Institutional Design and External Independence: Assessing Judicial Appointments in Latin America

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To what extent can formal constitutional rules provide a good measure of judicial independence? In this paper we make two claims. First, comparative measures of judicial independence that rely on formal constitutional designs require an explicit theory of institutional effects. Second, formal constitutional rules may have unexpected consequences for judicial independence (or they may have none). We illustrate this problem with the study of Supreme Court and Constitutional Tribunal appointments. A formal model of appointments is used to simulate the effects of different institutional designs. Based on these theoretical results, we propose a new measure of the capacity of executives and legislatures to control the composition of high courts. We estimate the measures of executive and legislative control for 18 Latin American countries between 1900 and 2010. Using this dataset, we test the consequences of formal constitutional designs on *de facto* judicial independence for the period 1981-2009.

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To what extent can institutional designs guarantee judicial independence? What can we learn from the study of constitutional rules? There is a long-lasting debate in the literature between those who remain optimistic and those who embrace a skeptical view about the role of constitutions and what we can learn from the study of them. On one hand, constitutional scholars typically claim that constitutions are important documents because they constrain governments and disempower temporary majorities in the name of binding rules (Elster 1988; Hayek 1978; Holmes 1988; Madison, Hamilton, and Jay 1787-1788; Sunstein 1988; Sunstein 2001; Vile 1998). They argue that the study of constitutions allows us to understand important features of the political system. On the other hand, those with a more skeptical view argue that constitutions are, in fact, merely "parchment barriers," formal pieces of window-dressing, or "convenient screens" for tyrants to hide behind (Camp Keith 2002; Frühling 1993; Murphy 1993; Sartori 1962). As a result, these constitutional theorists claim that studying the formal structure of a constitution can lead to wrong conclusions about the actual operation of the political system.

In this paper we explore this issue by focusing on the formal rules for appointing Supreme Court and Constitutional Tribunal members and the impact of those rules on (external) judicial independence. The contradictory perception of constitutions and their impact on the operation of the political system has led scholars to adopt different strategies when studying constitutional rules. For example, Lars Feld and Stefan Voigt (2003) distinguish between *de iure* (the letter of the law) and *de facto* rules (the actual implication of the norm), while Lara Borges et al (2012) compare the normative consequences of formal rules (e.g., the ideal effect of the rule as intended by constitution-makers) from their strategic consequences (the real impact when the rule is implemented by strategic actors).

The diverse and compelling literature addressing the impact of constitutional arrangements on judicial independence becomes the starting point for our research (Brinks and Blass 2010; Camp Keith

2002; Clark 1975; Epstein, Knight, and Shvetsova 2002; Feld and Voigt 2003; Ginsburg 2003; Kahn 1993; La Porta et al. 2004; Landes and Posner 1975; Lara Borges, Castagnola, and Pérez-Liñán 2010; Mueller 1996; Mueller 1999; Navia and Ríos Figueroa 2005; Ríos-Figueroa 2006; Ríos-Figueroa 2011). An analysis of this literature reveals that there is general consensus on the relevance of appointment procedures, the tenure of the justices, the size of the court, and the power of judicial review as factors that may affect the independence of the judiciary. Scholars make clear predictions about how variations in these rules can undermine or enhance the independence of the judiciary.

Despite the centrality of this topic, the comparative literature has not systematically addressed how appointment procedures affect the independence of justices. The comparative studies that concentrate on this rule do not present an exhaustive analysis, theoretical or empirical, of how different mechanisms for appointing justices affect external independence. A rich theoretical literature has been developed for the US case (Moraski and Shipan 1999; Primo, Binder, and Maltzman 2008; Shipan and Shannon 2003), but it is not clear how the theoretical lessons of the case should be exported to systems operating under different constitutional rules, and specially in Latin America in which there is a great diversity of rules. As we show below, there is a broad range of constitutional procedures to appoint justices that has been poorly theorized.

The first section of the paper examines the main claims of the literature that explores how constitutional rules affect the independence of the judiciary. Our discussion pays special attention to judicial appointments and their potential impacts. In the second section of the paper we propose a general model of judicial appointments, in order to provide a systematic framework to conceptualize procedures for nominations and conformations in comparative perspective. We employ this model to create a computer simulation that estimates the impact of alternative institutional designs, assuming that political actors are randomly located in the policy space. In the third part we build on the results of the simulation and propose empirical indicators to measure the institutional capacity of the president or

Congress to control de composition of high courts. After discussing the enormous institutional diversity of Latin America, we calculate those indices for 18 Latin American countries during a long period (1900-2010). In the last section of the paper we use these novel indicators to assess the role of institutional factors on de facto judicial independence. The results suggest that appointment procedures concentrated on elective institutions may not undermine, and they may even enhance, judicial independence.

