concentration of power in government. I examine the potential effect of formal authority on judicial assertiveness in two steps: I identify the mechanisms through which institutional features of constitutional review granting courts greater discretion increases judicial influence on public policy and I analyze their effect when courts face different levels of power concentration in government.

In chapter 2, I presented the measure of formal authority in constitutional adjudication that aggregates the set of rules related to: 1) the degree in which societal actors can challenge government policies—demand for constitutional justice, and, 2) the courts' ability to affect the general policy in response to the facts and legal considerations argued in each case—supply of constitutional justice. Collectively, these rules determine the breadth of the cases that get to the courts and the courts' ability to provide a resolution. On the one hand, rules broadening the demand side of constitutional justice allow access to a higher number of political actors, including for example citizens, and by lowering the barriers of non-justiciability (Hirschl 2011, 266). These rules make courts more successful at gathering information from the different parties in conflict, thereby more able to develop creative and forward-looking jurisprudence (Ríos-Figueroa 2016, 10). They also allow small groups in society, or those underrepresented in government to find mechanisms to voice their policy preferences through constitutional review. To the extent to which diverse and politically marginalized voices in society access courts, they develop a richer jurisprudence about a higher number of policies that provide courts with greater opportunities to influence policy (Wilson 2009; Gauri and Brinks 2008).

Also, rules broadening the demand of constitutional review may help courts to build legitimacy through public support. When courts are perceived as protectors of rights, legislators and executives have fewer incentives to ignore or overrule their decisions. The elected branches are more likely to comply with adverse decisions when they benefit from the support of courts in other policy areas. This increases the government cost of adopting strategies like judicial impeachments or to court stripping. Ultimately, from a procedural aspect, lowering the standing requirements to

access to constitutional justice makes it more difficult for courts to use inadmissibility rules as a strategy to avoid difficult decisions.

Likewise, Courts facing greater jurisdictional limits are less assertive because they have formal obstacles that prohibit them from delivering more comprehensive protection of the constitutional text, including both the bill of rights and the separation of power.[67] These limitations can take several forms, including for instance rules that restrict the type of laws subject of constitutional control, the constitutional prescriptions that can be protected, the moment in the public policy process in which courts intervene, as well as imposing short time-windows for the complainants to raise the constitutional challenge.

On the other side, rules shaping the supply of constitutional justice affect the ability of courts to influence policy. Granting courts greater discretion to deliberate[68] and to tailor the effect of their decisions, as well as centralization within the judicial hierarchy and voting rules lowering the consensus needed for a court of last resort to rule a policy unconstitutional allow courts to protect constitutional rights even in cases with procedural mistakes. Greater court discretion decreases the dependence of courts from the plaintiff, meaning that their deliberations and decisions solve constitutional problems in forms that were not initially considered by the complaint. Courts with greater discretion, for example, can strike down a policy that has been not explicitly challenged by the plaintiffs. While this type of discretion seems excessive,

[67] Although, exceptionally, courts act beyond the powers that have been explicitly attributed in the legal corpus, these cases are deeply justified as a comprehensive interpretation of a set of rules. See for example the US Supreme Court decision in *Marbury v. Madison*.
[68] See, for example, Mendés (2013) analysis of deliberative constitutional courts in which the authors taking into account the institutional setting of constitutional justice, defines a deliberative court as "one that maximizes the range of arguments from interlocutors by promoting public contestation at the pre-decisional phase, that energizes it decision-makers in a sincere process of collegial engagement at the decisional phase; and draft a deliberative written decision at the post-decisional phase" (2013, 107).

and it is rarely found in ordinary jurisdiction, it empowers constitutional courts to motivate their decisions in the light of the public interest rather than the particular preferences of the plaintiff. Also, centralization of the constitutional jurisdiction in courts of last resort generates higher levels of judicial security as they reduce the possibility of contradicting interpretations of the constitutional text. This clarity makes non-compliance costlier for the elected branches of power. Furthermore, the visibility of the decision when this is adopted by a high court escalates also the visibility of the non-compliance (Kagan and Skolnick 1993). A wider spectrum of actors within the civil society will be more likely to follow and publicize the negative of the political actors to abide with the court, making costlier for them to ignore or act against the court.

Similarly, courts' voting rules for adopting decisions, especially those affecting the size and the extent of the internal coalition needed to declare the unconstitutionality of law may restrict the courts' ability to influence policy (Brinks and Blass 2017). When decisions of unconstitutionality are conditioned on qualified majorities within the court, it is more difficult for the judges to modify the status quo that the policy under revision represents. Notice that, in comparison to courts that need a simple majority to strike down a policy, each judge has a greater influence in the final decision in courts that require a supermajority. In this regard, the sitting executive and legislature have a greater influence in the internal decision making of the court through the appointees they have selected. Therefore, this type of rule makes it easier for a minority of judges supporting the policy preferences of the elected branches to validate the policy.

Given the interrelation between these rules (explained in section 2), I expect that jointly, Courts granted with broader formal authority in terms of the demand and

supply for judicial intervention on policy are more assertive. My hypothesis about the impact of formal authority can be stated as follows:

> H1. As the formal authority of constitutional review increases, high courts become more assertive by declaring laws unconstitutional.

Yet, courts' exercise of constitutional control depends on more than the formal rules specifying their jurisdiction and function. A vast literature has pointed out that courts do not operate in a vacuum, on the contrary, they are strategic actors that respond to power concentration in government (Epstein and Knight 1998; Epstein, Knight, and Martin 2001; Vanberg 2015). Previous studies have argued three possible ways in which political concentration in government affects courts' assertiveness making them more or less deferent in times in which they face power concentration in government (see more in Chapter 2).

First, concentration of power in government, as opposed to fragmented, fosters judicial deference because it facilitates coordination among the elected branches, and therefore, increases the credibility of threats in the form of attacks on its integrity—composition and jurisdiction, as well as new legislation overriding their decision and non-compliance (Stone-Sweet 2000, Scribner 2011; Iaryczower et al. 2002; McCubbins, Noll, and Weingast 1995).[69] In contrast, during fragmented periods, courts have an opportunity to vote against the policy outcome generated from the elected branches of power, and have a greater impact on policy as the political sectors affected by the decision lack the political control to retaliate against the court

[69] But, see Stone-Sweet (2000). Looking at how political fragmentation affects courts' assertiveness in parliamentary systems, the author argues that fragmentation in multiparty parliamentary regimes actually increases the likelihood of decisions declaring the unconstitutionality of laws because in this political context the law implies greater consensus among competing legislative interests. I examine this argument in Hypothesis 2c.

(Ferejohn, Rosenbluth and Shipan 2009).

This argument has been examined in several single country studies. Chavez, Ferejohn and Weingast (2011) study on the US and Argentina Supreme Courts, find that in cases of constitutional review courts' attempts against the government have led to new legislation, or even more extreme reactions when a legislative majority stands with the president (i.e.: pack the court). Ríos-Figueroa (2007) analyzes constitutional cases from Mexico's Supreme Court between 1994 and 2002 and finds that as the level of fragmentation increases, the court is significantly more likely to vote against the government (see also Magaloni 2003). Scribner (2011) compares the effect of political fragmentation on the Chilean and Argentinean courts and finds that fragmented political environment has a positive and significant effect on the check of executive power for both countries (see also Iaryczower, Spiller and Tommasi 2002). These arguments lead to the following prediction:

> H2a. The larger the executive control over the legislature, the less likely the courts are to declare laws unconstitutional.

Second, courts are more deferent to the government when their ideological preferences are aligned with the dominant political regime (Dahl 1957, Tsebelis 2002). The intervention of political actors in the nomination and selection process allows them to place on the court justices that share their ideological and policy preferences. They expect that their behavior in the court reflect such preferences and serves the purpose to advance the policy agenda of the dominant political regime. While political fragmentation increases the compromises across ideological preferences that make more likely to select ideological moderated judges, the power concentration in government by contrast, allow the dominant political regime to select

judges that are more closely identify with the government policy preferences. If this is the case, courts' deference to government will increases with the ability of the elected branches to fill the court with judges that support ideologically their policy preferences. Therefore, it is expected that:

H2b. The larger the number of judges that represent the executive's ideological preferences, the less likely the courts are to declare laws unconstitutional.

Third, opposite to the dominant argument in the literature, a small group of scholars argue that power concentration in government may in fact increase judicial intervention in policy. As the divergent policy preferences increase the level of compromise needed to enact a particular policy, the outcome of the legislative process is less likely to be contested. When the dominant parties within the legislature enjoy the majorities needed to enact the policy, unsatisfied political minorities and sectors of the society, no represented in the congressional majority are more likely to litigate their policy preference in the constitutional court (Carrubba et al. 2008). Moreover, differences within the government, executive and legislature, create potential for gridlock that in turn expands the demand for judicial intervention in the policymaking process where courts play a third-party role, solving conflicts that the elected branches are not able or willing to deal with it effectively (Shapiro 1981; Ginsburg 2008). Bumin (2019) have found support for this argument in post-communist constitutional courts. Therefore, it is expected that:

H2c. Courts are more assertive as legislative fragmentation decreases.

Formal judicial institutions can provide courts with meaningful incentives to act assertively if they play a role in shaping judicial behavior when the political context is adverse to the courts (Carrubba et al. 2015, 3). As mentioned in Hypothesis 1, the institutional design of constitutional review creates different costs for the elected branches for non-complying or acting against its integrity when the court' decision veto their policy preferences. To the extent that formal authority mitigates the fear to sanction and non-compliance, constitutional courts are less likely to engage strategic deference as a mechanism to self-preservation. For example, rules increasing the accessibility of constitutional justice and those lowering the barriers of non-justiciability, conjunctively, incentivize the involvement of larger and diverse sectors of the civil society with strategic litigation of constitutional prescriptions, particular those related to rights -i.e., individual as well as social, economic, and cultural rights. This wider participation of the society in the constitutional adjudication helps courts to monitor the implementation of their decisions. Monitoring is always costly, and active participation of the civil society helps to hold the elected branches accountable for non-compliance with courts. When monitoring is effective elected branches are less to ignore a decision. Then, while the concentration of power across the elected branches increases courts deference as the credibility of the threats for non-compliance increases with the ability of these actors to coordinate their actions, granting courts with greater formal authority may mitigate some of this effect. Then I expect that:

> H3a. An increase in the executive control over the legislature increases courts' deference when courts' formal authority is low, but this effect decreases as courts' formal authority increases.

Also, regarding the effect of the executive control over the court, rules of authority, especially those imposing unanimity or supermajorities rather than simple majorities, may increase the impact of the political context on courts' assertiveness. The ability of government appointees to alter the final decision of the court is relative to the internal rules of the court to adopt decisions. Having one appointee loyal to the current government is more influential when the decisions require unanimity or supermajorities as it is more likely that this appointee vetoes the preference of the other or builds a coalition large enough to block a decision. Similarly, when courts decide in panels, the policy preferences of one judge may have a greater impact on the final decision than in those adopted en banc. The political influence of elected branches through the appointments are more likely to play a definitive role in the adoption of final decision when those appointees are key for the adoption of a decision.

> H3b. An increase in the number of judges that represent the executive's ideological preferences increases courts' deference when courts' formal authority is low, but this effect decreases as courts' formal authority increases.

Empirical strategy

To analyze the influence of formal authority on judicial assertiveness in constitutional adjudication, I examine 3,152 cases issued by constitutional courts in 2003 across nine Latin American countries: Argentina, Brazil, Bolivia, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, and Venezuela. The sample includes a wide variation of the institutional setting of constitutional adjudication in both measures of autonomy and authority, holding constant other alternative

explanations such as the legal tradition, presidential and multipartisan systems, and time since democratization.[70]

These cross-sectional data include two levels of variation. Case-level information about the court rulings outcome—dependent variable, as well as information about the type of petitioner, the type of review, the type of policy, and the year of the policy challenged in the case. The data was gathered from the CompLaw database[71] (Carrubba et al. 2012) that provides information on all cases of constitutional review, decided by the court of last resort in constitutional issues in 2003. The unit of analysis is the policy challenged within cases of constitutional review. I paired this data with country-level information about the formal environment in which courts operate and electoral data that reflects the political constraints on power concentration.

This approach posits some downsides. Constraints in data availability restrict the sample to a cross-sectional analysis of nine countries for only one year from Latin America. Such limitations introduce bias in the estimations, therefore, the inferences from the findings presented in the following sections are interpreted under the constraints imposed by data availability.

Despite this limitation, the cross-sectional data provide an opportunity to test the potential effect of institutions using a fined-grain comparison of the institutional environment for constitutional adjudication (see more about this in Chapter 2). While longitudinal data are desirable for making causal inferences, cross-sectional data may be adequate to test hypotheses such as those presented herein, in which theory

[70] Tate and Vallinder (1995), Hirschl (2008), Sieder, et al. (2005); Shapiro and Stone-Sweet (2002); Stone-Sweet, (1999).
[71] The CompLaw database includes a larger number of countries, 43 in total; however, the availability of data on the formal authority of courts in constitutional adjudication, the main institutional factor examine in this chapter, limited the sample to the nine Latin-American countries for which the dependent variable is available in the CompLaw database.

informs that the influence of courts assertiveness (dependent variable) cannot affect the formal authority of courts (the main independent variable).

Other research designs such as testing the effect of judicial institutions in experimental settings are not available to researchers' manipulation. Moreover, evidence provided by potential laboratory experiments may face problems of external validity as the judicial decision-making is inherent to a specialized type of training and experiences of judges facing both individual and collective incentives that are difficult to replicate using regular citizens in a controlled environment. Quasi-experimental research designs exploit changes in the institutional design of constitutional review to estimate the effect of judicial institutions. This type of empirical strategy, however, can rarely be used to test the effect of rules affecting authority separately from those related to autonomy as changes across these two dimensions are often parts of the same reforms.[72]

Because the dependent variable is binary and the data has a hierarchical structure that varies both across policy within cases and cases a cross countries, I estimate a multilevel logit model with random intercepts by country and robust standard errors.[73] This allows me to assess the effect of the institutional variables across countries, the central argument of the theory. The selection of the measurements is described in the following section.

