Courting Conflict:

A Logic of Risky Judicial Decisions in Latin America

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Abstract

The application of rational choice theories to judicial politics in Latin America has yielded several important insights about the emergence of judicial independence and the success or failure of judges to limit governments. But existing theories also contain certain analytical blind spots: If judges are strategically deferential, why are courts in the region still frequently attacked? If courts are routinely attacked, why do judges nonetheless challenge political authorities over salient policies? And if courts are often attacked and/or judges are largely deferential, why would litigants continue to seek redress through the judiciary? To begin to answer these questions, we develop a model of inter-branch conflict. In providing an explanation for this set of behaviors, the model suggests key implications for judicial reform and for building strong courts. In particular, common institutions designed to insulate judges and expand their political relevance can undermine the rule of law, and the construction of powerful courts may require judges to invite political conflict.

A decade ago, it was common to claim that while much was understood about legislatures, presidents, and even bureaucratic agencies in comparative politics, judiciaries remained relatively understudied (e.g. Gibson, Caldeira and Baird 1998; Epstein and Knight 2000). Fortunately, this claim can no longer be sustained, particularly in Latin America (Kapiszewski and Taylor 2008). Beginning in the mid-1990s, a wave of judicial scholarship has addressed courts in nearly ever state in the region. Building on this literature, we take up three core questions: 1) why does political conflict become judicialized?, 2) why do judges challenge or support the government?, and 3) how do politicians react to the choices judges make? Each of these questions refers to an essential chokepoint in the legalization process; and just as critically, each is related to the other (Brinks and Gauri 2008). Yet, insofar as these choices are inter-related, existing theories often fail to explain the particular configuration of empirical regularities that mark judicial politics in developing democracies.

Consider the following facts about Latin America. Despite a variety of barriers to access, both citizens and parties have been increasingly seeking redress for political wrongs in their judiciaries. The consensus from reports produced by the World Bank, USAID, and other non-governmental agencies is that there is substantial and growing demand for judicial services throughout the region (e.g. see Dakolias 1996; Hammergren 2007).[1] To cite three specific examples, between 1974 and 1984 the average number of cases entering the Argentine Supreme Court was roughly 4,000. By 1997, the figure had skyrocketed to 36,000 cases (FORES 1988; Molinelli et al 1999 cited in Helmke 2005). Similarly, the constitutional bench of Costa Rica has seen its caseload increase from about 1,600 cases in 1989 to roughly 17,000 in 2007 (Wilson 2009). Brazil has experienced a similar explosion in the demand for judicial resolutions. Since the transition to democracy, the number of cases in the judiciary overall has gone from 339,000 in

[1] Hammergren (2007) acknowledges that this is the leading wisdom of the policy community, but she goes on to argue that, despite the problems of access to justice and case backlog that plague the region, demands placed on Latin American judges are not particularly egregious. Compared to advanced industrial democracies, average annual filings per judge are relatively low (ranging from 136 in Honduras up 1,357 in Brazil compared to 1,992 in the US District of Colombia) (p.72). Still, she does not dispute the basic point that demands on Latin American courts are generally increasing.

1989 to 2.1 million in 2001, although there is some evidence that the trend is now being reversed (cited in Taylor 2008:38). More broadly, courts in the region have been increasingly drawn into the resolution of significant political questions (e.g. Gauri and Brinks 2008; Seider et al 2006).

Along similar lines, we are struck by the several instances in which Latin American judges boldly stand up to the government of the day. Though prudence may be the norm, there are numerous important counter-examples of judges taking risks and challenging powerful actors. For example, starting in 1991, despite repeated threats from Fujimori's government, the Peruvian Tribunal of Constitutional Guarantees struck down as unconstitutional key aspects of President Fujimori's economic proposal (Kenny 2003: 225-6). Moreover, following the 1992 *autogolpe* which effectively dissolved both the Legislature and the courts, several justices on the reconstituted Tribunal refused to allow Fujimori to run for a third term. Similarly, following Hugo Chavez's quick return to power in the wake of the 2002 coup, Venezuela's Supreme Tribunal openly defied his government by dropping charges against the military officers allegedly involved in the failed coup. During the same period, the Tribunal also began to clash with Chavez in a series of cases involving the government's economic policies and police power (Helmke 2005:161). In Ecuador in 2007 the Constitutional Tribunal overturned president Correa's decision to disband the legislature and set itself on its own institutional collision course with the president. In June of 2009, the Supreme Court of Honduras reinstated the chief of the armed forces after President Manuel Zelaya had fired him for failing to distribute ballots for a referendum on constitutional reform, which Zelaya promoted, but which had itself been declared unconstitutional.

The flip side of this story, however, is that most of the region's judiciaries have suffered at least one, and often multiple, attacks over the last three decades. Drawing on Helmke's (2009) *Institutional Crises in Latin America* (ICLA) data set, between 1985 and 2008, the number of institutional crises targeting high courts in the region has jumped from just five attacks in the late 1980s, to fourteen attacks in the early 1990s, to an average of eleven attacks every five years since then. Such attacks range from court packing (e.g. Argentina 1990) and impeachment (e.g. Peru 1997) to forced resignations (e.g. Bolivia 2008) and institutional dissolution (e.g. Venezuela 1999). Although certainly countries with the highest

frequency of judicial attacks include some of the regions most distressed democracies, even judges in relatively stable Chile have faced repeated efforts at impeachment since 1990. Moreover, the rate of successful attacks appears to have increased over the last decade. Between 1995 and 1999, judicial attacks succeeded just 40% of the time, rose to 57% in the first five years of the new millennium, and hit 83% between 2005 and 2008. All of this despite the trend toward institutionalizing formal institutional protections designed to safeguard judicial independence (Rios Figueroa 2009).

While current theories may explain each set of facts in isolation, they struggle to make sense of the picture as a whole. For example, the judicialization of politics might be explained by formal institutions that lower the barriers to access (e.g. Wilson and Cordero 2006), by the existence of a legal support network (Epp 1998), or by judicial independence itself, which incentivizes litigants to seek legal redress (Gauri and Brinks 2008). In turn, the overarching lesson of current theories of inter-branch relations is that judges under political threat should conduct themselves as prudently as possible (e.g. Ginsberg 1997; Bill Chávez 2004, but also see Helmke 2005). And, as long as judges behave strategically, politicians should have little reason to launch attacks against them. But then how can we understand situations in which judges clearly put themselves at risk and are attacked? And, in such unstable environments, how do we understand the growth of litigation?

Consider more carefully the two idealized worlds our current theories imply. In the first, judges have achieved independence, in the sense that their decisions are respected and not strongly influenced by external political conditions. What would we expect judicial politics to look like in such a scenario? Although we might expect fewer constitutional violations (in anticipation of judicial censure), in the event that rights are violated, we should certainly anticipate that litigants will seek relief and that legal remedies will be respected. When judges are independent, politics should be judicialized, courts should be more likely to challenge governments, yet inter-branch conflict, especially politically-inspired purges should be unobserved. Now consider a world in which judges are not independent. In such an environment, our theories tell us that judges should be prudent, if not entirely subservient, actors. And for the very reason that judges are willing to bend to pressure, the dual implication is that litigants should not seek relief and

politicians should have little need to carry out punishments. Although in this state of the world the mechanism is now judicial prudence, we should neither observe a significant judicialization of politics, nor open inter-branch warfare.

But as we have just alluded to in Latin America (and elsewhere), judicial politics do not always fit so neatly into these categories. Courts are asked to resolve difficult political questions, and in many places judges are attacked either for their responses, or in anticipation of them. Still, even in the most hostile environments, sometimes judges take risks; they make bold decisions that challenge powerful actors. More often than not, they pay the consequences, but there are also cases of judges that take risks and ultimately survive -- witness Paraguay in the late 1990s, Peru post-Fujimori, Pakistan in 2008 or Honduras in 2009. Despite all of our advances over the past two decades, our current theoretical models simply cannot explain this confluence of events. If courts are prudent, why are they being purged? If judges are likely to be attacked for aggressive decisions, why are they sometimes so bold? If courts are either prudent or likely to be purged if they are not, why do individuals judicialize complaints in political environments unfavorable to judicial independence?

Rather than simply dismiss the facts as random anomalies within what are otherwise complete theoretical models, or as evidence that judges simply do not understand the political implications of their decisions, the question we take up is whether there is instead an underlying logic to such crises. Is it possible, we ask, for judges to rationally court conflict? What conditions would need to hold in order for judges and politicians to engage in such high stakes behavior and for litigants to seek relief in their midst? How, we ask, can one make sense of empirical patterns that have heretofore been treated strictly as "off the equilibrium path" behavior? The remainder of this paper recombines existing theories to answer these questions. In so doing, we not only expand our understanding of the interactions among litigants, judges, and politicians, but also derive a series of novel implications that speak to fundamental issues of institutional design and the endogenous construction of powerful courts.

Argument Summary

In this paper, we present a model of inter-branch conflict – an incomplete information game, which aims to describe the conditions under which 1) governments enact potentially unconstitutional policies, 2) litigants seek judicial protection against such policies, 3) judges provide constitutional protection, and 4) governments attempt to punish courts for doing so.[2] The model speaks to a number of other behaviors, but we center our analysis on this collection of actions, precisely because it reflects the kind of behavior our models struggle to explain.