Constitutional Rules and Their Impact on Judicial Independence

Appointments

Even though most of the literature about judicial constitutional rules discusses appointment procedures; there is no consensus on which is the best mechanism for achieving judicial independence (Epstein, Knight, and Shvetsova 2002; Feld and Voigt 2003; Ginsburg 2003; Kahn 1993; Lara Borges, Castagnola, and Pérez Liñán 2012; Mueller 1996; Mueller 1999). Good appointment mechanisms are expected to insulate judges from short-term political pressures (Ginsburg 2003), on one hand, and from counter-majoritarian proclivities, on the other. Even though the best way to minimize the latter problem would be that all citizens actively participate in the selection of the judges (elective procedures), politicians have designed alternative methods to overcome the difficulties of direct popular elections.

1. **Cooperative procedures** require the cooperation of at least two bodies for judicial appointments, with the classic example being the American system in which justices are nominated by the president and confirmed by the Senate.
2. By contrast, **the representative model** uses multiple appointing authorities and the seats are divided (often equally) among them—for instance, one-third of the justices may be appointed by the President, another third by Congress, and another third by the Supreme Court. This type of mechanism is expected to widen the pool of candidates, contrary to cooperative procedures which

tend to produce more mainstream justices (Ríos-Figueroa 2011). The main disadvantage of this method is that appointees can be closely related to the appointing authorities if no other institution participates in the selection of the candidates, what may end up producing a system of mutually assured politization (Ginsburg 2003). **Professional appointments** are those carried out by other judges; in some countries like Ecuador or Colombia, this procedure is called cooptation. Scholars like Muller (1999) and Feld and Voigt (2003) favor professional appointments, arguing that the judiciary has clear incentives for a competitive and non politicized selection of judges.

3. **Popular elections.** Dennis Mueller (1996) argues that elections are an appropriate method if citizens have the capability to assess the relative qualities of candidates and if there is uncertainty over who will win the election. When this takes place, citizens will share an interest in selecting the most impartial candidate for the seat. Conversely, when there is no uncertainty about the future and society is strongly divided, then elections are not the most appropriate mechanism because partisan politics will likely emerge during the campaign.

Besides the type of judicial selection method, some scholars have also examined the majorities required to make an appointment when representative bodies are involved in the process. Even though scholars recognize that supermajorities tend to produce more representative candidates, and thus a more independent judiciary, the risks of having a deadlock are high (Ginsburg 2003; Mueller 1996; Mueller 1999). Therefore, there is a tradeoff between representativeness and continuity of the institution that is not settled in the literature.

The few empirical studies about the impact of appointment mechanisms on judicial independence in Latin America mainly concentrate on the number of actors involved in the process and on the required majorities. Julio Ríos-Figueroa (2006; Ríos-Figueroa 2011) claims that professional appointments and cooperative procedures (when there are at least two different state or non-state

organs involved) guarantee a minimum degree of independence of the justices; contrary to those mechanisms in which a single organ or organization carries out the selection procedure. Dan Brinks and Abby Blas (2010) go a step further in their study by differentiating the actors that participate during the nomination and approval processes and the required majorities on each of these stages. The authors argue that the appointment mechanism can be a good indicator for measuring the *ex ante* autonomy of justices. Their historical analysis of the constitutional designs in the region between 1945 and 2009 reveals that there is a positive trend towards a more depoliticized nomination and approval process, meaning that appointments are less partisan since they require a greater consensus among the actors involved.

From a different point of view, Paul Kahn (1993) examines the effect of the appointing system on judicial independence. The author concludes that no particular selection mechanism will guarantee a more independent judiciary, since what matters is not the rule *per se* but the informal tradition of norms that develops around the political and legal practices. To a similar conclusion arrive Lara Borges et al. (2012) under their normative perspective, because there is no reason to believe that one method is preferable over the other. However, under the strategic perspective, the authors arrive to a different conclusion and claim that when representative bodies participate in the selection process, it is likely that politicization will take place.