Dependent variable

Judicial assertiveness is a "court's issuance of decisions that challenge other actors' exercise of power – that seek to nullify, restrict or change their behavior"

[72] See Brinks and Blass analysis of the tradeoff between these two dimensions during moments of institutional change.

[73] To verify the model specification empirically, I performed the likelihood-ratio test to compare the fit of the single-level logit regression with multilevel logit outcomes. The significant result indicates that assuming cases were uncorrelated within countries would be a mistake, therefore, it supports the use of multilevel analysis.

(Kapiszewski 2012, 11). I assess the ability of courts to influence policy by looking at the case outcomes of constitutional review. Court assertiveness materializes when the rulings alter the status quo of a particular policy. Courts' assertiveness is operationalized as a binary outcome that takes the value of one when the decision strikes down legislation[74] or imposes limits on its interpretation. High rates of unconstitutionality are indicative of a powerful and active court. If the court upheld the constitutionality of the policy or decided not to rule on the merits or substance – e.g., lack of jurisdiction or competence, then the case is coded zero. The descriptive statistics about the number of policies reviewed by each constitutional court, including the proportion of 'assertive decisions' by country, are found in Appendix 6.

While case outcomes are commonly used in empirical studies to compare courts' behavior,[75] there are valid criticisms to this approach. Comparing rates of unconstitutionality across countries implies that each decision has an equal political impact while in fact, some are more salient than others. An alternative, limiting the sample to 'salient cases', creates further empirical problems in cross-countries analyses. The selection of salient cases often follows coding schemes that are country specific. For example, the use of newspaper reports may introduce bias related to media independence; and the use of specialized publications used for lawyers and judges to publicize relevant decisions may reveal differences in judicial cultures and values across countries. Even if such a set of rules is in place, and its application is valid across different countries, further questions about how to compare the political impact of the invalidation of a few words in comparison to a complete policy can be

[74] Including when the invalidation of the legislation is partial.
[75] For examples of empirical studies on judicial behavior using case outcomes to measure judicial assertiveness in cross-country samples, see Smithey and Ishiayma (2002); Herron and Randazzo (2003); Bumin (2017); Von Doepp (2006); and Kapiszewski (2012).

quantifiable in practical terms as each case become sui generis and requesting a significant level of case information. In contrast, the use of case outcomes to determine courts' assertiveness reduces measurement errors emerging from survey data as it provides objective rules for coding.

Independent variables

To assess the impact of formal authority on constitutional review, I use the formal authority in constitutional adjudication index (FACA) presented in Chapter 1. The analysis applies Multiple Correspondence Analysis (MCA) to aggregate information about the power granted to courts to review policies across all instruments of constitutional review. The index measures formal authority in constitutional adjudication as a continuous variable between 0 and 1, with 0 being the system granting the least formal authority and 1 the most.

This latent variable encompasses 12 different indicators that affect both the supply and demand for constitutional review. Five of the 12 indicators compare the degree to which rules increases the demand of constitutional review including those related to accessibility[76] and low barriers of non-justiciability for constitutional justice.[77] The remaining indicators aim to capture the supply of constitutional review and include aspects such as the courts' decisive capacity, docket control, the courts' ability to affect citizens beyond the parties of the case, the centralized jurisdiction,[78]

[76] The indicator of accessibility aggregated in the FACA index captures the broadness of legal standing and the need a case and controversy to initiate a constitutional challenge.
[77] The FACA index incorporates information about the rules restricting to the type of norms subject to constitutional control, the type of norm invoked as support of the constitutional violation, and the timing in which it is possible to initiate the action.
[78] To capture this feature of constitutional review, the FACA index includes an indicator that specifies whether the court of last resort in constitutional issues have original jurisdiction over the cases.

the mandatory effects of the decision, if any, the power to decide beyond the parties' request, as well as internal voting rules for adopting decisions.[79]

I provide evidence for the hypotheses related to power concentration in government using three measurements of the power distribution within and across branches. I look at: 1) the legislative support of the president as a proxy for concentration of power within government (Hypothesis 2a); 2) the number of judfes appointed during the current government as an indicator of the governments' opportunities to align the courts ideologically through the selection and appointment of new justices (Hypothesis 2b); and 3) the concentration of power within the legislature as a proxy for the degree of political bargaining involved in the enactment of a particular policy (Hypothesis 2c). To operationalize these variables, this study uses data from Perez-Liñan et al. (2019) who study the impact of power concentration in the executive on democratic backsliding in Latin America. I use the components of the index of presidential hegemony and re-estimated the measurement to differentiate between executive control over the legislature and the constitutional court. First, to measure the extent of the legislative support of the executive, I re-estimate the weighted index of executive hegemony over the legislature aggregating the percentage of seats directly controlled by president's party and the percentage of seats indirectly controlled by the president's coalition in Congress. Second, I calculate the index of executive hegemony including the percentage of justices that joined the supreme court or constitutional court during the president's term of office and the percentage of justices that joined the court during any government led by the president's party. Finally, to assess the degree of power concentration within the

[79] To compare the levels of consensus required to decide the unconstitutionality of the policy, the FACA index includes indictors that differentiate across courts that adopt their using panels versus *en banc* decisions and that requires simple majorities versus supermajorities.

legislature exclusively, I use Perez-Liñan et al. data (2019) on the effective number of legislative parties in the lower house (enlph) using Laakso and Taagepera formula (1979). Lower enlph indicates greater concentration and high enlph lower concentration.

Control variables

Other institutional characteristics of the environment in which constitutional adjudication take place may also affect the probabilities of judicial intervention in the policymaking process. As mentioned before, the literature has centered on the rules granting judicial autonomy as the main institutional feature affecting judicial assertiveness. I measure courts' formal autonomy using the average scores of Brinks and Blass's ex-ante and ex-post indices (2017). The ex-ante index provides information about the rules that affect the level of influence that political actors have in the nomination and selection process of judges. It aggregates information about the number of institutional veto players, with two multipliers: one that accounts for the collective nature of the veto players (legislature as opposed to the executive) and whether there is a supermajority requirement at any stage that affects a majority of the court. The ex-post index includes information about the level of influence that political actors have to modify the current composition of the court, including the length of judicial terms, the difficulty of removal, and constitutional protections of the number of judges and the judges' salary. The first type of constitutional guarantee makes court packing more difficult and, the second, isolates the courts from financial threats.

The formal distribution of power among the elected branches may also affect the patterns of judicial assertiveness. Rules that increase the executive control over

the policy outcomes decrease the potential influence of diverging policy positions within the legislature. Consequently, courts play a greater institutional role controlling the exercise of executive power, in part substituting the political accountability that a more deliberative legislative policy process would provide (Herron and Randazzo 2003 and Bumin 2017). To control for the president's constitutional powers over legislation, I use Negretto's index (2013). This index provides a measurement for the constitutional capacity of an executive to issue decrees of legislative content without a previous delegation by the legislature.

This study also considers that case characteristics may impact the constitutional courts' willingness to exercise constitutional review. Looking at constitutional cases without making differences across factors that affect the likelihood of unconstitutionality, such as case characteristics, creates problems in the estimations (Scherer 2004). I include three case characteristics. Courts may be more deferent to policies enacted by the sitting government because the current congress retailed against the court responding with court-packing, striping courts' jurisdiction, impeaching judges or affecting courts budgets or judges' salaries (Dahl 1957). To control for this potential effect, I use a binary variable that takes the value of one if the policy under review was enacted by the sitting government and 0 otherwise. I constructed this variable using information of the data in which the policy under review was enacted from the CompLaw database and the years of the executive in office from the V-Dem database.

A second aspect of the case that may affect courts' assertiveness is the type of litigants, in particular, whether the litigant has the political power needed to coordinate sanctions against the court. For example, when the president is the petitioner in a constitutional case, the fear of retaliation may trigger strategic

deference from constitutional courts. As a consequence, it is expected that courts are more willing to concede the petitions political actors in comparison to cases in which the litigants are citizens because they latter lack power to retaliate against the court. However, an alternative incentive to rule unconstitutional policies when citizens are the complaints may be in place. Courts' interests to gain and maintain public support to consolidate their legitimacy may increase the willingness of courts to rule in favor of citizens. To test whether the type of litigant affects judicial assertiveness I use a dummy variable that takes the value of one if the case has been brought before courts by citizens as opposed to political actors.

Third, characteristics of the policy under review may also matter in explaining patterns of unconstitutionality. Courts may be more deferent to national policies, those enacted by Congress and the president, in comparison to regional governments. National actors may retaliate against the court for invalidating policies while local governments do not have such influence (Tiede and Ponce 2014). This characteristic is operationalized as a dummy variable that indicates whether the policy under review has been enacted by the president or congress rather than by regional authorities. Finally, I include a dummy variable that informs whether the decision was adopted in a concrete or an abstract case. These variables are coded using original data from the CompLaw database. See Appendix 6 for the descriptive statistics of the variables described.

Results and discussion

Results estimating the probability of a decision declaring the unconstitutionality of a policy using multilevel logistic regression appear in Table 1 below. The coefficient estimates are provided in the table with robust standard errors

in parentheses. The results generally confirm the hypothesized effect of the institutional and political context on judicial assertiveness as well as the ability of institutions to mitigate judicial deference to government as a consequence of power concentration in government. In doing so, I provide some evidence about how rules broadening the demand and supply for constitutional justice increase the courts' ability to influence the public policy process. Models 1 through 3 show that formal authority is correlated with higher probabilities of unconstitutionality across different case types in accordance with expectations posited in Hypothesis 1. Model 1 estimates the effect of formal authority on judicial assertiveness including all cases of constitutional review.[80] This relation is further explored in Model 2 and 3 that distinguish between cases of abstract and concrete review respectively. Differentiating the types of constitutional review is important because it shows that formal authority affects courts' behavior across instruments of constitutional review, and it is not limited to abstract review which arguably has broader political implications.

Table 1 also provides evidence in support of the positive effect of formal autonomy on judicial assertiveness. The rules isolating constitutional courts from the influence of political actors are associated with an increase in the probabilities of courts to strike down policies. Yet, in comparison to formal authority, the effect of formal autonomy on courts' assertiveness is smaller.

[80] Given the low number of observations for Dominican Republic and Brazil, I re-estimated the model and the effects hold.

Table 4-1. Institutional and contextual influences on courts' assertiveness coefficients

	Model 1 Full sample	Model 2 Abstract cases	Model 3 Concrete cases	Model 4 Interaction in full sample
CC Formal authority	1.626***	0.929**	1.820***	-0.945
	(0.556)	(0.412)	(0.548)	(1.429)
Political context				
Executive control over the legislature	-3.505***	-2.290*	-2.652***	-5.386***
	(0.532)	(1.329)	(0.462)	(1.677)
Executive control over the cc	-0.0254	1.032***	-0.305**	-0.666***
	(0.0710)	(0.211)	(0.155)	(0.181)
Effective number of political parties	-1.250***	-0.819*	-0.951***	-0.651***
	(0.126)	(0.456)	(0.311)	(0.182)
CC formal authority * Executive control over the legislature				6.008
				(3.919)
CC Formal authority * Executive control over the cc				1.428***
				(0.380)
Other formal inter-branch relations				
Executive constitutional powers over legislation	0.0354***	0.0355***	0.0436***	0.0293***
	(0.00568)	(0.0130)	(0.0112)	(0.00554)
CC formal Autonomy	3.731***	4.309***	6.346***	6.314***
	(1.139)	(1.498)	(0.739)	(1.041)
Case characteristics				

Policy enacted by the sitting government	0.332	0.424	0.615*	0.364
	(0.244)	(0.467)	(0.347)	(0.243)
Citizens complaint	-0.211	0.473*	-0.844	-0.242
	(0.484)	(0.283)	(0.783)	(0.541)
National Policy	0.300	-1.513***	0.789**	0.313
	(0.239)	(0.293)	(0.349)	(0.239)
Executive Policy	1.049***	0.728	0.803**	1.073***
	(0.406)	(0.511)	(0.389)	(0.415)
Concrete	0.379			0.375
	(0.529)			(0.529)
Constant	-1.248	-2.220*	-4.335***	-3.968***
	(1.163)	(1.240)	(0.952)	(1.183)
Observations	3,152	1,755	1,397	3,152
Number of groups	10	9	10	10
AIC	3256.371	1467.826	1657.486	3253.909
BIC	3310.873	1511.588	1704.665	3308.411
Log Likelihood	-1619.185	-725.913	-819.7429	-1617.955

Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Figure 1 displays the estimations from Model 1 in Table 1 rescaled by the standard deviations, showing that formal authority has a greater impact on increasing courts assertiveness than rules related to courts' autonomy.[81] Further, these results suggest that even though institutional approaches to judicial behavior have been focused mainly on the latter, more attention need to be paid to other features of the institutional environment in which courts operate.