Drawing on the standard approach in judicial politics, we will assume that judges are guided by preferences over the outcomes of the cases they review, whether derived from raw political ideology or a recognized legal theory of interpretation. But, we recognize that judicial preferences may be quite complex and that competing goals may be in tension with each other. Thus, we also assume that judges value their seats – that there is some cost to being purged; and, we suggest that judges also can value having cases to review. Above and beyond holding their posts, judges may value playing a role in managing a state's constitutional order, whether because it increases the prestige of their post or because, to impact policy, they must have cases to resolve (see Ginsburg 2003, 76 or Staton 2007).[3] In short, judges are guided by policy and institutional preferences. Second, cases do not come to courts at random, but rather litigants bring complaints, so that our account of inter-branch conflict must wrestle with why litigants come to court when courts are under threat (see Simmons 2009, 22 or Gauri and Brinks 2008,

[2] In the context of a bargaining model of government repression, Hencken Ritter (2009) addresses the conditions under which an alleged veto player (e.g. a court formally empowered to review the constitutionality of government actions) can influence bargaining behavior and ultimately protect the rights of oppressed individuals. The logic of that model turns on the way that veto players might take advantage of a loss of public support for the government in order to constrain it from violating individual rights. Thus, judicial power operates through the mechanism of public support, as it will in our model. In addition to the lack of a bargaining framework, a core assumption distinguishes our approach. Hencken Ritter assumes that non-compliance is costly for courts. Although we believe that this is a sensible assumption, we do not make it. As we discuss below, a successful judicial purge is clearly costly, but a mere attempt, which involves non-compliance, is not. Ultimately such attempts can be useful to courts, as they provide a setting in which beliefs about judicial preferences can change.

[3] We might imagine that judges value leisure, as well (Posner 1996), which is in tension with the assumption we make. Although we grant that it cannot possibly be that a judge wants to be as busy as possible, it certainly cannot be that judges wish to have no work at all. Although we do not model the optimal level of work precisely, this is not a difficult problem. We will assume that judges can identify the marginal benefit associated with reviewing another case. This can be zero in our model, and an extension would allow it to be negative, without harming the results.

16).[4] Finally, we begin to explore how temporal dynamics, induced by the fact that constitutional politics play out across cases over time rather than all at once, might influence inter-branch policy-making. In particular, we consider how victims of state action can learn about the value of potential litigation from past judicial decisions and from governmental reactions to those decisions.

Once time and learning are modeled, a critical tension emerges. In so far as judges care about either policy outcomes or building judicial institutions (and especially so if they care about both), constitutional adjudication presents a tradeoff between avoiding direct political assaults on their seats and avoiding the construction of inaccurate beliefs about their usefulness as guardians of the constitution. The goal of the theoretical analysis will be to identify the conditions that govern how judges might evaluate this tradeoff. We will discuss a number of observable implications of the argument, which relate to common subjects of empirical analysis. But we will also highlight two general implications.

- Institutional reforms designed to empower judges can raise the likelihood of inter-branch conflict.
- The construction of judicial power may require judges to invite political inter-branch conflict.

The first implication raises questions about our understanding of institutional effects on judicial behavior, and by implication, about our theories of judicial reform. In so far as formal rules influence the judicial preferences, they will impact the core tradeoff around which the model turns. And as we discuss below, common subjects of institutional reform (e.g. tenure or jurisdictional rules) influence the possibility of inter-branch conflict in unanticipated ways. These results suggest further that common studies of the

[4] Clearly, we need not assume that litigants only come to court to win cases – simply generating publicity or inducing a new legal principle not immediately related to the particular conflict can be enough (e.g. McCann 1994, 154-155); however, it seems to overstate the role of domestic interest groups and international advocacy networks to believe that all litigation is always and only about generating publicity or even about building a long-term strategy of legal success. There are other obvious and significantly less costly means of generating public awareness , and potentially more effective means of inducing political change. And not all victims of state policy (and not all questions courts want to resolve) will be promoted by a group that cares nothing about its likely success. In so far as litigants might actually care about having whatever (particular) state burden they challenge removed in practice, we ought to confront the possibility that potential litigants will seek alternative means of pursuing redress, and what that might mean for high courts interested in institutional maintenance. Still, we will discuss below the implications of assuming all courts always enjoy an infinite supply of the kinds of cases they want to resolve.

impact of formal rules on judicial behavior are indeterminate. The second implication raises questions about whether a strategy of judicial prudence is likely to help build the authority of nascent constitutional courts (e.g. Carrubba 2009; Ginsburg 2003) or instead undermine that authority. Ultimately, the results suggest that building judicial power from within the judiciary alone is likely to be a terribly delicate process, subject to numerous fits and starts and perhaps unattainable for some courts in some political contexts.

The remainder of the paper proceeds as follows. The next section clarifies our puzzle from the standpoint of existing theories. Section three suggests how we recombine elements of current models to build a solution to the puzzle. Section four presents that model and its implications. The final section concludes with directions for future research.

II. The Puzzle

In this section we show that our current theoretical models of judicial reform, judicialization, and judicial decision-making, cannot fully account for the series of facts outlined above. This is not to say that existing models are unhelpful. Some explanations take us quite far, and all of them shed light -- at least implicitly -- on various chokepoints in the legalization process. Critically, however, no account in the extant literature explicitly models the interdependence between litigation choices, judicial decisions and political reactions. Nor can off-the-shelf models explain the specific confluence of litigation, risky decisions, and judicial attacks that mark judicial politics in Latin America and elsewhere.

[Table 1]

Table 1 captures the reach and limits of existing theories. The first dimension of the table refers to judges' behavior, distinguishing between prudent and bold decisions. The second dimension of the table refers to politicians' behavior, politicians can either purge courts, or not. Within each cell, litigants can decide whether to bring their conflicts to court, or not. The logic of conventional theories implies that of the eight possible combinations, only two are possible: prudence, not purging, not litigating (cell F) and boldness, not purging, and litigating (cell G).

Reform. Take, for example, the various approaches that argue that governments derive benefits from courts that are capable of constraining them (i.e. courts are independent). In this view, judiciaries serve a variety of political ends, including ensuring investor confidence in property rights (Moustafa 2007; North and Weingast 1989); "locking-in" core policy goals in the event of an electoral loss (Ramseyer and Rosenbluth 1993; Ginsburg 1997; Hirschl 2002; Finkel 2008); enforcing current legislative bargains into the future (Landes and Posner 1975); correcting bureaucratic drift (McCubbins and Shwartz 1984; Rosberg 1999; Moustafa 2007); and, providing a mechanism of blame avoidance (Salzberger 1993; Whittington 1999; Magaloni 2008).

Of course, these models are largely centered on politicians' choices to construct independent judiciaries and not the process that follows after construction. But even if we push their implications beyond what is analyzed explicitly, they essentially lead to the kind of world captured in cell G: politicians refrain from purging courts, judges are free to hand down bold decisions, and aggrieved parties presumably litigate. Of course, it is possible to imagine that judges will be attacked when governments recognize no need, say, to communicate credible commitments, monitor lower level bureaucrats, avoid blame or create political insurance. But, then we are essentially back in the kind of world captured in cell F, in which judges lack independence and potential litigants are thus thwarted.

Judicialization. Judicialization models have a different focus, but carry similar implications. To be sure, McCann (1994), among others, recognizes that litigation is often about more than winning any one particular case, but as Gauri and Brinks (2008) note, there are alternatives to litigation. Thus, since individuals and groups are likely often to prefer to win than to lose, a key prerequisite for judicialization is an independent judiciary.[5] This approach provides invaluable insight into why courts in some contexts become flooded with complaints while courts in other contexts are relatively unused. And they even explicitly link the choice to litigate to likely outcomes in the judiciary. Nevertheless, like reform models, the failure to explicitly model the interaction between judicial behavior and reactions to judicial decisions,

[5] Epp (1998) suggests further that it is not enough for courts to be independent, formally empowered to constrain the state, and willing to do so. Societies must possess a well-developed legal support network, including well-funded activists and attorneys, who are willing to pay the costs to help individuals access the system.

limits their reach. On these accounts, the independent nature of the judiciary serves purely as an exogenous factor that conditions litigant choices. As with reform models, judiciaries are either independent or they are not. The consequence of this conceptual dichotomy is that we again struggle to explain purges under any scenario of judicial behavior.

Separation of Powers Theories. A broad class of models that centers exclusively on the interaction between courts and policymakers fall under the heading of separation of powers games. A general result in these models is that external political conditions, whether unfavorable veto structures in the elected branches of government (Marks 1989; Ferejohn and Weingast 1992; Spiller and Gely; Epstein and Knight 1998; Ferejohn et al. 2007), low public support (e.g. Stephenson 2004 or Carrubba 2009), low issue transparency (Staton 2006; Vanberg 2005), or pending regime change (Helmke 2005), force judges to behave strategically in order to avoid having their decisions overturned, their jurisdiction stripped, or their posts eliminated. In this way, these models provide a clear explanation of judicial prudence. Critically, actual inter-branch conflict should be unobserved on nearly all of these accounts. It is precisely the threat of an attack or a purge that drives judicial prudence (cell F); or the absence of the threat that allows for judicial boldness (cell G). Simply put, while the threat of inter-branch conflict is crucial to the mechanism, actual conflict is always avoided in equilibrium.

Vanberg (2005) and Staton (forthcoming), in different ways, get us the closest to understanding how risky decisions and inter-branch crises might instead occur together. Although Vanberg also focuses on explicating the conditions under which public support enables judges to limit the government, the fundamental difference is that inter-branch crises are possible in equilibrium. In Vanberg's words, "…struggles or confrontations in which a court invalidates a measure, only to encounter resistance and non-compliance… are not necessarily the result of accidents or miscalculations on the part of politicians or judges" (2005:36). Specifically, the so-called "contentious equilibrium" in his model is sustained whenever beliefs about the level of public support for the court and the transparency of judicial decisions fall above the court's threshold for vetoing legislation and the below the legislature's threshold for evading the court ruling.