One of the main deficits of the literature on judicial appointments is the lack of a comprehensive approach that deals at the same time with: (1) the number of actors involved at each stage (nomination and confirmation), (2) the percentage of justices that each actor can nominate (confirm) at each stage and (3) the required majorities for nominating and confirming. A comparative theory of appointments should be able to accommodate different combinations of those rules, in order to justify the theoretical assumptions that sustain empirical measures of external independence.

Other Institutional Variables

In addition to appointment procedures, the literature underscores other institutional factors that potentially affect judicial independence. We discuss them briefly for completeness, and return to them in the empirical section at the end of the paper.

Tenure. There is an overwhelming consensus that life terms or long terms, rather than fixed short terms, increase judicial independence.[1] Judges with life tenure are less susceptible to direct political pressures or bribery (Feld and Voigt 2003; La Porta et al. 2004; Landes and Posner 1975) and are more likely to pursue long-term collective goods rather than short-term political interests (Ginsburg 2003). Besides increasing judicial independence, appointments for life this also increase the efficiency of the institution, since a long tenure produces more experienced judges (Landes and Posner 1975). Fixed short terms with the possibility of reelection are not conceived as advantageous for judicial independence because judges seeking reappointments may become sensitive to the political needs of the appointing authorities (Ginsburg 2003; Grijalva 2010). The underlying assumption in the literature is that life tenure or long terms can increase the independence of judges because there is no concurrence between the terms of the judge and those of the appointing authorities. If such overlap takes place, there is greater potential for political manipulation (Madison, Hamilton, and Jay 1787-1788).[2]

But because institutional rules are crafted by politicians, life tenure may not necessarily reduce judicial turnover, as Landes and Posner (1975) predict. In fact, Feld and Voigt (2003) propose a *de facto* indicator for studying the impact of judicial tenure on independence: the effective average term length of the court members. What these scholars implicitly claim is that the tenure system may not be correlated with the stability of the judge on the bench and thus, with judicial independence. Lara Borges

[1] Helmke and Staton (2011) challenge this view. The authors argue that by lengthening the tenure, the value of the justice's seat increases and, thus, can make justices more likely to defer to the ruling politicians who can actually remove them from office.

[2] Julio Ríos-Figueroa (2011) addresses a similar argument.

et al. (2012) go further in their analysis and claim that the tenure system may not have any effect on the stability of judges, since politicians that need to craft a friendly court will find a way to remove unfriendly judges from the bench.

Court size. Scholars have argued that the size of the court has a direct impact on judicial independence (Feld and Voigt 2003). The relative weight of an individual judge who does not decide along the lines of the ruling party decreases as the number of judges in the court increases. Therefore, by expanding the size of the court politicians can mitigate the relative power of unfriendly judges. Ginsburg (2003) also indicates that, in new democracies, smaller courts are often associated with dominant political parties while larger courts reflect a more diverse representation of the political factions in the country. However, he concludes that dominant parties in these countries do not have incentives to enlarge the size of the court because that would represent an extra cost.

From a somewhat different perspective, other authors focus on the capacity of executives and legislatures to increase the number of sitting judges (court-packing), examining whether constitutions fix the size of the courts (Lara Borges, Castagnola, and Pérez Liñán 2012; Ríos-Figueroa 2011). Ríos-Figueroa (2011) argues that countries with a constitution that fixes the total number of sitting judges will have a more stable judiciary, since politicians will need to reform the constitution in order to modify the size of the court. The supermajorities often associated with constitutional reforms will undermine political attempts to pack the court with friends. However, from a strategic point of view, Lara Borges et al (2012) argue that constitutions that impose a fixed-size court may promote judicial turnover, because politicians will only be able to craft a friendly court by removing some sitting judges, instead of expanding the size of the body.

Judicial review. One of the main features of judiciaries is their capacity to exercise constitutional review. This role is crucial for democracies, especially for new democracies, since it guarantees the system of checks and balances. George Tsebelis (1999) endorses the importance of judicial review for

judicial independence by arguing that what really matters for independence is, first, whether or not courts are constitutional and, second, the institutional design that regulates how difficult is to overrule a statutory or constitutional interpretation. Along these lines, Lara Borges et al (2012) also argue that the power of judicial review is a relevant feature for independence since constitutional judges may be more vulnerable to political manipulations, compared to the other members of the judiciary. If the power of judicial review is concentrated in a small number of judges, it is likely that those judges will become the target of attacks when they rule against presidents or congress members. Finally, La Porta et al (2004) also emphasize the importance of constitutional review but more precisely of the norms that regulate whether judges have full, partial, or null ability to review of the constitutionality of a law.