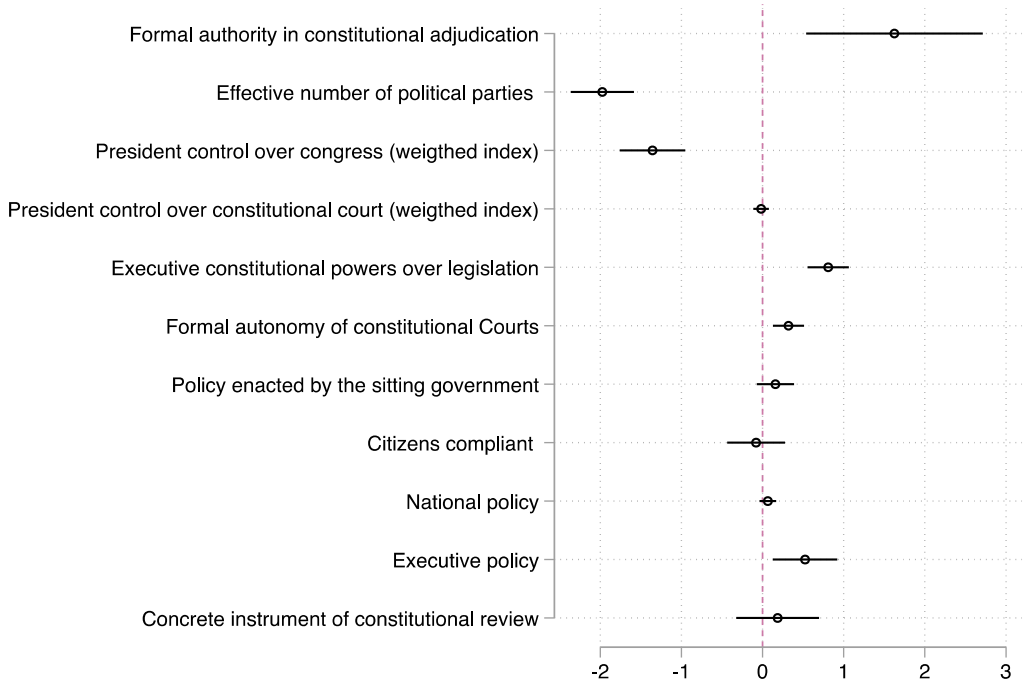


Figure 4-1.Marginal effects rescaled by the standard deviations of the predictors.

Furthermore, in accordance to expectations formulated in Hypothesis 2a, Model 1 shows that constitutional courts are more assertive as the executive control of the legislature decreases, and in doing so, it provides evidence of courts' strategic deference. However, contrary to the expectation stated in Hypothesis 2b, the president's control over the constitutional court is statistically insignificant. Two

[81] To compare the substantive effects of the different covariates in model 1, I present the effects of the covariates in the model rescaled by their standard deviations.

potential factors may explain this result. It may be that the control of the president over the court is measured by party identification is misleading in weak partisan systems present in some of the countries included in the sample. Also, the results may reflect the differences in the appointment mechanisms. For example, the degree to which political actors, such as the legislature, and non-political actors such as other courts, judicial councils, and professional organizations, intervene in judicial selections, therefore in the ability of the president to influence the court.

Also, the results show that as the executive control over the legislature increases the court is less likely to declare a policy unconstitutional. In support of Hypothesis 2c, the results also show that greater number of legislative political parties are associated with greater probabilities of decisions declaring a policy unconstitutional. This finding is significant through all models.

In addition, Model 4 estimates the interaction between formal authority and the political context to analyze the moderating effect of formal authority as hypothesized in H.3a and H.3b. Figure 1 shows the effect of executive control over the legislature by moving this continuous variable from 1.5 standard deviations below the mean to 1.5 standard deviation above the mean. This figure shows that at high level of the FACA index, government control over the legislature does not affect the chances of string down a policy. At low and medium levels of the FACA index, the probability that a court will strike down a policy is much higher when the president has weaker control over the legislature. This finding supports the moderating ability of the formal authority stated in the hypothesis H3a.

The interaction term for the effect of executive control over the constitutional court at 1.5 standard deviations above and below the mean is positive and statistically significant. Figure 2 shows that the probability that the court will strike down a policy

when the government has high control over the court is only significant at high levels of FAC, whereas the probability that the court will strike down a policy when the government has low control over the court is slightly lower at high levels of FACA. These results show some support for hypothesis H3b, although, there is no statistical difference between high and low executive control over the court across the scale of formal authority. As previously stated, the results of this interaction should be interpreted with caution given the potential measurement error of the influence of the executive on the court.

Additional evidence

I argue that rules related to formal authority in constitutional adjudication have a joint effect on courts' assertiveness. Modern scholarship on constitutional review has pointed out that changes in one aspect of constitutional review may trigger important effects on courts' rulings (Wilson 2011). Examining individual features of constitutional review is however problematic because these rules are often related to each other as they aim to deal with particular problems. For example, centralized constitutional review in specialized court aims to provide a more coherent interpretation of the constitutional text as opposed to uncoordinated and conflicting jurisprudence from different lower courts.

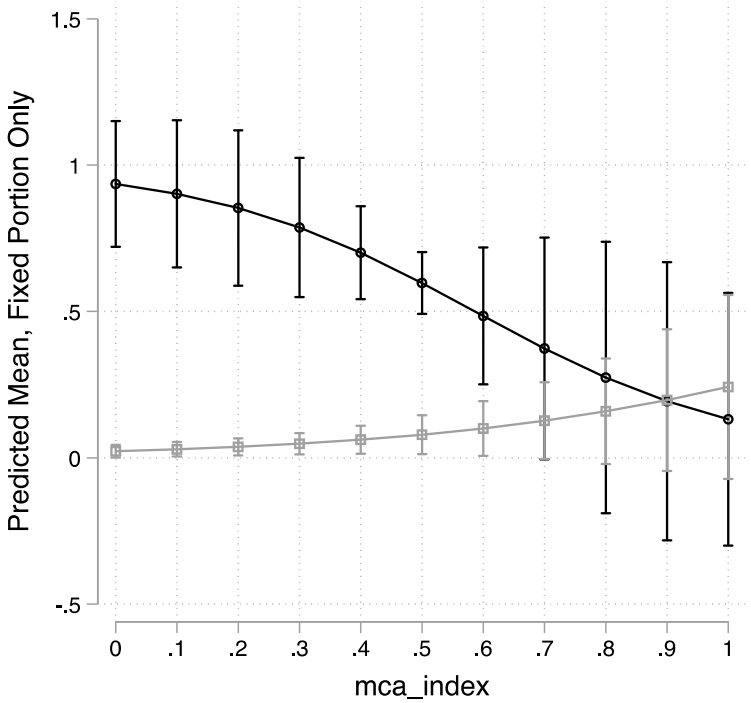


Figure 4-2. Predicted probabilities (with 95% confidence intervals) of striking a policy for strong and week president control over the legislature conditioned on courts' formal authority.

Note: The black line indicates the estimated for a value of the index of executive control over the legislature set 1.5 standard deviation below the mean across the FACA index. The grey line shows these probabilities for this index set 1.5 standard deviation above the mean.

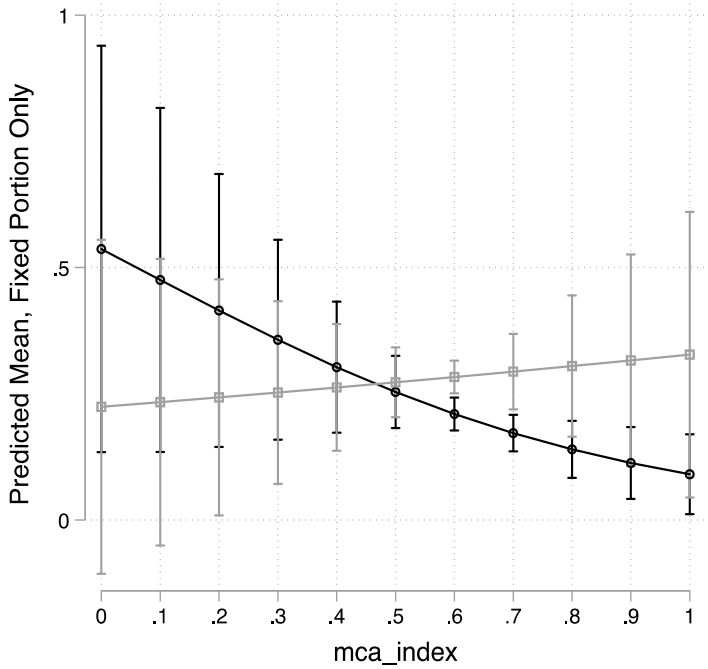


Figure 4-3. Predicted probabilities (with 95% confidence intervals) of striking a policy for strong and week president control over the court conditioned on courts' formal authority.

Note: The black line indicates the estimated for a value of the index of presidential control over the constitutional court set 1.5 standard deviation below the mean across the FACA index. The grey line shows these probabilities for this index set 1.5 standard deviation above the mean.

Nonetheless, this choice often creates courts with large dockets which may threaten their timely response. To deal with this issue, some systems grant courts control over their dockets, while others may choose to create multiple panels within the court to deal more efficiently with overloads. To determine the effect of centralization on judicial assertiveness, it is necessary to compare the set of rules that shape the operation of constitutional courts, meaning accounting for the effect of docket control and panels v. en banc decisions. The theoretical implications of the relationship between different aspects of the institutional design of constitutional review suggest that assessments of its potential effect on judicial assertiveness should be tested using a measurement that compares them collectively.

To provide further evidence supporting this relationship, I re-estimate Model 1 in Table 1 using the index of formal authority disaggregated by rules affecting the demand and the supply of constitutional justice. I expect that each of these indexes has a positive effect on courts' assertiveness. Also, I expect that the independent effects of such indexes reinforce each other; therefore, higher authority affecting the demand for constitutional review increases the probability of decisions declaring the unconstitutionality of a policy when the court is granted with greater formal authority to respond to such demand.

Table 2 shows the results of these estimations. Models 1a and 1b report the effects of the courts' authority disaggregating aspects related to the demand and supply for constitutional justice respectively. Model 1c shows the effect of the terms controlling for each other and model 1d shows the interactive effect between these two dimensions of formal authority. Model 1a shows a positive and statistically significant effect for the formal authority related to the rules shaping the demand side of constitutional review as

hypothesized in this chapter while model 1b shows a negative and significant effect for the rules related to the supply of constitutional review at odds with the expectations. Model 1c, however, provides some evidence for the claim that the attributes of courts formal authority should be analyzed conjunctively. It shows that when controlling for each other their independent effect is statistically insignificant, but according to the Wald test, their joint effect is significant and supports the findings presented in the previous section. In sum, these results support the argument in favor of examining the effect of formal authority jointly. About the potential reinforcing effect between the supply and demand side of formal authority, the insignificance of all terms in model 1d suggests that the components of formal authorities have an additive and joint effect rather than an interactive effect.

Conclusions

Does granting constitutional courts greater formal authority in constitutional adjudication matter? To answer this question, I used my aggregated index of formal authority, presented in chapter 2, and analyzed its relation to patterns of judicial assertiveness in nine Latin American Court in 2003. The results suggest that formal authority is a major driver of the courts' assertiveness. The evidence shows that an institutional environment allowing broad accessibility and low barriers of non-justiciability for constitutional justice, as well as low requirements for internal consensus to rule policies as unconstitutional, increases the probabilities of judicial influence on policy.

Table 4-2. Courts' Assertiveness in Latin America coefficients

	Model 1a	Model 1b	Model 1c	Model 1d
CC Formal authority (demand)	1.368***		0.743	-1.413
	(0.467)		(0.456)	(2.653)
CC Formal authority (supply)		-2.076***	-1.226	-4.498
		(0.799)	(0.939)	(3.744)
CC Formal authority demand X supply				3.258
				(4.220)
enph	-1.161***	-1.195***	-1.291***	-1.721***
	(0.105)	(0.119)	(0.148)	(0.574)
Executive control over the legislature	-3.573***	-2.839***	-3.438***	-3.606***
	(0.550)	(0.288)	(0.446)	(0.476)
Executive control over the cc	-0.0295	0.150	0.00367	0.0794
	(0.0651)	(0.127)	(0.0936)	(0.0540)
Executive constitutional powers over legislation	0.0265***	0.0467***	0.0402***	0.0723*
	(0.00354)	(0.0112)	(0.0113)	(0.0376)
CC formal Autonomy	3.991***	3.252***	3.544***	3.882***
	(1.313)	(1.075)	(0.970)	(0.840)
Policy enacted by the sitting government	0.323	0.340	0.337	0.350
	(0.246)	(0.247)	(0.244)	(0.245)
Citizens complaint	-0.229	-0.157	-0.191	-0.226
	(0.474)	(0.518)	(0.511)	(0.542)
National Policy	0.302	0.288	0.297	0.301
	(0.239)	(0.239)	(0.240)	(0.240)
Executive Policy	1.048***	1.042***	1.048***	1.057**
	(0.406)	(0.403)	(0.406)	(0.412)
Concrete	0.378	0.355	0.375	0.371
	(0.528)	(0.525)	(0.527)	(0.531)
Constant	-1.093	-0.342	-0.296	1.455
	(1.138)	(1.125)	(0.797)	(3.025)
Observations	3,152	3,152	3,152	3,152
Number of groups	10	10	10	10
AIC	3259.706	3257.414	3258.144	3255.01
BIC	3320.264	3311.916	3318.702	3309.512
Log Likelihood	-1619.853	-1619.707	-1619.072	-1618.505

Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Although limited to a small sample, these findings challenge the traditional concerns about judicial institutions as parchment barriers under power concentration in government. It provides some evidence supporting that the negative impact of concentration of power on judicial assertiveness is muted when the institutional setting broadened the demand and the supply for constitutional justice. Further research that includes a larger set of countries would help clarify how the institutional and political environment and the distribution of power within and across the elected branches affect the constitutional courts' willingness to influence policy. The use of cross-sectional data limits our ability to make causal inferences about the capacity of institutions in shaping judicial behavior. Moreover, further studies are needed to identify the set of institutional features that facilitate effective judicial intervention in the public policy process.