Vanberg's model thus provides us with a coherent explanation both for why judges might risk anti-governmental decisions in the most important cases and why such decisions are relatively rare. The short answer is that while courts in Latin America tend to lack diffuse public support, they may enjoy support on specific issues. Thus, the fact that certain cases contain hot-button issues may raise both public awareness and public support for the judiciary's decision such that courts are put in a "zone" whereby they are willing to take on the government. At the same time, this mechanism also explains why governments choose to punish courts that make such decisions. Precisely because the political stakes in such cases are so high (i.e. the ability to get re-elected or the imprisonment of one's closest supporters or enemies) governments are willing to suffer the costs of public backlash to punish a recalcitrant judiciary.[6] We believe that there are at least two reasons to push the Vanberg logic further. It provides no account of litigant choices. Simply put, cases arrive at courts randomly, and so it cannot account for why litigants might pursue legal strategies in the face of contentious politics. Second, the model is static, yet we know that inter-branch politics emerge over time. Critically, drawing on Helmke (2005) and Carrubba (2009) we believe that we can uncover novel lessons by beginning to model temporal dynamics in this framework.

With the temporal issue in mind, Staton (forthcoming) provides another potentially useful perspective on inter-branch relations. Although his model also contains equilibria in which courts defy the government and incur punishment, such interactions are less likely to emerge as the importance of the case increases for the government. Thus, at least in this respect, Vanberg remains the more relevant model for our purposes. Nevertheless, Staton highlights pitfalls of strategic deference, which also speaks to our more general question of why judges might risk sanctions and how doing so affects public perception. Here, the important point is that judges, who bend to the government in the short-term, might hurt themselves in the longer run by failing to disconfirm the public's belief that the judiciary is purely

[6] Interestingly, the government's prior beliefs about whether the Court shares its preferences have a counter-intuitive effect on the likelihood of inter-branch conflict. Where there is a sufficiently high chance that judges have convergent preferences, the government is less likely to engage in self-censoring and more likely to adopt legislation that results in conflict.

partisan. This insight provides another building block for understanding why courts under pressure nevertheless challenge political authority.

III. The Model

The key to developing a unified model of these behaviors, we believe, lies first in pulling together critical features of previous arguments, which have advanced our understanding of the rule of law. We begin by assuming that judicial decision-making is carried out within a context of strategic interaction (e.g. Couso 2004; Carrubba 2005; Epstein and Knight 1998; Ginsburg 2003; Helmke 2005). This does not imply that judicial behavior will be insincere – only that decisions are influenced by judicial expectations about the future behavior of government officials and litigants, and also by the expectations those actors hold about judicial behavior.

Also, we will assume that judges are driven by multiple goals and that these goals may be mutually-incompatible in some cases. Following the standard approach in judicial politics, we will assume that judges are guided by preferences over public policy outcomes (e.g. Segal and Spaeth 2003). Judges care not just about getting cases rightly decided, but about having their decisions impact broadly the way that rights and resources are allocated in a society.[7] Yet, we assume that judges have institutional interests, as well. There are (at least) two ways in which this might be so. The first, which we believe is relatively uncontroversial, is that judges value their seats. We will assume that, all else equal, judges prefer not to be sacked (Helmke 2005). This assumption can be motivated in a number of ways, including the obvious interest in their salaries and other perks. One additional rationale is that judges value the prestige associated with sitting on a state's highest court (Ginsburg 2003). Still another derives directly from the judicial interest in policy. In so far as judges value their potential impact on public policy outcomes, they should value the positions that grant them opportunities to make those impacts. Clearly, a seat on a high court is one such position. A second institutional interest we will model involves being accessed. We will assume that judges value having cases to resolve. Again, judges might value being on a

[7] Importantly, we do not necessarily assume that these policy interests are themselves driven by raw ideological proclivities. They may derive from a purely legal theory of interpretation. The key is that, however derived, judges are for their preferences to control the outcome to the conflicts they resolve.

prestigious court, and it is hard to imagine how a court could be prestigious if it is never used. As is the case with the interest in maintaining one's seat, we also can imagine that judges value having cases to resolve, because cases represent opportunities to play a role in shaping national policy (Staton 2007). In so far as judges wish to play a role in national policy-making, they simply must have cases to resolve. Below, we allow judges to derive varying utility from their seats and the choices of litigants to come to court.

Scholars have come to model inter-branch conflict within the context of an uncertain world (e.g. Carrubba 2009; Stephenson 2004). Uncertainty is also essential to our account. Political choices are often risky, because actors are not clear about relevant features of their world. Uncertainty may derive from the preferences of those with whom they interact to the precise links between the policy choices they make and the outcomes those policies induce. This does not imply, however, that the activities on which we focus are best explained by a logic of mistakes. We have compelling accounts of judicial choice, which though subject to uncertainty, are quite clearly calculated. Bad outcomes are not necessarily mistake-driven. The first analytical contribution of uncertainty is that it provides a rationale for behaviors that seem to be in tension with each other. As Vanberg suggests, we observe inter-branch conflict because governments are not fully sure about judicial preferences and legislators and judges cannot perfectly predict public backlashes. We, too, will make use of this basic analytical feature. Yet, uncertainty is essential to our account for another reason: it *invites us to consider how individuals learn about the world by observing each other's behavior*. This suggests the usefulness of a final modeling feature.

Numerous accounts in the literature suggest that judges trade off control over immediate policy outcomes in order to benefit a long-run strategy of institution building. By not asking governments to implement decisions that would invite defiance, judges build a norm of compliance, which makes it increasingly difficult to defy orders over time (e.g. Carrubba 2009; Ginsburg 2003).[8] And, by constructing

[8] Carrubba's model does not involve a norm of compliance precisely, but rather demonstrates how courts can influence public beliefs about the appropriateness of allowing them to constrain government systematically via a stream of decisions that are implemented.

legal principles in decisions that avoid direct political conflict, courts lay the groundwork for future expansions of power (e.g. Moustafa 2007). Time is critical to the logic of these stories. We wonder, however, whether we have come to think about time in an overly narrow sense. These arguments imply that judges must give up short-term policy interests in order to build institutions. Although this account is surely plausible, we question whether this is always true. We wish to ask whether courts might build judicial institutions through principled, aggressive decision-making. Critically, the value of modeling at least some temporal dynamic is that it allows us to consider how uncertainty might be reduced through repeated observation.

Sequence of Actions

The following model is designed to uncover the conditions necessary to sustain what we will call a "clashing" equilibrium. In other words, what has to be true about the world in order for judges to invite political conflict, for governments to enter into such conflict and for litigants to nevertheless use courts in such environments? The model we propose, an extensive form game of incomplete information, draws on Vanberg (2005), and we adopt his notation where appropriate. There are four players: a government, a court, and two potential litigants. Figure 1 summarizes the sequence of play. The government moves first. It may implement an agenda (p_1, p_2), which includes a pair of public policies.[9] If it does not, the game ends. Each policy in the agenda imposes a burden on the two potential litigants, against which there is a colorable constitutional argument. Litigants bear these burdens if the policy continues to be implemented, whether because they do not seek judicial relief, their petition is denied, or because governments refuse to implement a decision voiding the policy. To simplify only slightly, we match policies and burdens with litigants, so that the burden of the first policy falls on the first litigant exclusively and the burden of the

[9] In a parliamentary system, we might alternatively say that the government enacts its legislative agenda. In a presidential system, we might imagine two executive orders, or frankly, its own legislative agenda, which is adopted.

second policy falls exclusively on the second litigant. Further, we assume that there is a temporal order to these policies, such that the first litigant may seek legal redress prior to the second.[10]

[Figure 1]

Having observed the government's agenda, the first litigant may seek a court order enjoining the government from implementing the policy. If asked, the court reviews the litigant's claim, and may find the policy constitutional or not. If the court declares the policy unconstitutional, it requests a return to the *status quo*. In this case, the government must choose whether to accept the decision. If it does, it gives up p_1 and the first litigant's burden is removed. If the government does not accept the decision, it continues to implement p_1 and seeks to replace the court with partisans – judges whom it knows share its preferences perfectly.[11] Finally, as in Vanberg (2005) and Stephenson (2004), in the event that the government defies the court, it may confront a public backlash, which occurs probabilistically, but which will induce the government to comply with the court's decision. The probability of a backlash is q_i for policies $i=1,2$. Conceptually, allowing q to vary across policies highlights that we do not necessarily assume that the backlash is a mere function of diffuse public support (or legitimacy) for the court. Although there is nothing wrong with imagining that diffuse support is positively correlated with the backlash probability, the key point is that the probability of a backlash can vary across the two policies in the agenda for a number of reasons.[12] The second litigant may go to court after the first policy conflict is

[10] This ordering might be imposed by the law itself, in the sense that the procedures necessary for pursuing relief are more involved for the second burden than the first. It might emerge out of the nature of the policy, in the sense that the burdens of the second policy are simply felt after the first. What is important is that there is a sequence to the events so that litigants can learn from each other's experiences.

[11] We collapse simple non-compliance and a judicial purge into one choice. An extension of this model might distinguish between the two choices. The obvious advantage of that set-up are that it would allow us to consider why a government might choose non-compliance over a purge. In so far as there might be judicial incentives to avoid either, the central tension that would analyze below would remain.

[12] For example, specific support might vary across the policies, as might support for the government. Similarly, it might be easier to mobilize groups that are sympathetic to the first litigant's claim than the second, or vice versa. Public support models of judicial power are not only relevant to domestic accounts of judicial politics. Through the lens of the literature on rights advocacy, scholars of international relations and international law are increasingly viewing domestic political conditions, public opinion in particular, as critical for the enforcement of decisions of regional, especially human rights, courts (see Carvallaro and Brewer 2009, 770, 776).

fully resolved. At this stage, the process repeats itself (i.e. court makes a decision, government reacts and public responds).