A General Model of Judicial Appointments

Because one of the main deficits in the literature is the lack of a systematic analysis of how constitutional rules regulating appointments affect judicial independence, we develop a general model to address this concern. Consider a one-dimensional policy space that defines a range of feasible legal interpretations, given by a set of discrete choices $X = \{0, 1, 2, \ldots, 1000\}$. For reasons discussed below, we represent the policy space as an ordered set with fixed number of policy positions rather than as a continuum, as in more conventional spatial models. The location of the legal status quo (e.g., the median Court member or the prior jurisprudence) in the policy space is given by $q \in X$. All players with power to appoint or dismiss justices are assumed to have single-peaked Euclidean preferences, such that any player with ideal point x_i will prefer a set of alternatives P_i to the status-quo. The preferred set is formed by all policy positions closer to the player's ideal point than q (or located at the same distance). Formally, $P_i = \{ x : x \in [q,\ 2x_i - q],\ \forall\ q < x_i\ ;\ x \in [2x_i - q,\ q],\ \forall\ q \geq x_i \}$.

Decisions to appoint justices present players with a strategic situation (Moraski and Shipan 1999).[3] By proposing the appointment of new justices, an agenda-setter will induce a change in the composition of the Court. Players with constitutional authority to confirm the appointment will accept the proposal if the new justice is located within their preferred set P_i, and reject the proposal otherwise. We use *j* to denote location of the newly appointed justice in equilibrium.[4]

This simple theoretical setup allows for a summary measure of the degree to which any player has control over the ideological profile of the Court. Let $r_i(j) = \frac{|x_i - q| - |x_i - j|}{10^3}$ be the proportional reduction of the distance between player *i*'s ideal point and the status-quo that results from a given appointment. In a historical circumstance in which a single player *i* controls the nomination and confirmation of justices, any appointment may place a new judge at x_i , such that $r_i > 0$. If *i* is constrained by other players in ways that a new appointment represents no deviation from the status quo, $r_i = 0$. Negative values for r_i indicate that the appointment (decided by other players) represents a net loss for player *i* with regards to the prior legal situation.

1. Confirmations

Cooperative Appointments. Cooperative appointments create a game between agenda-setters and veto-players (Moraski and Shipan 1999; Tsebelis 2002). In equilibrium the agenda-setter will nominate a new justice located at *j*, the closest position to her ideal point that is acceptable to all other veto players (i.e., a position that belongs to the winset of *q*).[5] For illustration consider a system, depicted in Figure 1, in which the president located at *p* nominates Supreme Court justices and the

[3] Here we refer to the appointment process (nomination and confirmation), but the same logic applies to dismissal procedures (accusation and impeachment).

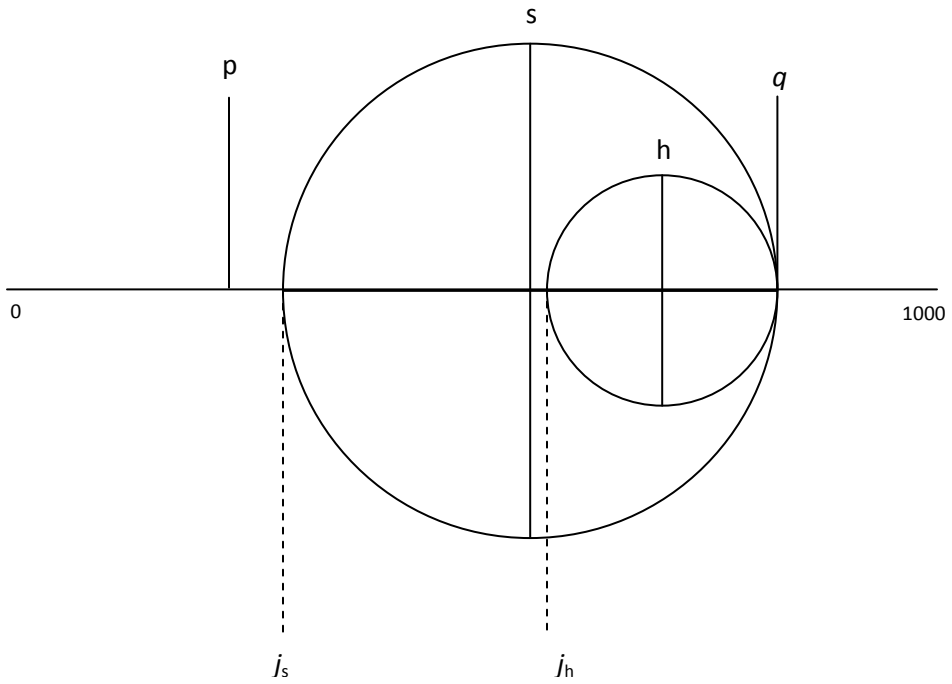
[4] We assume complete information, thus the equilibrium concept always implies subgame perfection.