This approach makes a number of contributions to the literature. It compares systems of constitutional adjudication with a new fine-grained measurement of formal authority applied to the outcomes of actual cases. This study suggests that institutions, different from those dealing with judicial independence, matter in explaining constitutional adjudication. The analysis also shows how these institutions interact with the political context in explaining why constitutional justice is relatively dormant in some countries and more vibrant in others. While more recent analyses of the constraints of judicial assertiveness have focused on the role of constitutional courts in populist governments, further examination on how power concentration in government affects judicial assertiveness. A broader comparison of institutional environments seems to be a necessary step to understand how the specificities of popular governments jeopardize the

effectiveness of constitutional review as an instrument of democratic consolidation and maintenance.

Chapter 5. Conclusions

At the beginning of this dissertation, I asked two questions: what combination of rules makes courts more likely to act assertively against the elected branches? What combination of rules allows courts to be assertive when there is concentration of power in government? This dissertation examines the joint effects of institutional features of formal authority in constitutional adjudication related to who has access to initiate constitutional claims and related to what, when, and how those claims are discussed in courts. The dissertation complements current studies of judicial behavior that have focused almost exclusively in rules isolating judicial decision-making from the influence of the elected political actors: formal autonomy. I provide evidence suggesting that both sets of rules increase judicial assertiveness.

Studies on the institutional variance of courts' authority are in their nascent stage. Brinks and Blass (2018) analyze the factors determining the origin of such variance, yet, they and other scholars overlook their effect on judicial behavior or analyze rules in isolation of one another. This is mainly due to the limited measures for discerning among rules shaping courts' autonomy and authority.[82] The contribution of this dissertation to the analysis of the behavioral consequences of such rules is twofold. In chapter 2, I provide a new index of formal authority that improves existing measurements. It provides a more appropriate method of aggregation and it incorporates within-country variance among instruments of constitutional review. In chapter 3, I re-examine how the concentration of power in government decreases judicial assertiveness, a dominant

[82] For an exception see Rios-Figueroa 2012; Brinks and Blass 2017.

argument in the literature. I argue that three causal mechanisms, previously argued in the literature, are simultaneously activated. The executive control over the legislature and the extent to which members of the constitutional court share its preferences increases the probabilities of decisions declaring the unconstitutionality of a policy. Also, I find that the concentration of power within the legislature actually increases judicial assertiveness. In chapter 4, I provide evidence for the positive association between formal authority and judicial assertiveness as well as the moderating effect of these institutions on the power concentration in government as a trigger for courts' deference to government.

This comparative analysis of the formal institutions of constitutional review has two broader implications to other social sciences. First, it uses an interdisciplinary approach and methodological pluralism to propose a common language for comparing systems of constitutional justice. It combines legal knowledge with a measurement strategy that maps the differences and similarities across the procedures in which courts hear constitutional challenges. As a result, it bridges the thick knowledge of comparative constitutional analysis, with the methodological approach of political science, achieving a systematic account of the role of constitutional courts, using controlled comparisons as fundamental components of causal inferences.

Second, it addresses questions related to how the institutional design of constitutional review targets and achieves specific goals of democratic constitutionalism, such as separation of powers, limited government, the rule of law, and access to justice. This, in turn, contributes to identifying combinations of judicial institutions that generate good governance and enhance human development in Latin America. The dissertation also informs reform processes that aim to achieve broader goals like the consolidation of

democracies, the guarantee of human rights, and the resolution of social conflicts through democratic means. In the midst of populist governments, understanding judicial institutions as tools serving to enforce civil and social-economic rights helps to tailor institutional changes aiming to manage pressing issues in the region such as poverty, inequality, conflicts, housing, education, healthcare, and environment. My focus on the rules related to the access and scope of constitutional justice facilitates national and international rights advocacy to choose the most suitable legal procedures to achieve policy change. Knowing how institutional features of constitutional review moderate the effect of governmental political concentration on judicial assertiveness contributes to overcoming coordination problems among national and transnational interest groups, especially, in an era in which legal strategies to promote and enforce human rights often surpass the geographic borders of a country.

Key findings

In chapter 2, I describe the limitations of current measurements of formal authority and provide a new approach to compare constitutional adjudication. The measurement aims to determine the extent to which those rules define the demand for constitutional justice, as well as the scope of the jurisdiction granted to courts to settle constitutional conflicts: the supply side of constitutional justice. Chapter 2 closely looks at the different procedures in which constitutional justice is adjudicated in 18 Latin America from 2003 to 2016 and identifies institutional variances that have not been captured by current measurements of formal authority. The result of this analysis is the FACA index which links legal studies focused on how procedures are relevant in explaining legal decision-

making to the literature on judicial assertiveness. This index incorporates variance across instruments of constitutional review within countries, a level of analysis that has escaped political scientists who study judicial behavior. Several conclusions emerge. First, given the relationship among institutional choices aggregated in the measurement, it is methodologically and theoretically relevant to analyze the joint effects of rules shaping courts' authority, rather than their individual effect. Similar to Melton and Ginsburg's (2014) findings about the effects of formal independence on de facto independence, I provide evidence that rules determining courts' authority do not work in isolation from each other. Consequently, future behavioral research related to courts' assertiveness might focus on determining how particular combinations of rules are more likely to provide institutional incentives for judicial intervention in the policymaking process.

Second, unlike the creation of current measurements, I use Multiple Correspondence Analysis to estimate the index of formal authority in constitutional adjudication (FACA). This method of data reduction allows the variance in the sample to inform the model about the relationship among different components and determines the influence of each component into the final score. The evidence provided suggests that scholars should question assumptions that assert that all indicators contribute equally to constitutional justice. On the contrary, as discussed in Appendix 1, some rules are better at differentiating systems of constitutional review and as such might have a larger impact on the final measurement and its impact.

The next two chapters explore both the effect of formal authority and its moderating effect on the association between concentrated power in government and low judicial assertiveness, a dominant argument in the literature. To that end, this dissertation

includes two separate empirical analyses. In chapter 3, I present a case study of the Peruvian Constitutional Tribunal. Based on arguments presented in the literature, I test the simultaneous effect of three different causal paths in which power concentration in government affects judicial behavior. I exploit the institutional design of this Court as well as an exogenous shock,[83] to assess how different configurations of power within and across elected branches contribute to explaining patterns of judicial assertiveness in constitutional cases. I find support for the existence of multiple causal paths linking power concentration in government and judicial assertiveness. The executive control over the legislature, as well as the extent to which judges share partisan identity within the president, are associated with lower probabilities of decisions declaring the unconstitutionality of policies, even after controlling for each other. It suggests that courts are deferent to these types of power concentration as a manifestation of the fear to sanction that concentration of power between the elected branches create, and the ability of the president to align the ideological preferences of the bench. At the same time, however, greater power concentration within the legislature, measured as the effective number of legislative parties, is associated with a higher rate of unconstitutionality. This is particularly relevant to understand judicial decision-making in multiparty and low institutionalized party systems, such as in Peru.

Finally, in chapter 4, I provide evidence for the positive association of the formal authority in constitutional review with courts' assertiveness. I use a sample of high

[83] In 1999, a decision of the Interamerican Court altered the ideological composition of the Tribunal by ordering the reintegration of three justices of the Tribunal previously impeached by the Congressional support of president Fujimori. Peru's constitutional court's design required that legislators in power choose judges who would serve concurrent terms with them. Re-integrating these judges into the court ensured that not all judges were chosen by the legislature concurrently.

courts' decisions in constitutional review cases adopted in 2003 from nine Latin American courts[84] and the FACA index estimated in chapter 2 as the main independent variable, to test whether formal authority matters in explaining judicial influence on policy. I show that formal authority has a greater impact on the likelihood of judicial intervention on policy outcomes than other institutional aspects such as formal autonomy and the presidents' power over legislation. I also find that formal authority moderates the negative effect of power concentration in power on courts assertiveness. The results, however, are interpreted in light of the limitations imposed by the sample of countries used and the need for further research.

In sum, the findings suggest that courts are more assertive when they are granted greater formal authority. Moreover, courts with greater formal authority are less impacted by the political context. Particularly, the findings suggest that the power concentration in government does not generates courts' deference to the government policy preferences when formal authority is high, but it does when formal authority is low.

Future research

Institutional variance in the rules defining courts' authority call for a more engaged discussion about the definition and operationalization of formal authority. While this dissertation argues against the inclusion of some indicators aggregated in current measurements (i.e., the list of the bill of rights in Brinks and Blass 2017), a different conceptualization of the set of formal rules, as suggested by Da Silva (2019), may be

[84] The use of case-level analysis improves the researcher ability to address causality linking formal rules with judicial behavior because it allows to control for case characteristics.

relevant depending on the research questions. In that sense, rather than building towards a consensus upon a unique measurement that captures all variance in the design of constitutional review, the field might focus on identifying how subsets of these rules serve, conceptually, to examine different phenomena. If this is the case, this study encourages a vibrant dialogue across institutional approaches looking at constitutional review that discusses more systematically what rules are relevant to what outcomes. Approaching this debate at the early stages of empirical studies assessing the causes and effects of such institutional variation may avoid conceptual ambiguity and the theoretical and practical problems that arise from it.

Moreover, the FACA index offers the opportunity to refine and validate the sub-set of rules defining the demand and supply for constitutional justice. For example, the idea that a subset of rules determining the type of cases that courts hear (demand) and courts' discretion to respond to constitutional challenges (supply) can be used to analyze other behaviors relevant to constitutional justice. One could ask whether rules affecting the demand in fact explain a larger number of cases submitted to the constitutional jurisdiction, as well as whether rules related to supply decrease decisions of inadmissibility.

As noted, more research will be necessary to overcome the limitations related to potential selection bias in the sample. A natural extension of this dissertation is testing the hypothesized effects of formal rules on judicial behavior using decisions from other constitutional courts. In chapter 3, I find that granting courts greater formal autonomy and authority is positively associated with courts' assertiveness. These results suggest

that mixed results in the literature about formal autonomy[85] may be a result of not considering the variation in courts' formal authority. The research could thus be extended to achieve greater statistical evidence of important causal links.

Other potential extensions of this research include further explorations about the content and direction of the decisions. While judicial assertiveness indicates the willingness of courts to influence policy, the impact of those decisions in the consolidation of rights can only be examined by analyzing the content of the decision and its direction —i.e., whether decisions expand or limit constitutional rights, will allow further explorations of the causal links between rules and judicial intervention in policy. Looking at the content and direction of the decision, for example, will allow to explore questions related to the ability of courts to protect rights of underrepresented sectors of society. Moreover, in-depth case analyses focused on specific rights may explore questions related to how rules of formal authority affect litigants' strategies.

[85] See, for example, Ríos-Figueroa and Staton (2012); Melton and Ginsburg (2014) that analyzed the effect of *de jure* and *de facto* independence; as well as Herron and Randazzo 2003 looking at judicial assertiveness.

Appendix 1.

Comparison of FACA index with existing measures of formal judicial authority

In this appendix I provide a brief summary of the current measures of formal authority and discuss the inclusion and exclusion of the indicators used in the construction of the proposed FACA index. I compare two cross-national measures of formal judicial authority: Ríos-Figueroa (2012) and Brinks and Blass (2017). Both measures are restricted to Latin America.

While these measures are theoretically related to the dimensions conceptualized and measured in the FACA index, Ríos-Figueroa's (2012) and Brinks and Blass (2017)'s indices use different indicators and emphasize different institutional factors. These existing measurements represent an incomplete picture of the systems of constitutional adjudication because they do not incorporate the full range of instruments use to bring a complaint. Both rely on the broad classification of abstract and concrete instruments to then measure the accessibility, scope, and decisiveness of courts, ignoring that each instrument may provide different degrees of courts' authority.[86] Moreover, they assume that each indicator[87] and each dimension is equally informative about the latent concept of formal authority.[88] These assumptions are particularly problematic because studies of

[86] This is partially because identifying the rules of those instruments often involves the study of not only constitutional norms but also, norms lower in the legal hierarchy such as laws and regulations. As a result, legal dispersion and the absence of available English translations make it more challenging to pinpoint, code, and classify original sources.

[87] Note that in this paper, I refer to aggregated measures of formal judicial authority as 'indices,' while 'indicators' refer to the specific rules operationalizing the three dimensions of the formal judicial authority.

[88] Brinks and Blass (2017) includes penalties and multipliers in their aggregation method that although have a theoretical justification, the magnitude applied has not empirical support.

courts' formal authority are an underdeveloped area in which previous studies have little theoretical or empirical evidence specifying what rules contribute to increasing courts formal authority and how they are related to each other.

To facilitate the comparability across the indicators aggregated in existing measurements of courts' formal authority in constitutional adjudication, Table 1 presents a list of the indicators classified according to the three dimensions identified by Brinks and Blass (2017): courts' accessibility, scope, and decisive capacity.

New Indicators:

Notice that, in comparison with previous measures, the most important advantages of the FACA index is the aggregation method and the unit of analysis from which the comparison is drawn from. But in addition to those modifications, the FACA index includes other institutional features than have been previously ignored by scholars in the measurement of formal authority.