Preferences and Information Structure

The government derives value out of the implementation of its agenda, but pays separable costs for enacting it, for attempting to pack the court and for failing in this effort because of a public backlash. In particular, the government derives $\alpha > 0$ from the agenda, which can only be eliminated by an unfavorable judicial decision that it ultimately accepts, whether voluntarily or following a public backlash. The government places a weight ϕ on p_1, where $0 < \phi < 1$, so that the value of the first policy in the agenda is $\alpha\phi$ and the value of the second is $\alpha(1-\phi)$. To enact its agenda, the government pays a cost $\underline{\varepsilon}_g : \alpha > \underline{\varepsilon}_g > 0$, which can reflect the opportunity costs of pursuing the agenda or simply the transaction costs associated with governing. The cost of attempting to purge the court is $\overline{\varepsilon}_g > 0$, where $\overline{\varepsilon}_g > \underline{\varepsilon}_g$[13] From the government's perspective, this parameter can reflect a host of factors developed in the literature, which increase the costs of purging a court, including most naturally, the fragmentation of government or formal institutions that increase the difficulty of removing judges. Finally, the cost of a public backlash against its attack is $\beta > 0$. The government knows the probability of a public backlash and the probability that the court's preferences are limited or expansive, as we define below. If the court is what we will call "partisan," again as defined below, the government knows it for sure.

Litigant preferences depend on the burdens they ultimately bear and on the costs they pay to access the legal system. We assume that each litigant's utility is independent of the other. It may be that the first litigant is able to help the second learn about the court's preferences, but this will not be because the first litigant is trying to do so. Thus, a key element of an equilibrium in which litigants gain information about their courts must involve an incentive for early victims to seek relief. The burdens associated with each policy in the government's agenda impose a cost on litigants,

[13] This ensures that the transaction costs of packing a court are larger than the costs of implementing the policy agenda. Substantively, the logic is that if is costly to implement an agenda, it must be costly to purge a court.

$b_{ij} > 0 \;\; for\; i \in \{H,L\},\;\; j = 1,2$, where $b_{Hj} > b_{Lj}$, so that some burdens are worse than others for each litigant.[14] Litigants bear these costs if the policy continues to be implemented, whether because they do not seek judicial relief, their petition is denied, or because governments refuse to implement a judicial decision voiding the policy. Litigants also must pay an access cost $\varepsilon_l > 0$ to get into court. The litigants know the probability of a public backlash and they know the probability that a court is of a certain type.

The court may be one of three types, which we can assume is drawn by nature from a set of courts, the distribution over which is known by the parties as defined above.[15] With probability η the court has expansive preferences, by which we mean that it shares the litigants costs associated with the policy burdens. Such a court will pay b_{ij} if the policy is upheld or if its decision invalidating it is successfully defied.[16] With probability λ, the court's preferences are limited, such that it will pay b_{Hj} only if a high burden is imposed and implemented; otherwise, it pays zero. Finally, it is possible that the court is simply an extension of the sitting government, a partisan court. The probability that a partisan court is drawn is $1 - \eta - \lambda$. A partisan court shares the policy preferences of the government precisely.

This describes the court's policy preferences, though above, we have suggested that the court has institutional preferences, as well. We model these as follows. First, following Vanberg, we assume that all court types pay a cost *c >0* in the event that they are successfully purged. This parameter may be interpreted to represent the value judges lose from impeachment, both in terms of lost salary and other less quantifiable benefits associated with being a member of the court. Second, we assume that the expansive and limited court types derive some additional value, $\upsilon > 0$, from being accessed by litigants.

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[14] Importantly, though $b_{Hj} > b_{Lj}$ we do not make any assumption about actual value of b_{Lj} to the litigants – low and high cost burdens are only "low" and "high" relative to each other. It may be that a low cost burden is quite high. The function of the ordering is to help us identify differences between court types, as we discuss below.

[15] The government knows if the court is partisan but is uncertain over the other two types. It knows the probability with which each type is drawn. The litigants only know the probabilities associated with each court type. And the court knows its type for sure.

[16] This need not be the case precisely. The key is that some court type needs to have preferences that converge with the government or not, so that there is some tension between judges and politicians.

There is a value to these courts from being used. This assumption reflects our effort to model a judicial interest in being relevant to the political landscape of its country – from being able to play a meaningful role in the control over the constitutional order.

Clashing Equilibrium

There are a number of substantively interesting cases in the model; however, we will focus on an equilibrium in which the profile of strategies matches the puzzling combination of behavior around which our discussion has been framed. We have elected to keep the model as flexible as possible in terms of the burdens the policies induce; however, in the present case, we assume each policy in the agenda imposes b_L on the litigants. This assumption influences the precise learning that transpires along the equilibrium path, but does not impact materially the empirical implications we discuss below.[17] Our solution concept is Perfect Bayesian equilibrium (PBE), which requires a profile of sequentially rational strategies and a profile of beliefs that are consistent with those strategies and determined via Bayes rule whenever possible (Osborne and Rubenstein 1994, 233). We assume beliefs are formed at information sets that should not be reached in equilibrium via passive conjectures (Rasmusen 2001, 142-145).[18] The clashing equilibrium strategy profile is as follows. We will discuss beliefs informally in the text, though they are characterized in the appendix.

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[17] Assuming that both burdens are high places the limited court type in the same position as the expansive court in the current case. This can influence the inferences litigants draw if a policy is struck down. They may still be uncertain about the precise court type after such a decision; however, there is no impact on the comparative statics we discuss below. An interesting alternative case involves a policy that induces a low burden, which is followed by policy that carries a high burden. In this case, governments might be willing to attack a limited court that has just upheld its policy, in expectation that it might strike down the more burdensome policy on the future docket. A limited court in this circumstance cannot gain by strategically challenging the policy, so it's behavior is unaffected.

[18] The solution concept places no restrictions on "off-path" beliefs. These are the beliefs players hold if they are called upon to choose at an information set that should not have been reached under the strategy profile. For example, we might wonder what Litigant_2 would believe if she observed Litigant_1 not go to court when she is supposed to according to her equilibrium strategy. We assume that players do not update at off-path information sets beyond where those beliefs lie prior to the unexpected behavior. In this sense, the conjectures players construct off-path are "passive."

Clashing Equilibrium Strategy Profile

Government: Enact policy agenda; Attack court if ever challenged
Litigant$_1$: Go to court
Litigant$_2$: Go to court if court strikes p_1
Avoid court if court upholds p_1 or if court is successfully purged
Court:
Partisan: Uphold both policies
Limited: Uphold both policies
Expansive: Strike both policies

Three conditions, defined on the probabilities of a public backlash and the probability that the court has expansive preferences, support this equilibrium. They are as follows:

Backlash Condition 1: $$\max\{\frac{\varepsilon_1}{b_L}, \frac{c}{c+b_L}\} < q_2 < \frac{\alpha(1-\phi)-\bar{\varepsilon}_g}{\alpha+\beta+\phi}$$

Backlash Condition 2: $$\frac{c-b_L}{q_2(c+b_L)+\upsilon} < q_1 < \min\{\frac{\alpha\phi-\bar{\varepsilon}_g}{\alpha\phi+\beta}, \frac{c}{c+\upsilon}\}$$

Expansive Court Condition: $$\frac{\varepsilon_1}{q_1 b_L} < \eta < \frac{\alpha-\underline{\varepsilon}_g}{\bar{\varepsilon}_g + q_1(\bar{\varepsilon}_g+\alpha\phi+\beta)+q_1q_2(\alpha-\alpha\phi-\beta)}$$

It is useful, from the perspective of replication, to notice that the conditions mirror a central implication of the Vanberg argument. Namely, contentious inter-branch politics are most likely to emerge under relatively high degrees of uncertainty. For example, litigants must be confident enough that their courts' preferences are similar to their own in order to access the judiciary, but governments cannot be too sure that courts share litigant preferences in order to pursue the policy agenda in the first place. Thus, as the Expansive Court Condition suggests, the probability that the court has expansive preferences can be neither too big nor too small. Similarly, litigants and courts have to be confident enough in the success of an eventual public backlash in order to come to court and to challenge the government, respectively; however, governments cannot be too confident about a public backlash, lest they will choose to accept unfavorable outcomes. Thus, the Backlash Conditions suggest that the probability of a successful public backlash must be neither too large nor too small. With these general results in mind, we now describe the equilibrium, highlighting a core judicial tradeoff around which our key implications revolve. This tradeoff

emerges in the first period, but is influenced by what happens in the second period. So, we will discuss the equilibrium backwards from the period of play following the first policy conflict.

The Second Policy Conflict

The first litigation reveals to the players considerable information. If they observed the court uphold the policy, they will conclude that it is not the expansive type. Since the government knows whether the court is the partisan type, it is now completely informed about the court's preferences. The second litigant can now rule out that the court has expansive preferences, however, she would remain unsure about the court's type, assigning probability weight to the partisan and limited types. Precisely, the updated probability the litigant assigns to court having limited preferences is $\frac{\lambda}{1-\eta}$. Yet, since the litigant knows that the court does not have expansive preferences, and since the burden associated with the second policy is sufficiently small, she will not anticipate relief from either court type, and so she will not go to court, saving the costs of litigation. Likewise, if the second litigant observed the government successfully purge the judiciary, she will again choose to save the costs of litigation rather than engage in a costly, fruitless effort to obtain relief. On the other hand, if the players observed the court strike down the first policy and survive an attack, they will all conclude that the court is the expansive type. For this reason, the only way that the second period continues beyond the litigant's choice is if court that has survived an attack in period one.