[5] For greater clarity in the exposition, we use the female pronoun for the agenda-setter, and the male pronoun for players with power over the confirmation.

median senator located at *s* confirms the appointment. Facing only one veto player, the president, who initiates the nomination, may appoint a justice located at $j_s = 2s - q$. If, however, the lower house—with a median legislator at *h*—is also responsible for the confirmation, the president will obtain a less desirable judge at $j_h = 2h - q$. Thus, following the literature we expect that, *ceteris paribus*, a greater the number of institutions with veto power over appointments will make the displacement of the Court from the status quo less likely. The impact of veto players in the appointment process will depend on their specific location in the policy space and on the location of the status quo; we address this issue systematically below.

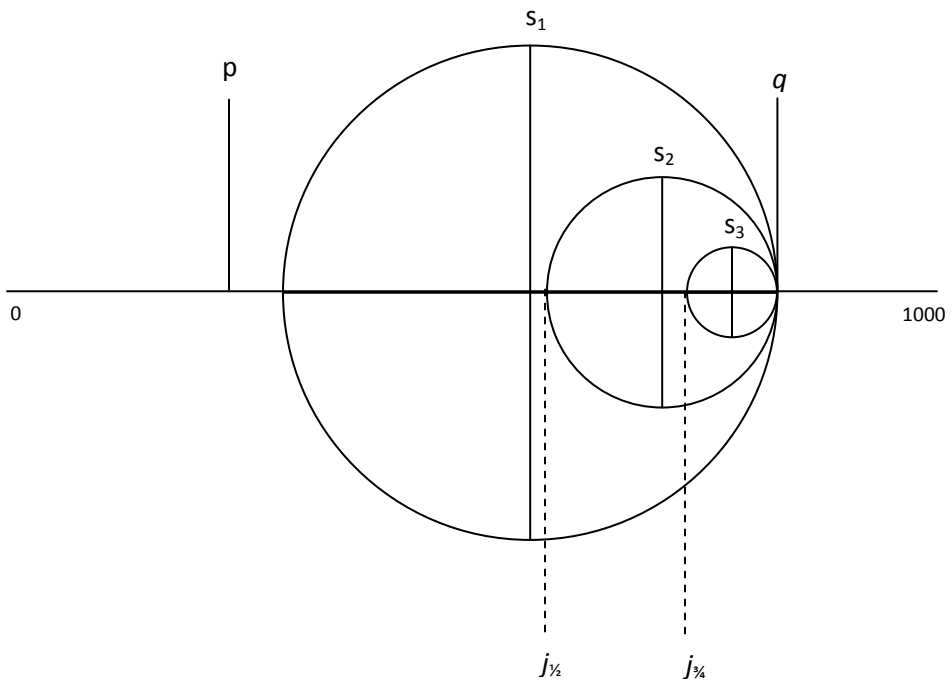
Majorities for Confirmation. Cooperative appointments also depend on the role of pivotal players (Krehbiel 1998; Primo, Binder, and Maltzman 2008). Consider a constitutional system in which the president nominates justices and a three-member Senate confirms or rejects the appointment. The location of the players is presented in Figure 2, where the president (*p*) is to the left of the Senate (s_1, s_2, s_3), and the Senate is to the left of the Court (*q*). If justices are confirmed by a single majority, the president may displace the median justice to location $j_{½}$ with support of two of the three senators. But if the constitution requires three-quarters of the votes, Senator 3 becomes the pivotal legislator and the president offers a compromise at $j_{¾}$. Notice that a more demanding threshold for the confirmation process affects the power of the agenda-setter, not the power of the Senate. For the president, $r_p(½) > r_p(¾)$, but for the median legislator $r_2(½) < r_2(¾)$, even though the median legislator is not the pivotal player in the super-majority equilibrium.