Docket Control
Effects of the decision
Ex officio discretion
Limit to policy
Limit to ground
Limits in timing related to the plaintiff time to challenge a policy
Panel v. *en banc* decisions

Table A1-1. Comparison of the indicators aggregated the in existing indices of formal authority and FACA

Dimension	Ríos-Figueroa	Brinks and Blass	FACA index
Accessibility to constitutional review	Legal Standing	Legal Standing *	Legal Standing
	-	-	Docket Control
	Centralization	-	Centralization
Scope of Courts' jurisdiction	Type	Type *	Type
	Scope of the decision	Scope of the decision *	Scope of the decision
	-	-	Effects of the decision
	-	-	*Ex officio* discretion
	-	Jurisdictional reach= No. civil and political rights + (No. economic, social and cultural rights *1.5)	Jurisdictional reach= Limit to policy
	-	-	Limit to grounds
	Limit in timing: A priori v. A posteriori		Limit in timing: *A priori* v. *A posteriori* + Prescription
Court Decisive Capacity		Courts majorities to decide	Courts majorities to decide
			Panel v. *en banc* decisions

Note: * These aspects are combined in the *standeffect* variable (an ordinal ranking with range of 1–5)

Exclusion of indicators incorporated in the existing index of formal authority:

One of the most important differences in the selection of indicators is the exclusion of the number of constitutional rights as proxies for the courts' jurisdictional reach (Brinks and Blass 2017).[89] Perhaps the most important argument for looking beyond a list of rights to measure the scope of review is the fact that courts often have the ability to derive, deduce, or create constitutional protections to rights not included in their country's constitution (Brewer-Carías 2011; Sánchez 2002). Courts' ability has been expressly included in the constitutional text. In Latin America, for example Canova-Gonzalez (2012, 68) lists the constitutional provisions that open the justiciability of personal rights beyond the constitutional text: Argentina (Art. 33); Bolivia (Art. 35), Brazil (Art. 5 LXXVII), Colombia (Art. 94), Costa Rica (Art 74), Ecuador (Art. 22), El Salvador in regards to labor rights (Art. 52), Guatemala (Art. 44), Honduras (Art. 63), Nicaragua (Art. 46), Paraguay (Art. 45), Peru (Art. 3), Dominican Republic (Art. 10), Uruguay (Art. 72), and Venezuela (Art. 22). Chile and Panama are the regional exception. The existence of such provisions makes it inappropriate the use of constitutional rights as a criterion to compare courts jurisdictional reach.

A second argument against using a list of constitutional rights to compare the scope of judicial intervention across countries is the fact that it assumes that other provisions of the constitutions are not justiciable. This assumption does not always hold, in fact, constitutional provision that are not related to rights can also serve as a ground to

[89] For an opposite view see Albert (1977).

courts revision. For example, in instruments that review the formation of the law, rights related to the separation of power are especially important.

On the other hand, Brinks and Blass (2017) include the courts' ancillary powers as an indicator of formal judicial authority. But courts' exercise of such roles is more likely to affect courts autonomy than authority. Courts in charge of presidential impeachments or electing other public officials, for example, shape the inter-branch relations of the judiciary with the elected branches of power, but it not affects directly courts' influence on policy through constitutional review.

Although not included in previous measures, rules affecting how constitutional law is interpreted can also determine the scope of constitutional law and constitutional adjudication (Grimm 2005). The duty to protect refers to the ability of courts to declare the unconstitutionality of omissions in the legislation. Meaning that constitutional courts not only a negative power to strike out policies but that in fact courts can require actions from the government. This element was not included because it is not clear that the source of legitimacy for courts to use this rule of interpretation is purely formal. In other words, there are countries such as Brazil that have a specific instrument for reviewing possible constitutional via omission "ação de inconstitucionalidade por omissâo", or Ecuador where the constitution expressly states the power of courts in cases of government omissions (see art. 436 paragraph 2). However, there are other countries such Colombia in which this type of review is exerted by the court but there is not a direct rule granting such jurisdiction. Grimm (2005) also considers the doctrine of the radiating effect that refers to the possibility of using constitutional law to solve conflicts between

private parties. I have incorporated this element by classifying the instruments of review that have been restricted the grounds for constitutional challenge.

Appendix 2.

Data Collection Process

This appendix describes the data collection process, including the use of original and secondary sources and elaborates about the advantages of this approach in terms of transparency and replicability.

The first step in the construction of the data aggregated in the FACA index was to identify all instruments of constitutional review Latin America from 2003 to 2017. For the identification of such instruments I looked the following texts in their original language:

> Constitutions: I often refer to specific sections within the constitutions that list the different judicial mechanisms designed to protect the constitution and to the constitutional articles related to the functions of high courts.
>
> Legal development: This includes three types of documents, the organic laws of the judiciary, the organic laws for constitutional review, and courts' internal regulations.
>
> Legal scholarship: I use specialized literature to cross-examine the identification of the instruments. Particularly, I use the description and classification of the different procedures for constitutional review to identify the instances in which the procedural rules create differences that affect one or more of the indicators selected. In such cases, the instrument was subcategorized using legal scholarship as support.

I also cross-examined changes across time by looking at the Comparative Constitution Project (Ginsburg, Elkins, and Melton). The full dataset, reporting the

coding of each instrument by country-year across the indicators, is available upon request.

Table A2-1 Summary of the codebook of the instruments included in the FACA index

Variable name	Description
Country	Country name
year	year
last_const_reform	year of the last constitutional reform
Constitution	Dummy variable that takes the value of 1 if the micro-device is regulated in the Dummy variable that indicates whether the instrument has been incorporate in the constitution and 0 otherwise
Con_article	Report the number of the constitutional article that regulate the instrument
legal development	Record the specific legislation regulating the instrument
name of the court	Name of the court of last resort for the specific instrument
court_last_resort	Dummy variable that takes the value of 1 if the court that have competence to decide the case is the court of last resort in constitutional issues and 0 otherwise.
instrumento	Name of the instrument in Spanish
instrument	Name of the instrument in English
description	Description of the general objective of the protection seek by the instrument
action or incident	dummy variable that takes the value of 1 if the instrument is considered an action, meaning an independent process, or 0 if it is considered an incident, meaning that it takes place within a process that has a different purpose than the constitutional review
type	Dummy variable that takes the value of 1 if the instrument is abstract review or 0 if it is considered concrete review
timing	Dummy variable that takes the value of 1 if the micro-device is a priori or 0 if it is reviewed a posteriori
comments_timing	Detailed the legislation according to which the variable was coded

access_plaintiff	Who has standing to initiate challenge to the constitutionality 0. Automatic 1. elected actor 2.other political actors 3. Citizens + standing in a case and controversy 4. Citizens
comments_access_plaintiff	Detailed the legislation according to which the variable was coded
access_docketcontrol	Dummy variable that takes the value of 1 if court of last resort has discretion over the cases to decide or 0 otherwise
comments_docketcontrol	Detailed the legislation according to which the variable was coded
access_uniqueinstance	Dummy variable that takes the value of 1 if court of last resort has original jurisdiction over the cases or 0 otherwise
comments_uniqueinstance	Detailed the legislation according to which the variable was coded.
scope_decisioneffect	Dummy variable that takes the value of 1 if decision has erga omnes effects or 0 if the decision has inter-partes effects
scope_mandatory	Dummy variable that takes the value of 1 if the decision has mandatory effects or 0 if the decision is a recommendation
comments_scope_ mandatory	Detailed the legislation according to which the variable was coded
scope_discretion	Dummy variable that takes the value of 1 if the court can decide beyond the plaintiff request and arguments or 0 otherwise
comments_scope_discretion	Detailed the legislation according to which the variable was coded
scope_omision	Dummy variable that takes the value of 1 if the instrument can be used to challenge the constitutionality of a legislative or administrative omission or 0 otherwise
comments_scope_omision	Detailed the legislation according to which the variable was coded
limit_typeoflaw	Dummy variable that takes the value of 1 if there is expressed exclusion to the type of law that can be subject of the constitutional review
comments_limit_typeoflaw	Detailed the legislation according to which the variable was coded.

limit_violationinvoque	Dummy variable that takes the value of 1 if there are restrictions to the type of rights protected. For example, if there is express reference that the instrument protects certain constitutional rights or if it protects rights prescribed in international treaties and laws.
comments_limit_violationinvoque	Detailed the legislation according to which the variable was coded.
limit_timing	Dummy variable that takes the value of 1 if the instrument prescribes and 0 if there is not expressed mention.
comments_limit_timing	Detailed the legislation according to which the variable was coded
decisiveness_majdum	Dummy variable that takes the value of 1 if constitutional court needs simple majority, and takes the value of 0 otherwise
decisiveness_maj	Continuous variable numerator the min number of votes needed to declare the unconstitutionality and the denominator the number of judges
comment_maj	Detailed the legislation according to which the variable was coded.
decisiveness_courtsize	Dummy variable that takes the value of 1 if constitutional court takes decision en banc, and takes the value of 0 when decide in panels

Table A2-2 . Inventory of constitutions and their amendments, and legal development of the instruments by country.

Country	Constitution	Legal Development
Argentina	Constitution 1983, reformed 1994	Law 16.986/1966
		Law 25.488/2001
		Law 23.098/1984
		Law 2566/2000
		Law 48/1863
		Law 23.774/1990
		Law 23.098/1984
		Law 26.183/2006
		Ley 25.326/2000
Bolivia	Constitution 2009	Law 254/2012
		Law 27/2010
	Constitution 1967, reformed 1994	Law 1.836/1998
Brazil	Constitution 1988	Law 9868/1999
		Law 4717/1965
		Law 9507/1997
		Law 9882/1999
		Resolution C-427/2010
Chile	Constitution 1980, reformed 2005	Law 17997/1981
		Law 20381/2009
Colombia	Constitution 1991	Decree 2067/1991
		Decree 1834/2015
		Law 1581/2012
		Decree2591/1991
		Law 397/1997

		Law 472/1998 Law 1095/2006 Acuerdo 5/992, reformed 01/1995, 01/ 1996, 01/1997, 01/ 1999, 01/ 2000, 01/2001, 01/ 2004, 01/2007, 02/2007, 01/ 2008, 01/2010, 01/ 2015, and 2/ 2015 Constitutional Court
Costa Rica	Constitution 1949, reformed 1989	Law 7135/1989 Law 9003/2011
Dominican Republic	Constitution 2015	Law 5353/1914
	Constitution 2010	Law 156/1997
	Constitution 2002	Law 437/2006 Law 137/2011 Internal regulation Constitutional Tribunal/2014
Ecuador	Constitution 1998	
	Constitution 2008	Internal regulation Constitutional Court 3/2015 Internal regulation Constitutional Court 5/2015 Law of Constitutional Control, published in the Official Gazette No. 99 of July 2 of 1997. Organic Law of Jurisdictional Guarantees and Constitutional Control published in the Official Gazette No.52 of October 22, 2009 Resolution of the Supreme Court of Justice, promulgated in the Official Gazette No. 378 of July 27, 2001. Resolution s of the Supreme Court of Justice, published in the Official Gazette No.559 of April 19, 2002. Resolution of the Constitutional Court published in the Official Gazette No. 246 of August 2, 1999. Resolution 262/2001-TP of the Constitutional Court, “Rules of Procedure of Records in the Constitutional Court “, promulgated in the Official Record 492 of 11 January 2002

		Resolution of the Supreme Court of Justice, which contains the "Transitory Statute" of the Constitutional Control ", published in the Official Gazette No. 176, of April 26, 1993
El Salvador	Constitution 1983	Ley de procedimientos constitucionales 1960, Decree 2996/1960, reformed in 1997
Guatemala	Constitution 1985	Resolution of the Constitutional Court 1 /2013 Resolution of the Constitutional Court 1/2016 Resolution of the Constitutional Court 2/1986 Resolution of the Constitutional Court 7/1988 Resolution of the Constitutional Court 6 & 9/2004 Resolution of the Constitutional Court 10/2003 Resolution of the Constitutional Court 5/2006 Resolution of the Constitutional Court 3& 4/1989 Resolution of the Constitutional Court 1/1994 Resolution of the Constitutional Court 1, 2, 3 & 9/1995 Resolution of the Constitutional Court 2/1997 Resolution of the Constitutional Court 1, 18/2001 Resolution of the Constitutional Court 49 & 50/2002 Resolution of the Constitutional Court 18 & 24 / 2007 Decree 1/1986
Honduras	Constitution 1982	Law of constitutional justice/ 2004 Internal regulation of the constitutional chamber of the Supreme Court/2008
Mexico	Constitution 1917, reformed 2011	Decree July 14 / 2014 Decree June 17 / 2016 Law of Amparo, Regulatory of articles 103 and 107 of the Political Constitution of the United Mexican States Federal Law of Popular Consultation, regulation of section VIII of article 35 of the Political Constitution of the United Mexican States / 2014.