Assuming that the second litigant has gone to court and that the court has struck down p_2. The government will choose between attacking the court for the second time and accepting the resolution. An attack imposes the legislative cost of the purge, $\bar{\varepsilon}_g$, and risks another backlash. But as long as q_2 is sufficiently small, the government will go forward with the purge attempt. The precise threshold, $q_{2\max} = \frac{\alpha(1-\phi)-\bar{\varepsilon}_g}{\alpha+\beta+\phi}$, reflects the upper bound on q in Backlash Condition 1. Expecting the government to attack, the expansive court must be sufficiently confident in another successful public backlash to risk being purged, so q_2 must be sufficiently large. Since the game ends following this decision, the choice

depends on relative size of the purge cost, c, and the policy loss associated with the government's agenda, b_L. The precise condition, $q_{2\min} = \frac{c}{c + b_L}$, reflects one of two possible lower bounds on q listed in Backlash Condition 1. Finally, expecting a sympathetic court, the litigant must also be convinced in the success of a public backlash in order to come to court in the first place. As long as $q > q_{2\min'} \equiv \frac{\varepsilon_l}{b_L}$, the litigant will seek relief. This establishes the second possible lower bound on q_2, as defined in Backlash Condition 1. The probability of a backlash must be larger than both thresholds to sustain the clashing equilibrium.

The logic of the second policy conflict mirrors the Vanberg analysis. Although it adds a litigant to the interaction, the underlying story is the same. The value-added of the current model turns on the behavior it can speak to in the first period, where the effects of current choices on future utility streams play a significant role.

The First Policy Conflict

We begin with the government's reaction in the event that the court has struck down p_1. Its choice depends again on how the government balances the costs of attempting to purge the court and a successful backlash against it versus the benefits of the entire policy agenda, what it will obtain if it successfully packs the court with partisans.[19] As, a successful public backlash has to be insufficiently likely in order for the government to proceed: $q_1 < q_{1\max} \equiv \frac{\alpha\phi - \bar{\varepsilon}_g}{\alpha\phi + \beta}$, as defined in Backlash Condition 2.

The temporal dynamic of the model induces a core tradeoff for the expansive court. If it strikes the policy, it will successfully signal its type to future litigants, and future litigants will come to court, granting the court a direct benefit associated with use and the indirect benefit associated with the

[19] In most respects, the decision is similar to that made in the context of the second conflict. What differs is the way that the value of the first policy in the agenda influences the calculus. As the value of the first policy in the agenda, relative to the second, increases, the government is increasingly likely to attack the court in the first period yet decreasingly likely to attack in the second. The reason is that if the second policy is not particularly important, the government simply allows the court to strike it down. What this implies is that for attacks to emerge in both periods, the value of the policies in the agenda must be roughly equal.

opportunity to strike down another offensive policy. However, to increase litigant demand, the court embarks on an extremely risky strategy. In fact, it invites two attacks – one from the government over the first policy and another over the second. In such a context, deference is highly attractive as standard separation of powers models suggest. Yet, if the court is strategically prudent and avoids conflict, its behavior is indistinguishable from the limited or partisan types, and the decision it will induce inaccurate beliefs in society about its preferences. Consequently, it will have to accept two unfavorable political implications: 1) it will be unable to resolve the constitutional problem associated with the second policy since the second litigant will not seek relief, and 2) it will have to give up the institutional benefits of being accessed. In order for the expansive court to resolve the tradeoff in favor a sincere attack on the policy, the probability of a successful backlash must be sufficiently high: $q_1 > q_{1\min} \equiv \frac{c - b_L}{q_2(c + b_L) + \upsilon}$.

The partisan incentive to uphold the policy is transparent; however, the limited court faces a tradeoff similar to the expansive court's. By upholding p_1, the limited court fails to accurately communicate its type to future litigants, and for this reason, it gives up the institutional benefits of being accessed. Might the limited court attempt to attract the second litigant by strategically challenging the government, thus appearing to be the expansive court? Under this alternative strategy, the limited court would risk a purge in the first round to increase demand for its services in the second. In order for the limited court to implement its equilibrium strategy, a successful public backlash in the first period must be insufficiently likely: $q_1 < q_{1\min'} \equiv \frac{c}{c + \upsilon}$.

Unlike the second litigant, the first is unsure of the court's type when it makes its choice to go to court. In order for her to expend resources on a legal strategy, she must be sufficiently sure that the court is the expansive type: $\eta > \eta^* \equiv \frac{\varepsilon_l}{q_1 b_L}$. As is clear from the expression, the litigant's choice also depends on a sufficiently high q_1 – if it is too low, there is no probability of an expansive court high enough to induce a legal effort. The final choice concerns whether the government will enact the policy in the first place. It

must balance the value of the policy agenda against the costs of implementing it, of attempting to purge the court twice, and of possible, successful public backlashes. As the Expansive Court Condition suggests, for the government to legislate, we need: $\eta < \eta^{**} \equiv \frac{\alpha - \underline{\varepsilon}_g}{\overline{\varepsilon}_g + q_1(\overline{\varepsilon}_g + \alpha\phi + \beta) + q_1 q_2(\alpha - \alpha\phi - \beta)}$.

Empirical Implications

We organize our discussion of the empirical implications of the model around Figure 2, which depicts the clashing equilibrium graphically. The backlash probability shown here is for the first policy. For ease of presentation, we assume that Condition 1 is met.[20] We begin by considering the impact the salience of the policy agenda has on the inter-action.

[Figure 2]

Observation 1: The value of the policy to the government and the cost of the burden to the litigant strictly increase the chances of conflict[21]

As the value of the policy agenda to the government (α) increases, the contentious equilibrium window expands both upward and to the right (η^{**} and q_{max} both rise). As this happens, the government becomes willing to enact potentially unconstitutional policies for higher and higher probabilities that the court has expansive policy preferences. Likewise, as the burden of the policy to the litigant increases, the expansive court's threshold (q_{min}) shifts to the left in Figure 2, similarly expanding the contentious equilibrium window. The court is increasingly willing to strike down the policy as the burden increases. Despite the fact that the court knows that the government will attack it for challenging its authority, as the burden grows, the court becomes increasingly aggressive. The rationale for this result derives from the temporal dynamic of the model, which allows the players to learn about judicial preferences. Within the context of the first policy conflict, as the burden grows, the court's incentive to accurately communicate

[20] Precisely, the equilibrium resides in a kind of rhombohedron-shaped region in the center of the three-dimensional parameter space. We do not trace out the exact shape of this object.

[21] $\frac{\partial q_{\min}}{\partial b_L} < 0$, $\frac{\partial q_{\max}}{\partial \alpha} > 0$ and $\frac{\partial \eta^{**}}{\partial \alpha} > 0$.

its preferences rises, as well. The reason is that by doing so, the court gains an opportunity to strike the *second* policy on the agenda. By strategically deferring to the government, the court not only loses out on the first policy, it gives up the opportunity to have an impact on the second, because it has convinced litigants not to waste their resources on a lost cause.[22]

Insofar as the only separation of powers models that produce a conflictual equilibrium are centered on a public support mechanism for judicial power, we next consider how public preferences influence inter-branch conflict in our analysis.

> *Observation 2. Inter-branch conflict is increasingly likely as a) publics come to disapprove of the government's policies, or b) as courts enjoy increasing legitimacy; however, these effects are likely to be non-linear.*

As we move from left to right across Figure 2, we become increasingly likely to enter the clashing equilibrium window. The empirical implication is that we should be increasingly likely to observe conflict as public preferences diverge from their representatives, emboldening courts with expansive preferences. Likewise, in so far as judicial legitimacy is correlated with the probability of a successful public backlash, courts should be increasingly likely to invite conflict as they grow in public esteem. This result is evident in Vanberg (2005) and we return to its substantive implications below. What is more, it is important to stress the precise empirical implication suggested by these results. Both relationships are subject to important non-linear effects and conditional effects. As the probability of a backlash continues to increase through the window in Figure 4, conflict is not longer in equilibrium, because the probability of a backlash is too high. This follows either because governments do not initiate questionable agendas in the first place or because, if they do, they will accept unfavorable judicial

[22] There is an interesting link between this result and the revolution in judicial philosophy described by Couso (2009). If Couso is correct, and Latin American judges are increasingly influenced by international human rights jurisprudence in ways that are leading them to prefer enhanced legal constraints on the state, then it is possible that the international network of rights activists are heightening the conditions for inter-branch conflict. With respect to the model, we can interpret a change in judicial preferences through the lens of the burdens litigants face. Indeed, from the perspective of the judges in our model, there is no difference conceptually between litigant burdens and judicial preferences. As b_{ij} increases, so do the costs judges pay for failing to veto the policy. Broadly speaking, the same might be said for the effects of regional human rights courts, as they increasingly ask governments to enforce sensitive decisions in political contexts in which the rule of law is much in doubt (see Cavallaro and Brewer 2009). In as much as domestic courts are part of the regional enforcement mechanism, it may be that regional courts, along with rights activists, are placing domestic courts in risky political situations.

decisions. Thus, we should observe an inverted-U relationship between measures that capture the probability of a public backlash and conflict. Likewise, either for extremely high or low probabilities that the court shares litigant preferences, public support is simply irrelevant to conflict (i.e. the effect of public support is not only non-linear, but it is conditioned by beliefs about judicial preferences). Thus, the non-linear effect of public support is conditioned by beliefs about the kinds of burdens courts are likely willing to tolerate.

This proposition is clearly testable with data on public support for courts in Latin America. It is well-known that judicial legitimacy in the region is relatively low in many countries, yet it is inaccurate to suggest that it is literally zero everywhere, or really even close to zero. Indeed, it may be that we see so much conflict in the region precisely because public support is not high enough to warrant governmental self-censoring yet not low enough to always induce judicial deference. Further, it is important to note that the model is not limited conceptually to a notion of judicial legitimacy. Instead, we might expect to find these crises over conflicts in which governments manage to misgauge public preferences over particular policies, situations in which courts are able to exploit differences to obtain favorable policy outcomes.