Figure 1. Appointment by Two or Three Veto Players



Professional Appointments. As noted in the previous section, professional appointments involve the participation of incumbent justices in the selection of new Court members. Intuition suggests that this procedure should reproduce the legal status-quo over time (i.e., reinforce judicial independence) as incumbent justices "coopt" new ones with similar policy preferences. To model this procedure we may assume that an incumbent court with a median justice situated at *q* participates in the confirmation of new justices (or in the nomination, as discussed below).

Figure 2. Confirmation by a Three-Member Senate



2. Nomination (Agenda Setting)

Cooperative Nominations. Some constitutions require the cooperation of several players to *nominate* candidates. This happens not only when collegiate bodies (e.g., a judicial council) select nominees collectively, but also when multiple institutions must agree on the nominees. For example, according to the nomination procedure adopted in 2001, the Chilean Supreme Court presents a five-member list to the president and the president nominates a candidate from the list; the nominee is then confirmed by the Senate (article 75 of the Chilean Constitution).

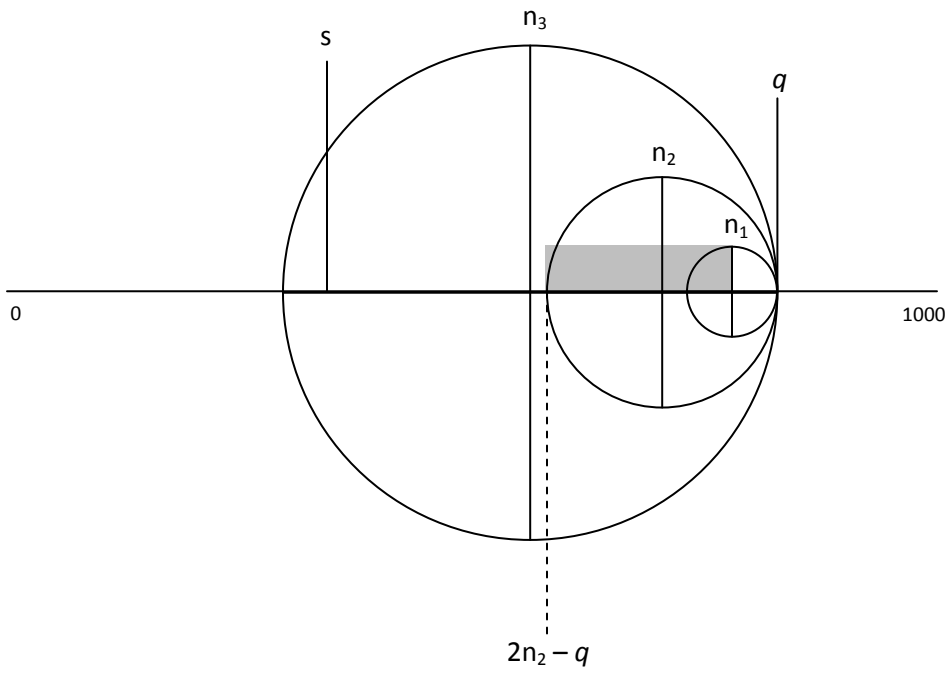
In the absence of a unique agenda-setter, the equilibrium proposal *j* becomes hard to identify. In order to represent a stylized nomination process with multiple players, n_1, n_2,… , n_i, we underscore three principles: (1) if allowed to set the agenda, individual nominators will propose their preferred candidates placed at j_1, j_2, …, j_n, the optimal location for each agent that can defeat the status-quo; (2) in

order to be feasible, those proposals should be acceptable to not only the players in charge of the confirmation, but also the other nominating agents (e.g., in the Chilean case, a majority of justices in the Supreme Court and the president); (3) given a set of feasible proposals, we assume that open rule dominates the nomination process and thus the median candidate is selected from the pool.