		Regulatory law of fractions I and II of article 105 of the Political constitution of the United Mexican States Organic law of the judicial power of the federation /1995 Internal regulation of the Supreme Court/2008, reformed 2009
Nicaragua	Constitution 1987	Law No. 831/2013 Law No. 49
Panama	Constitution 1972	Law 6/2002 Judicial Code of the Republic of Panama
Paraguay	Constitution 1992	Law 600/1995 Law 609/1995 Law 1500/1999 law 1337/1988 Law 879/2001
Peru	Constitution 1993	Law 28237/2004 Organic Law 28301/2004 Law 26435 Normative Regulation of the Constitutional Court Administrative resolution No. 095-2004-P-TC Law 23506, Law of Habeas Corpus and Amparo. Law 25398, Law complementary to the Habeas Corpus and Amparo Law Law 24968, Procedural Law of Popular Action. Law 25011, which partially modifies Law No. 23506 Law 25315, which partially modifies Law 23506 Decree Law 25433, which modifies Law 23506 and Law 24968 Law 26248, which partially modifies Law No. 23506 Law 26301, Law of Habeas Data and Compliance Action Law 26545, which partially modifies habeas data and action processes of compliance Legislative Decree No. 824, which partially modifies Law No. 2350610

		Law 27053, which partially modifies Law No. 23506 Law 27235, which partially modifies Law No. 23506. Law 27959, which partially modifies Law No. 23506.
Uruguay	Constitution 1985	Law 18.331/2008 Law 15.750/ 1985 Law 16.011/1988 Law 13.747/1969 Law 15.982/1988
Venezuela	Constitution 1999, reformed 2009	Organic Law of the Supreme Court of Justice of the Bolivarian Republic of Venezuela/2004 Organic Law of the Supreme Court of Justice of the Bolivarian Republic of Venezuela/1976 Organic Law of the Supreme Court of Justice of the Bolivarian Republic of Venezuela/2010

Table A2-3 Instruments of constitutional review by country

Country	id	Instrument name in the original language	Instrument name
Argentina	1	Acción de Amparo	Amparo
	2	Acción Declarativa de Certeza	Declaratory Action of Certain
	3	Acción de clase (Amparo colectivo)	Amparo
	4	Hábeas corpus	Habeas corpus
	5	Habeas data	Habeas data
	6	Recurso Extraordinario Federal	Diffuse Constitutional Control
Bolivia	7	Acción de cumplimiento	Writ of compliance/mandamus
	8	Acción de Inconstitucionalidad previo de Consultas de preguntas de referendos	Control of questions in referendums
	9	Acción de Inconstitucionalidad previo de Consultas de Proyectos de Estatutos o Cartas Orgánicas	Control of organic laws
	10	Acción de Inconstitucionalidad previo de proyectos de ley, (incluye las objeciones presidenciales)	Action of unconstitutionality for bills, including presidential objections
	11	Las impugnaciones del Poder Ejecutivo a las resoluciones camarales, prefecturales y municipales contrarias a la Constitución.	Control of legislative resolutions
	11	Recurso contra Resoluciones del Órgano Legislativo	Control of legislative resolutions
	12	Los recursos directos de nulidad contra los actos o resoluciones de quienes usurpen funciones que no les competen o ejerzan jurisdicción, potestad o competencia que no emane de la Ley.	Control of constitutional competence
	13	Los recursos de inconstitucionalidad contra tributos, impuestos, tasas, patentes, derechos o contribuciones de cualquier naturaleza, creados, modificados o suprimidos en contravención a la Constitución.	Control of taxes
	13	Recurso contra Tributos, Impuestos, Tasas, Patentes, Derechos o Contribuciones Especiales	Control of taxes
	14	La constitucionalidad de tratados o convenios con gobiernos extranjeros u organismos internacionales.	Control of International treaties
	14	Acción de Inconstitucionalidad previo de tratados internacionales	Control of International treaties
	15	Acción de protección de privacidad (habeas data)	Habeas data

	16	Acción popular	popular action
	17	Amparo Constitucional	Amparo
	17	Acción de Amparo constitucional	Amparo
	18	Demandas respecto a procedimientos contrarios de Reforma de la Constitución.	Control of Constitutional Amendments
	18	Consulta el procedimiento de reforma parcial de la Constitución	Control of Constitutional Amendments
	19	Consultas de Autoridades Indígena Originario Campesinas sobre la aplicación de sus normas jurídicas a un caso concreto	Control of indigenous application in concrete cases
	20	Consultas del Presidente de la República, del Presidente del Congreso Nacional y del Presidente de la Corte Suprema de Justicia, sobre la constitucionalidad de proyectos de ley, decretos o resoluciones.	Control of bills and decrees
	21	Consultas sobre la constitucionalidad de leyes, decretos o resoluciones aplicables a un caso concreto	Concrete constitutional control
	21	Acción de Inconstitucionalidad concreto	Concrete constitutional control
	22	Hábeas Corpus	Habeas corpus
	22	Acción de libertad (hábeas corpus)	Habeas corpus
		Recurso Directo de Nulidad	Direct Action for Annulment
	23	Recurso Directo de Nulidad	Direct Action for Annulment
	24	Recurso directo o abstracto de inconstitucionalidad	Direct or Abstract Action of Unconstitutionality
	24	Acción de Inconstitucionalidad abstracto	Direct Action of Unconstitutionality
	28	Recurso Indirecto o Incidental de Inconstitucionalidad vinculado a un proceso judicial o administrativo.	Concrete constitutional control
	29	Recursos contra resoluciones congresales o camerales.	Control of legislative resolutions
Brazil	30	Acción civil publica	civil public action
	31	Acción declaratoria de constitucionalidad (ADCs)	Declaratory Action of Constitutionality
	32	Acción Directa de Inconstitucionalidad (ADI)	Direct Action of Unconstitutionality
	33	Acción popular	popular action
	34	Arguição de descumprimento de preceito fundamental (ADPFs) - Acción de incumplimiento de precepto fundamental contra decisiones judiciales	Allegation of Disobedience of Fundamental Precept

	35	Hábeas corpus	Habeas corpus
	36	Hábeas data	Habeas data
	37	Mandado de segurança (mandamiento de seguridad o Amparo)	Amparo
	38	Mandado de segurança colectivo (mandamiento de seguridad o Amparo)	Amparo
	39	Recurso Extraordinario	Diffuse Constitutional Control
	40	Acciones declaratorias de constitucionalidad por omisión (ADO)	Direct Action of Unconstitutionality by Omission
Chile	41	Hábeas corpus	Habeas corpus
	42	Recurso de protección-Amparo	Amparo
	43	Control de la constitucionalidad de las leyes orgánicas constitucionales	Control of organic laws
	44	Cuestiones de constitucionalidad sobre la tramitación de los proyectos de ley o de reforma constitucional y de los tratados sometidos a la aprobación del Congreso	Control of Constitutional Amendments and International Treaties
	45	Acción de control constitucional de partidos políticos	Control of political parties
	46	Cuestiones que se susciten sobre la constitucionalidad de un decreto con fuerza de ley	Control of decrees having force of law
	46	Cuestiones de constitucionalidad de decretos con fuerza de ley	Control of decrees having force of law
	47	Cuestiones que se susciten sobre constitucionalidad con relación a la convocatoria a un plebiscito, sin perjuicio de las atribuciones que correspondan al Tribunal Calificador de Elecciones	Control of plebiscite
	47	Cuestiones de constitucionalidad la convocatoria a un plebiscito, sin perjuicio de las atribuciones que correspondan al Tribunal Calificador de Elecciones	Control of plebiscite
	48	Acción de inaplicabilidad de precepto legal	Writ of Inapplicability
	49	Presidente de la República no promulgue una ley cuando deba hacerlo, promulgue un texto diverso del que constitucionalmente corresponda o dicte un decreto inconstitucional	Control of mandate to presidential sanction
	49	Cuestiones sobre la promulgación de una ley	Control of mandate to presidential sanction
	50	Constitucionalidad de un decreto o resolución del presidente de la República que la Contraloría haya representado por estimarlo inconstitucional, cuando sea requerido por el presidente en conformidad al artículo 88	Control of presidential decree

	50	Conflictos de constitucionalidad sobre decreto o resolución del presidente de la República	Control of presidential decree
	51	Acción de control constitucional decreto supremo	Control of supreme decree
	52	Acción de inconstitucionalidad de un precepto legal declarado inaplicable	Action of unconstitutionality for inapplicability
	53	Cuestiones de constitucionalidad de autos acordados	Control of courts' regulation of internal procedures
Colombia	54	Acción de constitucionalidad de las leyes	Action of unconstitutionality
	55	Acción de constitucionalidad de los decretos de fuerza de ley	Control of decrees having force of law
	56	Acción de constitucionalidad de los decretos legislativos (estados de excepción)	Control of legislative decrees
	57	Acción de inconstitucionalidad contra reformas constitucionales (sólo por vicios de procedimiento en su formación)	Control of Constitutional Amendments
	58	Constitucionalidad de la convocatoria a un referendo o a una Asamblea Constituyente (solo por vicios de forma)	Control of referendums
	58	constitucionalidad de la convocatoria a un referendo o a una Asamblea Constituyente (solo por vicios de forma)	Control of referendums
	59	Constitucionalidad de los proyectos de ley que hayan sido objetados por el Gobierno como inconstitucionales (objeciones presidenciales)	Presidential objections
	60	Constitucionalidad de los proyectos de leyes estatutarias	Control of statutory laws
	61	Constitucionalidad de los referendos sobre leyes y de las consultas populares y plebiscitos del orden nacional. Estos últimos sólo por vicios de procedimiento en su convocatoria y realización.	Constitutionality of referendums, popular consultations, and plebiscites
	62	constitucionalidad de los tratados internacionales y de las leyes que los aprueben.	Control of International treaties
	63	Tutela	Amparo
	64	Acción popular	popular action
	65	Incidente de inconstitucionalidad	Exception for unconstitutionality
	66	Hábeas corpus	habeas corpus
	67	Acción de cumplimiento	Writ of compliance/mandamus
Costa Rica	68	Acción de inconstitucionalidad	Action of unconstitutionality

	69	Consulta facultativa potestativa u optativa	Political optional consultation
	70	Consulta preceptiva proyecto de reforma constitucional, reformas a la Ley de la Jurisdicción Constitucional y la aprobación de convenios o tratados internacionales	Control of Constitutional Amendments, reforms to the systems of constitutional review, and international treaties
	71	Consulta judicial facultativa	Judicial optional consultation
	72	Consulta judicial preceptiva	Judicial mandatory consultation
	73	Hábeas corpus	Habeas corpus
	74	Hábeas corpus especial - Hábeas data	Habeas data
	75	Objeciones presidenciales	Presidential objections
	76	Recurso de Amparo	Amparo
Dominican Republic	77	Acción de hábeas corpus	habeas corpus
	78	Acción directa de inconstitucionalidad	Action of unconstitutionality
	79	Recurso de Amparo	Amparo
	79	Acción de Amparo	Amparo
	80	Amparo de cumplimiento	Writ of compliance/mandamus
	81	Amparo electoral	electoral Amparo
	82	Control difuso- recurso (excepción) de inconstitucionalidad	exception for unconstitutionality
	83	Control preventivo de los tratados internacionales	Control of International treaties
	84	Hábeas data	Habeas data
	85	Revisión de decisiones jurisdiccionales (recurso)	Control of judicial decisions
Ecuador	86	Acción de acceso a la información pública	Access to public information
	87	Hábeas corpus	Habeas corpus
	87	Acción de hábeas corpus	Habeas corpus
	88	Hábeas data	Habeas data
	88	Acción de hábeas data	Habeas data
	89	Acción de incumplimiento de sentencias constitucionales (IS)	Writ of compliance/mandamus
	90	Acción de interpretación	Action for interpretation

91	Acción extraordinaria de protección - Amparo contra sentencia	Amparo
92	Acción extraordinaria de protección contra decisiones de la justicia indígena	Control of indigenous justice
93	Acción por incumplimiento (AN)	Writ of compliance/mandamus
94	Inconstitucionalidad sobre leyes orgánicas y ordinarias, decretos-leyes, decretos, ordenanzas; estatutos, reglamentos y resoluciones, emitidos por órganos de las instituciones del Estado	Action of unconstitutionality for laws
94	Acción publica de inconstitucionalidad-Control constitucional de las disposiciones legales de origen parlamentario	Action of unconstitutionality for laws
95	Inconstitucionalidad de los actos administrativos de toda autoridad pública	Action of unconstitutionality for executive actions
95	Acción publica de inconstitucionalidad-Control constitucional de los actos normativos no parlamentarios y actos administrativos de carácter general	Action of unconstitutionality for executive actions
96	Amparo	Amparo
96	Acción de protección-Amparo	Amparo
97	Control concreto	Concrete constitutional control
98	Control constitucional de los Estatutos de Autonomía- de la consulta popular en la que se aprueba el Estatuto de Autonomía	Control of status of autonomy by popular consultations
99	Control constitucional de los Estatutos de Autonomía- las leyes orgánicas de conformación de regiones autónomas y distritos metropolitanos autónomos.	Control of status of autonomy by organic laws
100	Control constitucional de los Estatutos de Autonomía-de los proyectos de Estatutos de Autonomía elaborados por los gobiernos provinciales o cantonales	Control of bills abut status of autonomy
101	Control posterior constitucional de las enmiendas, reformas y cambios constitucionales	Control posteriori of amendments
102	Control previo constitucional de las enmiendas, reformas y cambios constitucionales	Control a priori of amendments
103	Convocatorias a consultas populares de carácter nacional o a nivel de los gobiernos autónomos descentralizados	Control of popular consultations
104	Estados de Excepción	Control of states of exception
105	Objeciones (presidenciales) de inconstitucionalidad	Presidential objections
106	Repetición contra servidoras y servidores públicos por violación de derechos - inconstitucionalidad de actos administrativos individuales	Action under a right of recourse

	107	Tratados internacionales	Control of International treaties
El Salvador	108	Amparo	Amparo
	109	Control previo en caso de controversias en el proceso de formación de la ley (objeciones presidenciales)	Presidential objections
	110	Habeas corpus o de exhibición de la persona	Habeas corpus
	112	Inaplicabilidad	Exception for unconstitutionality
	111	Inaplicabilidad	Exception for unconstitutionality
	112	inconstitucionalidad de las leyes, decretos y reglamentos	Action of unconstitutionality for laws and executive actions
Guatemala	113	Amparo	Amparo
	114	Consulta de constitucionalidad	Consultation of Constitutionality
	115	Inconstitucionalidad concentrada	Action of unconstitutionality for laws
	116	Inconstitucionalidad de las leyes en casos concretos (difusa)	Concrete constitutional control
	117	Objeciones presidenciales	Presidential objections
	118	Revisión constitucional proyectos de leyes constitucionales	Control of constitutional laws
	119	Exhibición personal	Habeas corpus
Honduras	120	Acción de inconstitucionalidad-concentrado	action of unconstitutionality for laws
	121	Acción de revisión en lo civil y en lo penal -concentrado	concrete constitutional control
	122	Excepción de inconstitucionalidad -difuso	exception for unconstitutionality
	122	Excepción de inconstitucionalidad -concentrado	exception for unconstitutionality
	123	Garantía o recurso de Amparo	Amparo
	124	Habeas corpus	habeas corpus
	125	Habeas data	habeas data
	126	veto presidencial por inconstitucionalidad (objeciones presidenciales)	presidential objections
Mexico	127	Acciones de inconstitucionalidad	Action of unconstitutionality
	128	Controversias constitucionales	Constitutional controversies
	129	Juicio de Amparo directo	Amparo (direct)