If Gauri and Brinks are correct, then the choice to litigate should be related to both judicial decisions and government reactions. One of the goals of the analysis has been to link those choices explicitly. We are now in a position to consider how inter-branch dynamics might influence the judicialization of politics.

Observation 3: Conflicts are more likely to become judicialized in the wake of unsuccessful attacks.

The logic of the clashing equilibrium turns on a fundamental tension that constitutional judges confront. When attacks are expected, judges have incentives to strategically defer to powerful political authorities; however, when they do so, they risk producing inaccurate beliefs about their preferences, which can lead litigants to discount the future value of using the judiciary. In the limit, judges may come to be perceived as mere extensions of the government. Whether judges value opportunities to impact policy outcomes or simply value being accessed, incentives for sincere adjudication can offset incentives

for strategic deference. In the clashing equilibrium, the expansive court resolves this tension in favor of risk. This choice has important implications for how litigants learn about their courts. In this case, governmental attacks are made only against courts with expansive policy preferences. Thus, courts that survive attacks manage to signal successfully their preferences to future litigants; and for this reason, we should observe litigants increasingly likely to seek relief following unsuccessful attacks, precisely because they have learned that about a potential ally.

Finally, we have argued that our models of judicial politics ought to afford a wider set of goals for judges – we ought to consider what can be learned by allowing judges to value features of the interaction beyond immediate (or even long-term) policy outcomes. Our approach has been to imagine that judges have material, institutional preferences. They can value their seat (c) and their relevance to the shaping of constitutional meaning (υ).

Observation 4. Institutional preferences create competing pressures for conflict

Panel A of Figure 3 replicates the information in Figure 2. Consider what happens to the clashing equilibrium window as we increase the relevant parameters. As the judge's cost of the purge increases, the expansive court's threshold (q_{min}) shifts to the right, as depicted in Panel B, so that court must be increasingly certain that the public will successfully push back against the government in order to strike the first policy. Thus, reflecting the logic of a standard separation of powers model, judges are prudent to avoid losing their seat, and they should be increasingly prudent as the seat itself is increasingly valuable. But now consider the effect of the other institutional parameter. Panel C, which depicts the implications of increasing the value of reviewing future cases, suggests precisely the opposite effect. As the value of resolving future cases increases (i.e. υ gets larger), and the utility associated with inducing greater litigant demand for relief rises, the clashing equilibrium window expands. The court is willing to strike down the first policy for lower and lower probabilities of public backlash. Quite obviously, this change increases the possibility of conflict. It is worth considering carefully the implications of this result. We believe that they are significant, both for our interests in institutional design and for our ability to test institutional theories. It is to this and one additional broader implication that we now turn.

[Figure 3]

Broader Implications

Institutional Reform

Although we do not consider the choices of politicians to reform their judiciaries, the model suggests implications for that process, as well. Whether the aim of reform is solve a credible commitment problem (e.g. North and Weingast 1989), to provide insurance against a loss in political power (e.g. Ginsburg 2003), or to create a mechanism for resolving inter-jurisdictional disputes in a federal system (e.g. Magaloni 2003), our reform models are predicated on knowing the effects of institutions on behavior. Typically, however, salient institutional effects are assumed, not analyzed; and, our model questions whether all institutional influences are as straightforward as commonly assumed.

A standard approach to enhancing external judicial independence involves increasing judicial tenure (Ríos-Figueroa 2006). The logic of the design is transparent. By ensuring that judges enjoy their seats for longer periods, we insulate them from the need to curry favor with either parties who have control over their tenure or parties who might hire them once off the bench. But consider what increased tenure might imply in our model. On one hand, longer tenure can increase the value of a seat (i.e. increase the cost of a purge, c) by increasing the salary stream that will be lost and the years of prestige associated with the position. Yet, increased tenure might also increase the value of hearing future cases (i.e. υ). In so far as being accessed influences the prestige of the court, access should be valued more by judges that will sit on the court longer. Importantly, as we have just discussed these parameters have distinct effects on judicial behavior. The implication is that by increasing tenure, we induce two competing effects.

Tenure is not the only institution commonly involved in judicial reform that likely has this effect. Expanding jurisdiction or enhancing the legal effects of judicial decisions (e.g. creating *erga omnes* effects), influence the inter-action analogously. By creating a court that is empowered to resolve ever more important constitutional questions in ways that have greater implications for future policy debates, reformers at once increase the value of seat and the value of access; and again, these changes have competing effects on inter-branch conflict. The bottom line from an institutional design perspective is that

unless reformers know how potential appointees will value seats and litigant access, predicted behavioral changes associated with changes to judicial tenure, jurisdiction or legal effects are indeterminate.[23] What is worse, neither effect is unambiguously positive from the perspective of the rule of law. By increasing the value of the seat, we increase incentives for strategic judicial deference. By increasing the value of access, we increase the possibility of sincere judicial decision-making, but at the expense of risking inter-branch conflict. For these reasons, even if tenure rules might reduce conflict, we surely cannot say that they necessarily advance the rule of law. The cost of a reduction in conflict is a lowered constraint on the state.

Other institutional changes are likely to influence conflict in ways assumed by the reform literature. Consider Figure 4, which again shows the clashing equilibrium window. The shaded region shows how this window shrinks as the costs of purging the court increase. As the figure suggests, there are two consequences of this change. The first is to lower the government's public backlash threshold, such that the government requires a smaller and smaller probability of a successful public backlash in order to justify an attack. Simultaneously, the government becomes less and less likely to enact the questionable agenda in the first place. Institutions that make it necessary for governments to negotiate with minorities on the appointment or removal of judges induce precisely this effect. Unlike reforms to jurisdiction, tenure or legal effects, the consequences of removal or appointment reform unambiguously

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[23] Beyond institutional design, this result has implications for research in comparative law, as well. Given these competing effects on behavior, we cannot be sure which of the two competing pressures will outweigh the other. For this reason, if all we are armed with are data on tenure rules, the model suggests that we might observe positive, negative or null effects on both strategic judicial deference and on inter-branch conflict. Fortunately, we are also guided by a rough sense of how to evaluate what we do observe. Imagine that we observe judicial purges clustering around states with low levels of *de jure* judicial independence. If we are right, and there are competing, yet unobserved influences on judicial behavior induced by increasing tenure, then we likely have under-estimated the effects of both institutional preferences. We would have estimated a larger negative effect of tenure if we could be sure that courts care nothing about attracting future litigants, and we may have estimated a positive effect if we could be sure that judges care nothing for their future streams of income and other sorts of professional prestige unrelated to increasing demand for their services. This would not necessarily mean that formal institutions are irrelevant to judicial behavior or to crises more generally. They can matter greatly. It is just that we may not pick up the right effects in field data, because of the competing incentives problem. For this reason, we believe that the larger point is that our field needs to consider the applicability of lab experiments for the purpose of testing theoretical propositions. In the laboratory, we can get control over the competing incentives our institutions induce. And we may even begin to learn about how judges might evaluate these competing pressures on balance.

advance *de facto* judicial authority, by making it more likely that governments will accept unfavorable resolutions and less likely that they will enact unconstitutional policies in the first place. For this reason, it may be advisable to offset jurisdictional or tenure changes with corresponding changes in appointment and removal power. The critical point is that reform along one institutional dimension is likely to place pressure on other dimensions.

[Figure 4]

Endogenous Construction of Judicial Power

If a deep commitment to judicial review is critical to the ability of courts to command the respect of elected officials, then judges have strong incentives to build public support (e.g. Carrubba 2009; Gibson, Caldeira and Baird 1998). And we know that they engage in a number of activities designed, in principle at least, to build legitimacy (e.g. Staton forthcoming). Yet, as our analysis suggests, in line with a key result in Vanberg (2005), the development of judicial legitimacy can have non-intuitive results on inter-branch conflict. As Figure 2 suggests, the clashing equilibrium exists for middling beliefs in a successful public backlash. As long as these beliefs are correlated with judicial legitimacy, then the immediate implication for nascent courts is that as legitimacy is built, the likelihood of a judicial purge increases, as well. It is only at a relatively high probability of a backlash that the changes of a conflict are reduced again. This result suggests a daunting proposition for the construction of legitimacy and ultimately judicial power. It may be that as courts build public support, they create precisely the incentives that can ultimately undermine their authority. This result may have a lot to do with the relative lack of cases around the world in which scholars can definitely identify a court that has built its authority endogenously from the ground up.

The model also raises a question about a common contention about the ability of courts to build their authority in the long-run through a short-run strategy of prudence. For both Carrubba (2009) and Ginsburg (2003) among many others, by avoiding overt political conflict over salient public policies, or at least by not asking governments to implement decisions that would impose significant costs, judges build public beliefs in the value of judicial review (per Carrubba) and construct a norm of compliance (per

Ginsburg). Over time, this strategy will expand judicial power considerably. Our analysis suggests that this kind of prudential strategy may, in fact, be quite costly for judges. The critical problem with prudence is that it risks constructing inaccurate beliefs about judicial preferences – essentially teaching future litigants that the court is either extremely partisan or unwilling to defend rights. In a broader sense, prudence suggests the same inference for current political minorities, such that if and when they come to power, they will perceive every reason to reform significantly the judiciary.

The solution to this problem takes judges in constrained political contexts down a path of likely conflict. Judicial sincerity will communicate preferences accurately, but it does so at the risk of a purge. If this is true, then courts in their institutional infancies face a kind of political trap: be extremely careful and risk being written off as irrelevant or be aggressive and risk a purge. The implication of this trap is relatively simple in the end. It may be necessary for judges to induce tears in the rule of law fabric in order to build it. Unfortunately, systematic rule of law failures are the likely result of this approach.