Figure 3 illustrates this criterion. A three-member judicial council (n_1, n_2, n_3) nominates candidates who are confirmed by the pivotal senator (*s*). If allowed to set the agenda, nominating agents n_1 and n_2 will propose candidates located at their ideal points, since those positions are acceptable to a majority of the council (i.e., the player and another council member) and to the senator. The position held by n_3 is also acceptable to the Senate, but in order to command enough support in the council, the third member must moderate its proposal and offer a candidate located at $2n_2 - q$. Thus, the nominee will be located at n_2, the median value from the set $\{2n_2 - q, n_2, n_1\}$.

Representative Nominations. As explained in the previous section, representative nominations involve the allocation of quotas in the Court among different nominating institutions. In practice, this means that different sub-sets of judges are nominated and appointed following different institutional rules (in the sense that diverse actors are involved), creating several equilibrium outcomes for the sub-sets of vacancies. For example, consider a five-member court in which actor *i* autonomously nominates and appoints justices for vacancies 1, 2, and 3, and actor *k* autonomously nominates and appoints justices for vacancies 4 and 5. This representative procedure would yield two different equilibria: $j^1 = j^2 = j^3 = x_i$ and $j^4 = j^5 = x_k$, where the superscript for *j* identifies the vacancies. In order to obtain a measure of the leverage exercised by each player in representative procedures, we can estimate $r_i(\bar{j})$, the value of *r* for player *i* for the average vacancy in the court.

Figure 3. Nomination by a Judicial Council



3. Simulating Judicial Appointments

In any specific situation, the resulting equilibrium outcome *j* is determined by the preferences of the players, by the initial location of the status-quo, and by the institutional rules that regulate the appointment process. Because we want to assess the net impact of institutional rules irrespective of the position of the status-quo and of the other players, and in the absence of any prior information about the location of the actors, we assume a distribution of the players in the policy space with uniform probability, $i \sim U(0, 1000)$.

This assumption allows us to simulate the consequences of institutional rules for nominations and confirmations in a one-dimensional policy space. We created a computer simulation to generate 1200 scenarios with randomized institutional designs and individual locations. For each scenario, the program simulates the appointment of a five-member Court:

1. Determines the location of the status-quo as an integer in the range [0, 1000]
2. Determines the location of 24 players, who constitute four institutions:
   2.1. The president (a unitary actor with a single ideal point).
   2.2. A three-member judicial council.
   2.3. An incumbent Supreme Court, with the median justice located at q.
   2.4. A fifteen-member legislature.
3. Selects a procedure to nominate five justices. Candidates can be nominated by:
   3.1. A single institution, that is
      3.1.1.the president;
      3.1.2.the judicial council, by simple majority;
      3.1.3.the Supreme Court, by simple majority; or
      3.1.4.the legislature
         3.1.4.1. by simple majority,
         3.1.4.2. with 3/5 of the votes, or
         3.1.4.3. with 2/3 of the votes; or
   3.2. A representative procedure in which one of the previous actors, randomly selected, nominates three justices and another actor nominates two justices.
4. Selects an institution (the president, the council, the court, or the legislature, with a simple or a super-majority) to confirm the candidates. This constitutional choice is independent from the choice at stage 3.
5. Identifies the equilibrium outcomes j^1 through j^5, and
6. Estimates the proportional reduction of the distance from the status-quo, $r_i(\vec{j})$, as a measure of success for each player.

Institutional designs are drawn with equal probability from a uniform distribution. The simulation thus generates multiple institutional configurations: (a) unified procedures in which the same institution nominates and appoints five justices; (b) cooperative procedures in which two different institutions nominate and confirm; (c) representative procedures in which two institutions nominate candidates separately (and one of them, or a third institution, confirms the nominations); (d) cooptation procedures in which the incumbent Court nominates or confirms its successors.

Table 1 presents the results of the simulation—the average value of *r*—for the president. The columns distinguish three selected situations: instances in which the president nominates all justices, instances in which the president and another institution nominate quotas in a representative way, and instances in which a simple majority of the legislature nominates all justices. The rows indicate which institution is in charge of the confirmation and also, for the legislature, the majorities required to confirm the nominations.