	130	Juicio de Amparo indirecto	Amparo (indirect)
	131	Amparo de urgencia	Amparo for issues with priority attention
	132	Las determinaciones de constitucionalidad sobre la materia de consultas populares	Control of popular consultations
	132	Revisión Constitucional de la Legislación de los Estados de Excepción	Control of states of exception
Nicaragua	133	Habeas data	Habeas data
	134	Inconstitucionalidad en casos concretos	Action of unconstitutionality in concrete cases
	135	Recurso de Amparo	Amparo
	136	recurso de exhibición personal - habeas corpus	Habeas corpus
	137	Recurso de Inconstitucionalidad	Action of unconstitutionality
Panama	138	Acción de inconstitucionalidad	Action of unconstitutionality
	139	Hábeas corpus	Habeas corpus
	140	Hábeas data	Habeas data
	141	Objeciones presidenciales	Presidential objections
	142	Recurso de Amparo de garantías constitucionales	Amparo
	143	Recurso de consulta o advertencia de inconstitucionalidad	Consultation of Constitutionality
Paraguay	144	Amparo	Amparo
	145	consulta constitucional	Consultation of Constitutionality
	146	Habeas Corpus	Habeas corpus
	147	Habeas data	Habeas data
	148	Inconstitucionalidad vía de acción	action of unconstitutionality
	149	Inconstitucionalidad vía de excepción	exception for unconstitutionality
Peru	150	Acción de Amparo	Amparo
	151	Acción de cumplimiento	Writ of compliance/mandamus
	152	Acción de Inconstitucionalidad	Action of unconstitutionality
	153	Acción Popular (Inconstitucionalidad de actos administrativos de rango sub-legal)	Popular action

	154	Hábeas Corpus	Habeas corpus
	155	Hábeas Data	Habeas data
	156	Incidente de inconstitucionalidad	Exception for unconstitutionality
Uruguay	157	Acción de inconstitucionalidad	Action of unconstitutionality
	158	Excepción de inconstitucionalidad	Exception for unconstitutionality
	159	Amparo	Amparo
	160	Habeas data	Habeas data
	161	Habeas corpus	Habeas corpus
Venezuela	152	Acción de Amparo a la libertad o seguridad	Habeas corpus
	153	Acción de Amparo constitucional	Amparo
	154	Acción de inconstitucionalidad	Action of unconstitutionality for laws
	155	Habeas data	Habeas data
	156	Incidente de inconstitucionalidad	Exception for unconstitutionality
	157	inconstitucionalidad de las omisiones del Poder Legislativo Municipal, Estadal o Nacional	Action of unconstitutionality by omission
	158	Objeciones presidenciales	Presidential objections
	159	Recurso de Interpretación	Writ of interpretation
	160	Revisión de inconstitucionalidad para los decretos de estados de excepción	Control of states of exception
	161	Revisión previa de inconstitucionalidad para las leyes orgánicas	Control of organic laws
	162	Revisión previa de inconstitucionalidad para los tratados internacionales	Control of International treaties

Appendix 3.

Details of the indicators aggregated in the FACA index

Table A3-1Descriptive Statistics of the indicators included in the FACA index, 2017

					Quantiles				
Variable		n	Mean	S.D.	Min	0.25	Mdn	0.75	Max
Type	access	157	0.48	0.5	0	0	0	1	1
Legal standing	access	157	2.34	1.31	0	1	3	3	4
Centralization		157	0.66	0.48	0	0	1	1	1
Timing: A priori v. A posteriori	scope	157	0.19	0.39	0	0	0	0	1
Effects: Erga Omnes v. Inter Partes	scope	157	0.54	0.5	0	0	1	1	1
Ex officio discretion	scope	157	0.65	0.48	0	0	1	1	1
Limit policy	scope	157	0.19	0.39	0	0	0	0	1
Limit ground	scope	157	0.05	0.22	0	0	0	0	1
Limit prescription	scope	157	0.46	0.5	0	0	0	1	1
Docket control	decisiveness	157	0.12	0.33	0	0	0	0	1
Courts majorities to decide	decisiveness	157	0.75	0.43	0	1	1	1	1
Panel v. en banc decisions	decisiveness	157	z	0.37	0	1	1	1	1

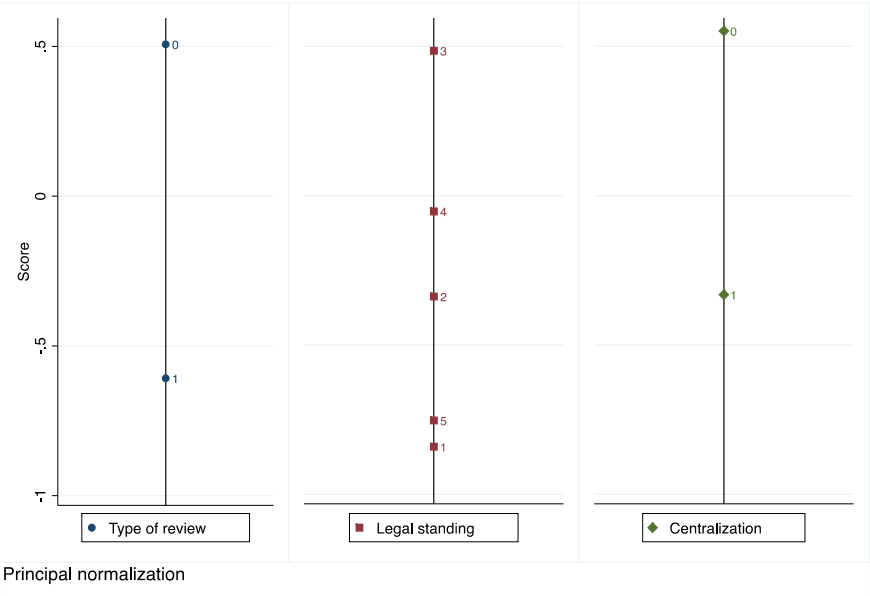
Table A3-2. Multiple Correspondence Analysis, 2017

		Overall			Dimension 1	
Categories	Mass	Quality	Inertia (%)	Coordinate	Squared corr	Contribution
Legal Standing						
1	0.010	0.825	0.054	-2.282	0.825	0.050
2	0.010	0.443	0.016	-0.917	0.443	0.008
3	0.050	0.993	0.077	1.316	0.993	0.086
4	0.015	0.055	0.005	-0.144	0.055	0.000
5	0.016	0.928	0.063	-2.043	0.928	0.066
Type						
0	0.055	0.993	0.092	1.374	0.993	0.103
1	0.045	0.993	0.111	-1.649	0.993	0.124
Centralization						
0	0.038	0.980	0.076	1.495	0.980	0.084
1	0.062	0.980	0.046	-0.900	0.980	0.051
Limit *A priori*						
0	0.082	0.824	0.019	0.460	0.824	0.017
1	0.018	0.824	0.084	-2.068	0.824	0.078
Effects						
0	0.047	0.986	0.099	1.526	0.986	0.110
1		0.986	0.089	-1.368	0.986	0.099
Ex officio discretion						
0	0.035	0.002	0.011	-0.025	0.002	0.000
1	0.065	0.002	0.006	0.013	0.002	0.000
Limits						
0	0.048	0.690	0.020	0.563	0.690	0.015
1	0.041	0.813	0.026	-0.769	0.813	0.024
2	0.012	0.280	0.005	0.372	0.280	0.002
Courts majorities to decide						
0	0.077	0.067	0.003	-0.058	0.067	0.000
1	0.023	0.067	0.012	0.195	0.067	0.001
Panel v. *en banc* decisions						
0	0.082	0.834	0.009	-0.330	0.834	0.009
1	0.018	0.834	0.043	1.485	0.834	0.040
Docket control						
0	0.089	0.881	0.004	-0.202	0.881	0.004
1	0.011	0.881	0.030	1.648	0.881	0.030

Relationship among indicators within each dimension: access, scope, and court's decisiveness

Figure A3-1 displays a projection plot of the coordinates of the variables aggregated in the FACA index. It shows the internal structure of the covariance matrix as a useful way to explore the correlation among the indicators. The distribution of the categories within the indicators shows interesting relationships. At the bottom of the three panels in Figure 3 are located instruments with the following characteristics for accessibility: they are abstract review, accessible to elected political actors and adjudicated by a centralized court. At the top of the panel, instruments of concrete review are associated with citizens accessibility but initiated in the lower courts.

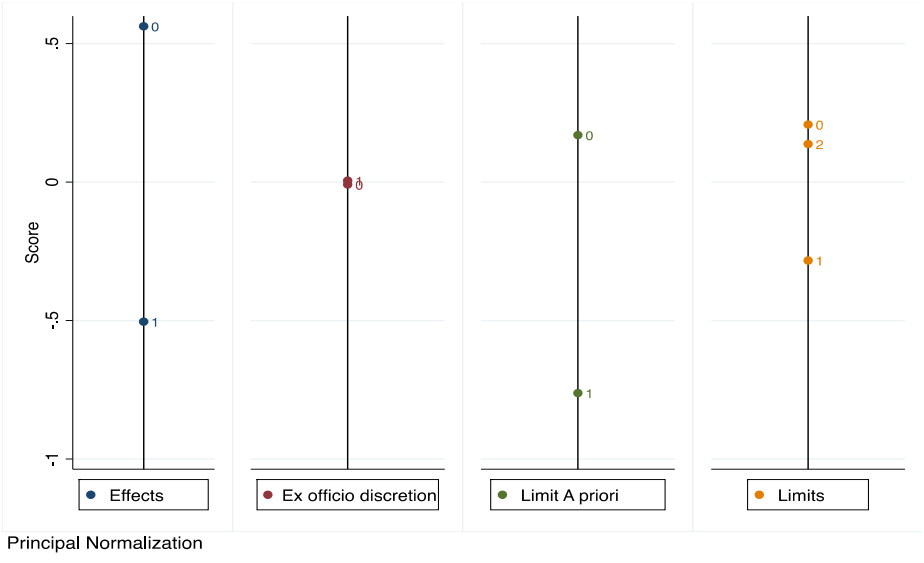
Figure A3-1. MCA dimension projection plot for indicators in the access dimension



The relations between the three indicators of accessibility provide some evidence in support of the trade-off between accessibility and efficiency in constitutional adjudication. Also, the distribution of the categories within the variable related to legal

standing (middle panel), shows that Category 1, that refers to accessibility limit to elected political actors (executive or legislature) is closer to the category 5 which refers to automatic constitutional control characterized as the capability of courts to review the constitutionality of a norm ex officio rather than prosecutable jurisdiction. This suggests that characteristics in terms of the type of law or action justiciable in instruments with access limited to elected political actors are similar to those cases brought to courts' dockets automatically.

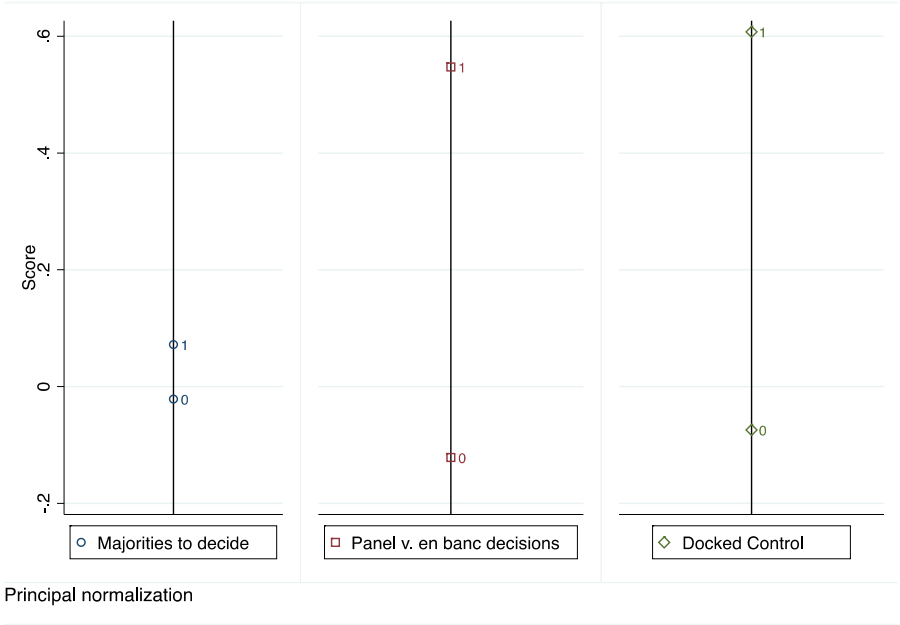
Figure A3-2. MCA dimension projection plot for indicators in the scope dimension



As regards the indicators related to the scope of constitutional review (Figure A3-2), it shows that the variance across ex officio discretion contribute little to the measure. This unexpected finding may be explained by the fact that the variable was coded based on the legal provisions ruling the instruments and in several cases this characteristic of the courts formal authority emerged first in the jurisprudence. Further revision of the coding rules for this variable should be done to incorporate such consideration before discarding its contribution in the index. Also, given the small distance between two of the three categories in the indicator for the limits to the justiciability, it is possible that a

dummy variable performs more efficiently. Moreover, indicators for the effects of courts' decisions and a priori review play a significant role differentiating the formal judicial authority across countries.