Conclusion

Over the past fifty years, scholars of judicial politics have developed an impressive array of theoretical arguments to account for why governments might ever create courts empowered to constrain the state and for why such courts might ever exercise their power in practice. There can be no question that we know a great deal more about how judicial power works than we did at the beginning of this process. There are good reasons to suspect that politicians empower courts to solve credible commitment problems and to insure themselves against future electoral losses. There is considerable evidence that fractionalized politics provides the political cover necessary for judges to constrain arbitrary state action, and there is evidence that public support empowers courts, that judges believe it, and that they care about influencing it. This work all suggests that democratization may have a powerful influence on judicial independence and the rule of law. Yet, it also seems that courts can be quite constrained, even in a democracy. Indeed, the Latin American experience not only suggests that courts under democracy can be constrained, it reminds us that courts under democracy can be openly attacked. Despite these attacks, litigants bring cases, and courts sometimes challenge powerful, potentially dangerous political officials.

As we discussed in Part II, existing theoretical models struggle to explain this behavior, but not because they are inherently misguided. Far from it. Our existing models have a number of admirable qualities. It is just that no model is able to put these behaviors together, and we believe that our field should have such an account, precisely because the issues of judicial independence, the rule of law and the judicialization of politics are so central to our concerns – both in the region and around the world. We have presented a model of inter-branch conflict, which takes a stab at putting these behaviors together. We do so by pulling together features of existing models, and adding to them assumptions about institutional preferences, litigant choices, and time. The model suggests that judges confront a core tradeoff in difficult cases, especially when people are watching: a strategy of deference can avoid direct political conflict, but it risks creating inaccurate beliefs about judicial preferences, whereas a strategy of aggressive constitutional control may communicate accurate beliefs about preferences, but it risks a purge. The way in which judges evaluate this tradeoff can have important implications for inter-branch attacks, the construction of judicial institutions, and ultimately for beliefs about courts. Our model also suggests implications for institutional design and for institutional research. Increasing judicial tenure, really any institution that increases judicial time horizons, induces competing incentives for strategic judicial deference, which imply competing effects on conflict. We need to consider carefully our design recommendations, and we must consider alternative research designs, ones that take seriously the problem of identifying the causal effect of the institutions we care about.

Although we believe the model raises some novel insights, we certainly do not believe this represents an end point in our collective research agenda. There are clearly alternative explanations for increasing caseloads (e.g. Epp 1998). Jurisdictional changes, whether they emerge out of the legislature or doctrine, should obviously increase access, as do rules governing standing. And groups may push legal agendas simply for the political platforms high courts provide (e.g. McCann 1994). We have not attempted to model those features of the world. And surely, there is room for a logic of ideas or institutional ideology (Hilbink 2007), another source of judicial behavior that we exclude from the analysis. Further analysis also might consider how simple non-compliance might be accounted for in such

a model. In other words, why purge a court when you can simply ignore a decision? Also, the current model does not explain how judges might build their institutions though the logic of strategic deference, that is, by maximizing compliance. Here, such a strategy is deeply problematic. An extension might consider the conditions under which deference might be preferred to risk as a means of institution building. Finally, we have not modeled the institutional design stage, and it is surely worth investigating whether we can tie a logically consistent account of judicial reform to a model of inter-branch conflict. We would welcome such additions to the framework we have constructed, and we would even welcome an entirely novel approach, one that turns our results on their head. Yet, we believe that whatever changes are adopted, it is critical that we develop theoretical models that speak coherently to the myriad of behaviors that constitute the legal process.

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Table 1. Behavior Consistent with Existing Models

	Judicial Behavior/Litigant Behavior			
	Prudential Adjudication		Bold Adjudication	
Government Reactions	Litigate	Don't Litigate	Litigate	Don't Litigate
Purge Court	A	B	C	D
Accept Decision	E	F √	G √	H

Table 1. Shows the intersection of behaviors implied by existing models of judicial review. Existing models that anticipate judicial prudence can explain neither purges nor the choice to litigate. Models that anticipate boldness can explain litigation, but fail to explain purges.

Figure 1. Sequence of Actions

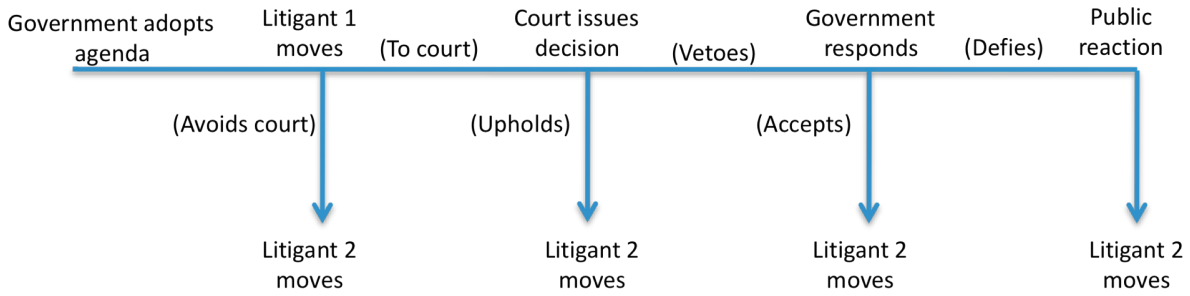

Figure 1. Shows the sequence of actions in the game, beginning with the government's choice to enact its policy agenda. Once the second litigant moves, the sequence of actions repeats itself.

Figure 2. Location of the Clashing Equilibrium

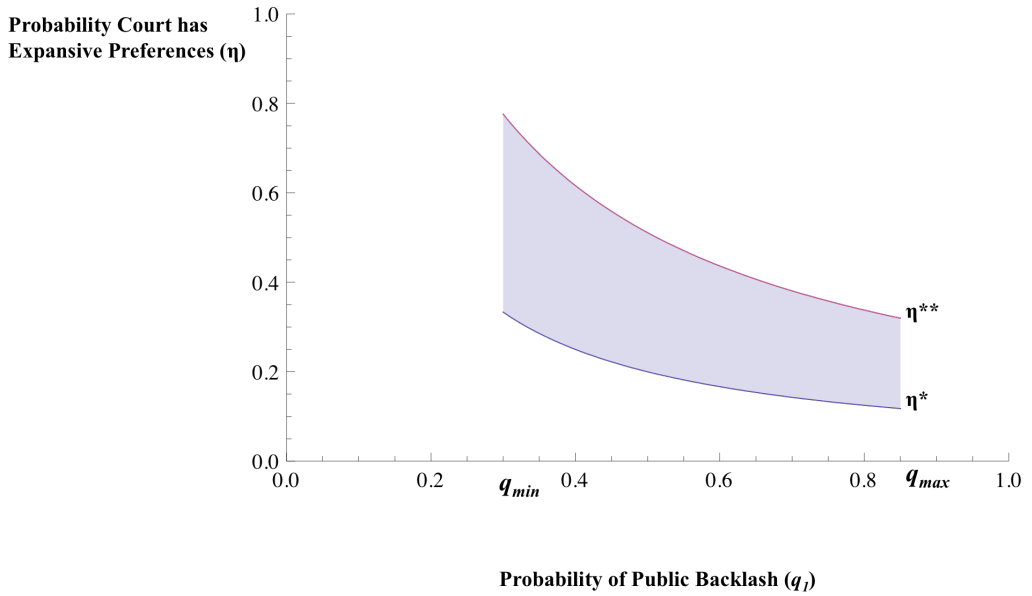

Figure 2. Shows the location of the clashing equilibrium across the η-q_1 space. As q_1 increases, so does the likelihood of a successful public backlash in defense of the court. As η increases, so does the probability that the court shares the litigants' preferences over policy burdens. The clashing equilibrium can be sustained only for middling values of these parameters.

Figure 3A. Location of the Clashing Equilibrium

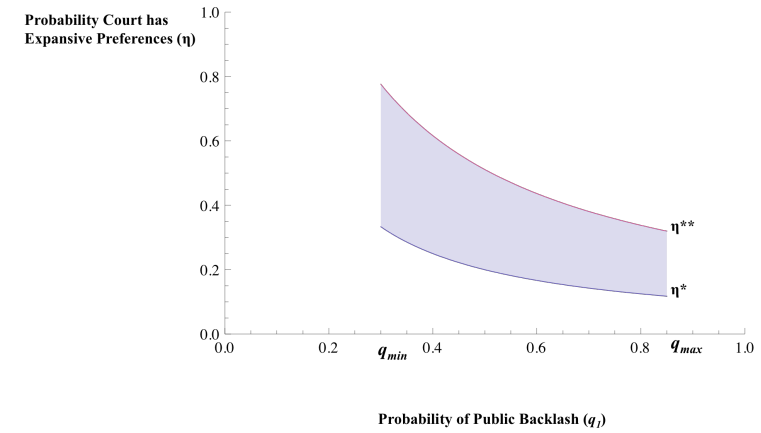

Figure 3B. Location of Clashing Equilibrium: Increased Judicial Cost of Purge (c)

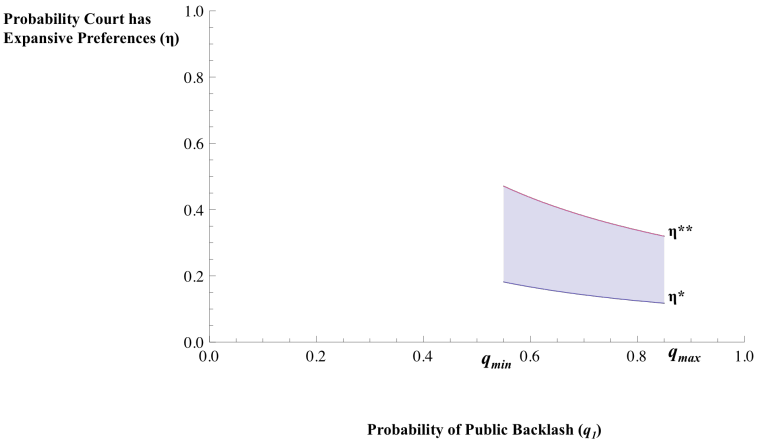

Figure 3C. Location of Clashing Equilibrium: Increased Value of Access (υ)