Figure A3-3. MCA dimension projection plot for indicators in the decisive capacity



The analysis of the rules related to the decisive capacity of courts (Figure A3-3) shows that docket control is a very influential indicator to compare the institutional design of constitutional adjudication in Latin America. Analyzed in context to the accessibility indicators, it is also interesting to notice that its location in the graph indicates that institutionally docket control is more frequent in concrete review exerted by centralized courts. However, it is important to point out that, within the sample of Latin American countries, there are not examples of courts with docket control over instruments of abstract review.

Appendix 4. The FACA values by type of instruments, 2017

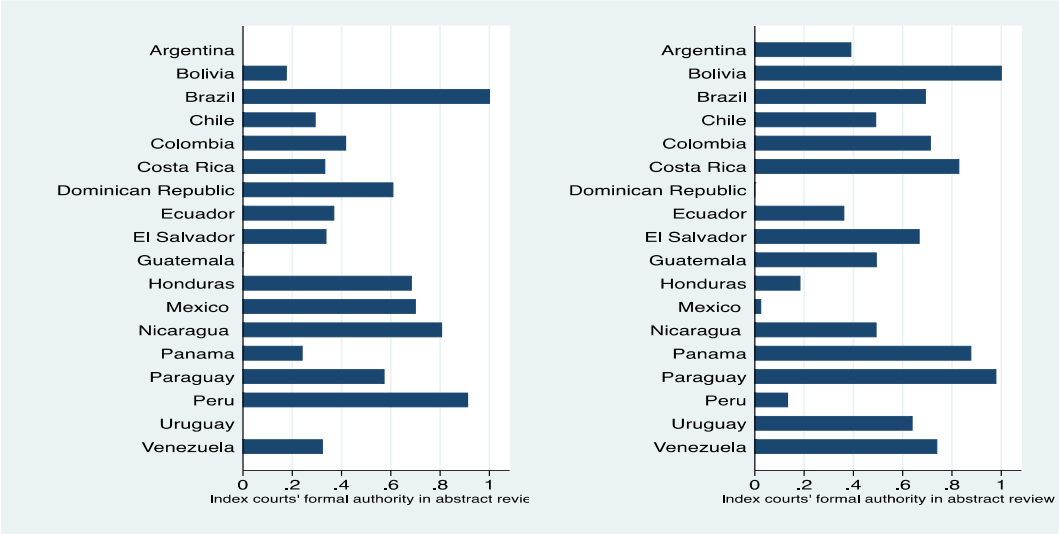


Figure A4-1. The FACA values by type of instruments, 2017

Appendix 5. Assertiveness in the Peruvian Constitutional Tribunal

Table A5-1. Variables, Operationalization, Hypotheses and Descriptive Statistics: The Peruvian Constitutional Tribunal 2002-2016

Variable	Causal Mechanisms	Hypothesized relationship	Mean	Sd	Minimum	Maximum	Source
Strike	Dependent Variable		0.3568282	0.479592	0	1	Tiede and Ponce 2014, updated 2016
Effective number of political parties	Fear to Sanction	+	4.032922	0.267678	3.78	4.37	
Court ideological distance to Congress	Ideological alignment	+	1.25285	0.6539703	0.0194101	2.687469	Authors' estimation using PELA
% of justices that joined PCT during the president's term of office	Ideological alignment	-	10.69093	0.563062	9.5	11	Pérez-Liñán et al. 2019
% of seats in Congress controlled by the president's party	Deliberative legislation	-	33.90151	3.550992	30	37.5	Pérez-Liñán et al. 2019
Ideological distance between the president and the legislature	Deliberative legislation	+	1.647586	0.4290426	1.286585	2.507936	Authors' estimation using PELA
Concentration of power in the President		-	22.28252	1.684433	20.49	24.18	Pérez-Liñán et al. 2019
Regional policy		+	0.3125	0.4640929	0	1	Tiede and Ponce 2014, updated 2016
Legislative policy			0.4725	0.4998684	0	1	Tiede and Ponce 2014, updated 2016

Notes: The data file includes 369 decisions.

Table A5-2. Estimations of the ideological preferences of the President, Congress, and the Constitutional Tribunal in Peru

Judge	Dates of Service	Ad hoc legislative committee	Ideology
José García Marcelo	June 1996 to June 2002	1995	7.650883838
Francisco Acosta Sánchez	June 1996 to June 2002	1995	7.650883838
Luis Guillermo Díaz Valverde	June 1996 to June 2002	1995	7.650883838
Ricardo Nugent	June 1996 to June 2002	1995	7.650883838
Guillermo Rey Terry	June 1996 to May 1997 and November 2000 to May 2004	1995	7.650883838
Manuel Aguirre Roca	June 1996 to May 1997 and November 2000 to June 2004	1995	7.650883838
Delia Revoredo Marsano de Mur	June 1996 to May 1997 and November 2000 to December 2004	1995	7.650883838
Juan Bautista Bardelli Lartirigoyen	June 2002 to September 2007	2002	6.700235081
Víctor García Toma	June 2002 to July 2007	2002	6.700235081
Magdiel Gonzalez Ojeda	June 2002 to September 2007	2002	6.700235081
Javier Alva Orlandini	June 2002 to September 2007	2002	6.700235081
César Rodrigo Landa Arroyo	December 2004 to December 2009	2004	6.848658831
Juan Francisco Vergara Gotelli	December 2004 to June 2014	2004	6.848658831
Carlos Mesía Ramírez	July 2006 to June 2014	2004	6.848658831
Ricardo Beaumont Callirgos	June 2007 to April 23 2013	2007	5.945776228
Fernando Calle Hayen	September 2007 to June 2014	2007	5.945776228
Gerardo Eto Cruz	September 2007 to June 2014	2007	5.945776228
Ernesto Álvarez Miranda	September 2007 to June 2014	2007	5.945776228
Óscar Urviola Hani	June 2010 to September 2017	2010	6.049834743
Ernesto Blume Fortini	May 2014	2014	6.860971288
Manuel Miranda Canales	May 2014	2014	6.860971288

Carlos Ramos Núñez	May 2014	2014	6.860971288
José Luis Sardón de Taboada	May 2014	2014	6.860971288
Marianella Ledesma Narváez	May 2014	2014	6.860971288
Eloy Espinosa-Saldaña Barrera	May 2014	2014	6.860971288

Table A5-3. Conformation and Estimations of the ideological preferences of the Ad hoc legislative committee

Members Ad Hoc Committees	Party Affiliation	Year	Source	Party Ideology	Ad Hoc Committee Ideology
Carlos Torres	Alianza Cambio 90	1995	Pela-32	9	7.650883838
Victor Joy Way Rojas	Alianza Cambio 90	1995	Pela-32	9	7.650883838
Cesar Fernandez Arce	Alianza Cambio 90	1995	Pela-32	9	7.650883838
Carlos Ferrero Costa	Alianza Cambio 90	1995	Pela-32	9	7.650883838
Martha Chavez Cossio	Alianza Cambio 90	1995	Pela-32	9	7.650883838
Juan Guillermo Carpio	Renovación	1995	Pela-32	5.4375	7.650883838
Julio Castro Gómez	Movimiento Democrático De Izquierda	1995	Pela-32	5.4375	7.650883838
Alexander Kouri	Partido Popular Cristiano	1995	Pela-32	7.5455	7.650883838
Fernando Olivera Vega	Independiente	1995	Pela-32	5.4375	7.650883838
Marcial Ayaipoma Alvarado	Perú Posible	2002	Pela-31	6.25	6.700235081
Jose Luis Delgado Nuñez Del Arco	Apra / Partido Aprista Peruano	2002	Pela-31	4.8333	6.700235081
Fausto Alvarado Dodero	Frente Independiente Moralizador	2002	Pela-31	6.6667	6.700235081
Rafael Valencia-Dongo Cardenas	Unidad Nacional	2002	Pela-31	8.3714	6.700235081
Natale Amprimo Pla	Somos Perú / Alianza Para El Progreso	2002	Pela-31	7.3797	6.700235081
Henry Pease Garcia	Peru Posible	2004	Pela-31	6.25	6.848658831
Cesar Acuna Peralta	Sau /Alianza Para El Progreso	2004	Pela-31	7.3797	6.848658831
Xavier Barron Cebreros	Unidad Nacional	2004	Pela-31	8.3714	6.848658831
Jorge Del Castillo Galvez	Apra / Partido Aprista Peruano	2004	Pela-31	4.8333	6.848658831
Fausto Alvarado Dodero	Fim Frente Independiente Moralizador	2004	Pela-31	6.6667	6.848658831
Hector Chavez Chuchón	Gpdi / Alianza Unidad Nacional	2004	Pela-31	8.3714	6.848658831
Luis Guerrero Figueroa	Peru Ahora / Partido Perú Posible	2004	Pela-31	6.25	6.848658831

Alcides Chamorro Balvín	No Agrupados/ Frente Independiente Moralizador	2004	Pela-31	6.6667	6.848658831
Pastor Valdivieso	Partido Aprista Peruano	2007	Pela-61	6.36364	5.945776228
Falla Lamadrid	Partido Aprista Peruano	2007	Pela-61	6.36364	5.945776228
Otarola Penaranda	Partido Nacionalista Peruano / Unión Por El Perú	2007	Pela-61	2.6667	5.945776228
Espinoza Ramos	Unión Por El Perú	2007	Pela-61	2.6667	5.945776228
Castro Stagnaro	Unidad Nacional	2007	Pela-61	8.9877	5.945776228
Sousa Huanambal	Alianza Por El Futuro	2007	Pela-61	7.7791	5.945776228
Lescano Ancieta	Frente De Centro/ Acción Popular	2007	Pela-61	6.7931	5.945776228
Luis Falla Lamadrid	Partido Aprista Peruano	2010	Pela-80	6.8621	6.049834743
Wilder Calderón Castro	Partido Aprista Peruano	2010	Pela-80	6.8621	6.049834743
Miguel Guevara Trelles	Partido Aprista Peruano	2010	Pela-80	4.3913	6.049834743
Juvenal Ordóñez Salazar	Nacionalista / Unión Por El Perú Upp	2010	Pela-80	4.3913	6.049834743
José Urquizo Magia	Nacionalista / Unión Por El Perú Upp	2010	Pela-80	4.3913	6.049834743
Raúl Castro Stagnaro	Unidad Nacional	2010	Pela-80	8.4861	6.049834743
Rolando Sousa Huanambal	Fujimorista / Alianza Por El Futuro	2010	Pela-80	8.5152	6.049834743
José Vega Antonio	Unión Por El Perú Upp	2010	Pela-80	4.3913	6.049834743
Víctor Andrés García Belaunde	Alianza Parlamentaria / Frente De Centro	2010	Pela-80	6.1579	6.049834743
Tomas Zamudio Briseno	Nacionalista Gana Peru	2014	Pela-84	3.4464	6.860971288
Gustavo Rondon Fudinaga	Alianza Solidaridad Nacional	2014	Pela-84	8.0854	6.860971288
Jose Leon Rivera	Peru Posible	2014	Pela-84	6.4714	6.860971288
Mesias Guevara Amasifuen	Accion Popular - Frente Amplio (Perú Posible)	2014	Pela-84	6.4714	6.860971288
Alberto Beingolea Delgado	Alianza Por El Gran Cambio (Ppc-App)	2014	Pela-84	8.4737	6.860971288

Javier Velaquez Quesquen	Partido Aprista Peruano (Concertacion Parlamentaria)	2014	Pela-84	6.9524	6.860971288
Wuiliam Monterola Abregu	Perú Posible (Union Regional)	2014	Pela-84	6.4714	6.860971288
Julio Gago Perez	Fuerza Popular (Fuerza 2011)	2014	Pela-84	8.5156	6.860971288

Appendix 6. Courts' assertiveness in Latin America

Table A6-1. Descriptive Statistics

Variable	N	Mean	Sd	Min	Max
Strike	3355	0.247392	0.4315608	0	1
CC Formal authority	3355	0.6463853	0.2102333	0	1
CC Formal authority supply	3355	0.3239441	0.1685377	-7.68E-17	0.8064998
CC Formal authority demand	3355	0.653472	0.2484432	0.0312596	1
Effective number of legislative parties	3355	5.453707	1.579591	2.353733	8.491788
Executive control over the legislature	3355	6.77E-11	0.3868544	-0.7957002	0.6548283
Executive control over the CC	3355	-8.31E-10	0.6858401	-0.7359607	1.425836
Executive constitutional powers over legislation	3355	70.34924	22.83981	27.03	92.01
CC formal Autonomy	3355	0.6119278	0.0858246	0.4464285	0.8928571
Policy enacted by the sitting government	3355	0.64769	0.4777611	0	1
Citizens complaint	3355	0.8304024	0.3753349	0	1
National Policy	3152	0.9492386	0.219545	0	1
Executive Policy	3355	0.5126677	0.499914	0	1
Concrete	3355	0.4163934	0.4930339	0	1

Table A6-2.Descriptive statistics of the dependent variable by country

country	Mean	Std. Dev.	Freq.
Argentina	0.41025641	0.49314626	195
Bolivia	0.26756757	0.44329027	370
Brazil	0	0	2
Chile	0.18534483	0.38941722	232
Colombia	0.16220736	0.36879513	1,196
Dominican Republic	0.16666667	0.40824829	6
Ecuador	0.37103175	0.4835609	504
El Salvador	0.41436464	0.49397847	181
Guatemala	0.31578947	0.46577334	247
Venezuela	0.17298578	0.37868393	422
Total	0.24739195	0.43156076	3,355

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