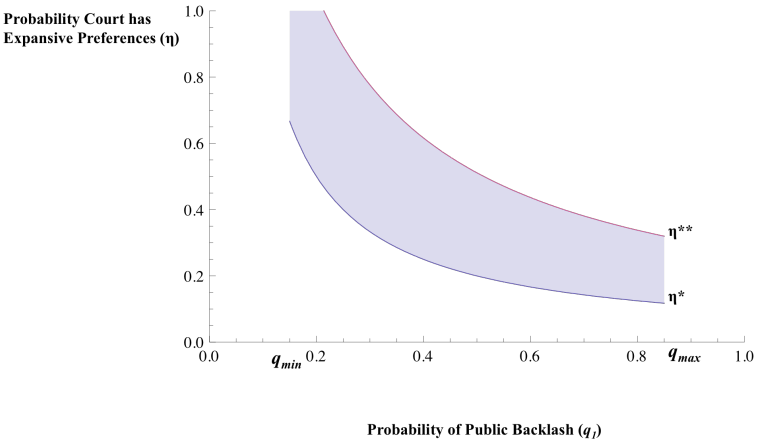

Figure 3. Shows changes in the clashing equilibrium for increases in the judicial costs of a purge (c) and the value of litigant access (υ).

Figure 4. Clashing Equilibrium as Government Costs of Purge Increase

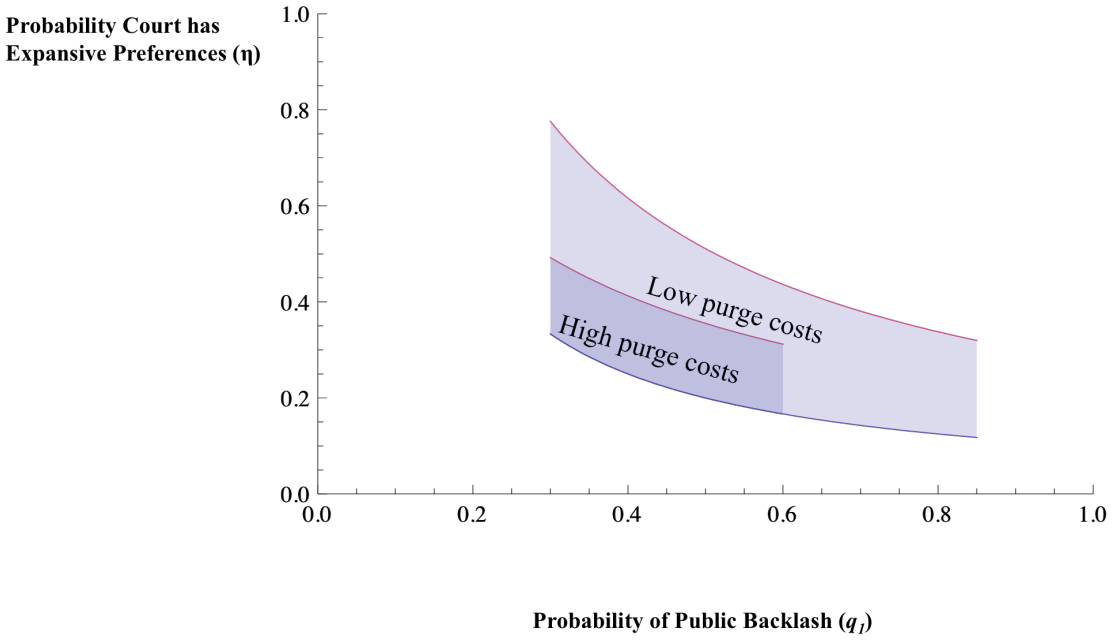

Figure 4. Shows the change in the clashing equilibrium window as the government's cost of a purge increases. This change influences the equilibrium in two ways: 1) it lowers the threshold above which the government is willing to accept the court's decision and 2) it lowers the threshold above which the government will not enact its policy agenda.

Appendix

The following analysis proves the results described in the text. In particular, it identifies the conditions that must hold for the strategy profile listed above to be a PBE, and it defines the corresponding beliefs that are consistent with the profile. Given the model's finite horizon, we proceed via backward induction, beginning with the government's choice over the second policy on the equilibrium path. We assume that if players are asked to move at an information set that should not be reached in equilibrium, they do not update beyond their beliefs on path, prior to the deviation. We clearly need to make a few knife-edged restrictions on behavior, to break ties. For now, we assume that there are no ties to break.[24]

Second Policy

Given the equilibrium strategies, if the players observe the court strike the second policy, both the government and the litigant know for certain that the court is the expansive type. The expected value of accepting the decision is 0. The expected value of purging the court is $q_2(-\beta - \bar{\varepsilon}) + (1-q_2)(\alpha - \alpha\phi - \bar{\varepsilon})$. Solving for q_2 yields the upper bound on q_2 in Condition 1. For the expansive court, the expected value of upholding is $-b_L$. Expecting defiance, the expected value of striking the policy is $-c - b_L + q_2(c + b_L)$. Solving for q_2 yields one of the two possible lower bounds on q_2 in Condition 1. Finally, the litigant pays $-b_L$ if she does not go to court, and the expected value of going to court is $q_2(-\varepsilon_l) + (1-q_2)(-b_L - \varepsilon_l)$. Solving for q_2 yields the final threshold on q_2 in Condition 1.

If the litigant observes the court uphold the policy, the probability that it assigns to it being limited is defined in the text, and since the court cannot be expansive, the probability that it is partisan is directly implied. But since the burden is b_L, litigant knows that both of the possible remaining court types will uphold it. For this reason, she does not go to court. If instead, the litigant observes the court purged, she knows that the new court is partisan, and again does not go to court.

First Policy

Given the players' strategies, the government will know for sure the court's type if it upholds. This is because it knows a partisan court for sure and of the court types it was initially uncertain about, only the limited court type will uphold. Since the government knows that both of these types will uphold the second policy, it does not waste its resources on attempting a purge. If instead the government observes the court strike the first policy, it knows for certain that it is the expansive type. If the accepts this decision, it gains the continuation value of the second round, which we can denote CV_2. If instead, it attempts to purge the court, the government expects $q_1(CV_2 - \bar{\varepsilon}_g - \beta) + (1-q_1)(CV_2 + \alpha\phi - \bar{\varepsilon}_g)$. Solving for q_1 yields one of the two upper bounds on q defined in Condition 2.

Given the partisan court's preferences, it obviously rejects the appeal. The limited court will obtain 0 if it upholds, because the second litigant will not bring a case. If instead, it strikes the policy it expects $q_1\upsilon + (1-q_1)(-c)$. Thus, to ensure that the limited court upholds, q_1 must be smaller than the threshold defined in Condition 2. Finally, if the expansive court upholds the policy, it loses $-2b_L$ since it will give up the burden in both periods. If instead it strikes, it will gain the value of the second period interaction, discounted by the probability of surviving, plus the value of being purged, or $q_1(\upsilon + ((1-q_2)(-c - b_L)) + (1-q_1)(-c - b_L)$. Solving for q_1 yields the lower bound on q_1 in Condition 2.

When the first litigant moves, his beliefs are identical to his priors. If he does not go to court, he pays $-b_L$. If he goes to court, he can expect $\eta(-q_1\varepsilon_l + (1-q_1)(-\varepsilon_l - b_L)) + (1-\eta)(-\varepsilon_l - b_L)$, and solving for η yields the lower bound in Condition 3. Finally, like the litigant, when the government moves first, its

[24] Clearly, further analysis is needed to demonstrate that all conditions can hold simultaneously. This will be included in a future draft.

beliefs are defined in the text – they are the government's priors. If the government fails to enact the policy, it gains 0. If it enacts, it will expect the following:

$$(1-\eta)(\alpha-\underline{\varepsilon}_g)+(\eta-\eta q_1)(\alpha-\underline{\varepsilon}_g-\overline{\varepsilon}_g)+(\eta q_1-\eta q_1 q_2)(\alpha-\alpha\phi-\underline{\varepsilon}_g-2\overline{\varepsilon}_g-\beta)+\eta q_1 q_2(-\underline{\varepsilon}_g-2(\overline{\varepsilon}_g+\beta))$$

Solving for η yields the final threshold in Condition 3.

Off-path behavior

The limited court, partisan court or new court strikes p_2

Government beliefs do not update beyond where they were after the first policy was either upheld or struck, but those beliefs are irrelevant, since this is the last period of the game. The government's calculus is identical to what it is on the equilibrium path.

The first litigant does not go to court

If the first litigant does not go to court, the second litigant's beliefs are given by her priors. Given the equilibrium strategies, the calculus for the second litigant is precisely the same as the calculus for the first litigant, as described above.

The government does not attempt to purge after p_1 is struck

The second litigant is certain that court is the expansive type, and thus its calculus is unchanged.

The government attempts to purge after p_1 is upheld

The second litigant's beliefs do not update beyond what they were after the court's decision, so her calculus is unchanged. [Frankly this is the one off-path belief that is weird. Why would she think the court was partisan if the government tried to purge?] She might instead conclude that it is limited, but she would still not go to court. Another possibility is that she thinks it might be either limited or expansive. This would imply another condition on η, but again, it would have to be large enough.

All other information sets are reached in equilibrium.