Table 1. Average Value of *r* for the President, in Selected Situations

Who Nominates?	President		Congress (sm)
Representative?	No	Yes	No
Who Confirms?			
President	0.349	0.227	0.119
Council	0.220	0.144	0.072
Court	0.000	0.000	0.000
Legislature (sm)	0.114	0.089	0.005
Legislature (3/5)	0.252	0.075	0.189
Legislature (2/3)	0.105	0.104	0.029
N	169	237	70

The shaded cell in the left-top corner of the table reflects the average success of the president in deciding the profile of the Court when the executive alone nominates and appoints all justices. The table indicates that the president may lose control of the Court in two ways: “horizontally”, as other

players gain control of the nominations (partially in a representative system, or fully in a non-representative system controlled by the legislature), and "vertically" as other players gain control of the confirmation. In the extreme case, a nominating president becomes powerless if incumbent justices operate as gatekeepers for presidential nominees. Against our initial expectations, the majorities required for confirmation by the legislature have no consistent impact on the leverage exercised by an executive who controls the nominations.

Table 2 presents the same information for the average legislator. The three columns aggregate information for situations in which Congress nominates alone; Congress shares the nomination with another institution in a representative procedure, and in which the president nominates alone. The shaded cell reflects the maximum capacity of legislators to control the composition of the Court, when they nominate and confirm by simple majority. Again, the leverage of the legislature declines when other players gain control of the nominations, and also when other players gain control of the appointments. As in the previous example, a cooptation mechanism limits Congress completely.

Table 2. Average Value of *r* for the Typical Legislator, in Selected Situations

Who Nominates?	Congress (sm)		President
Representative?	No	Yes	No
Who Confirms?			
President	0.073	0.074	-0.016
Council	0.073	0.084	0.010
Court	0.000	0.000	0.000
Legislature (sm)	0.141	0.074	0.028
Legislature (3/5)	0.041	0.068	0.072
Legislature (2/3)	0.034	0.057	0.029
N	70	117	169

The two examples based on the simulation support three intuitive conclusions: (1) an actor achieves the maximum capacity to control the profile of the court when nominates and appoints all

justices; (2) actors lose this power "vertically", when cooperative procedures introduce more veto players, but also (3) actors lose this power "horizontally" when nominations or confirmations are segmented in institutional quotas for representative purposes. Our simulation did not show consistent effects of the majorities required in the appointment process. We follow these principles to develop an empirical measure of external independence.

Measuring Political Control over Court Selection

Based on the previous discussion, we introduce a new empirical indicator to capture the leverage exercised by any actor on the selection of justices. The indicator adopts the form

$$X_i = \frac{\pi_i^N + \pi_i^c}{\sum \pi_i^N + \sum \pi_i^c}$$

where π_i^N represents the proportion of justices nominated by the i-th player, and π_i^c represents the proportion of justices confirmed by the i-th player. The denominator aggregates the scores for all actors. Notice that if, for instance, two players share the appointment of justices in a purely representative procedure, $\pi_i^N = \pi_i^c = \frac{1}{2}$, because each actor nominates and "confirms" fifty percent of the court; but if two players share the appointment of justices in a purely cooperative procedure (i.e., one nominates and the other confirms), $\pi_i^N = 1$ and $\pi_i^c = 0$ because the first player participates in the nomination of all justices, but not in their confirmation. The index assigns a maximum score of 1 to any institution that nominates and appoints all justices alone, and reduces the score if more players join the process "horizontally" in a representative way or "vertically" in a cooperative way. An institution that nominates and appoints 50% of the Supreme Court judges would receive a score of 0.5. If the same institution nominates 100% of the justices while another player confirms all justices, it would also receive a score of 0.5.

Using this procedure we computed two indicators to reflect the influence of the president and the influence of Congress in the selection of Supreme Court justices.[6] Our analysis focuses on the president and Congress because these are the most distinctively "political" institutions in the selection process (as the next section shows). Arguments in favor of adopting cooptation procedures or the creation of judicial councils are predicated on the need to de-politicize the nomination process.

The Diversity of Appointment Mechanisms in Latin America: the Role of Presidents and Legislators

We computed the value of our indices for Latin American constitutions in 18 countries between 1900 and 2010. Scores were estimated separately for Supreme Courts and for Constitutional Tribunals (in countries and periods when they existed). Over the course of the twentieth century, Latin America developed a rich tradition of constitutional adjudication. Centralized and decentralized models of constitutional litigation coexist in the same region, and often in the same country. Structured within the civil law tradition, Latin American legal systems embraced the principles of *Marbury v. Madison*, the Mexican *amparo* procedure, the Kelsenian notion of specialized constitutional courts, and a more pragmatic concept of centralized judicial review exercised within the Supreme Court.

Latin America constitutes a textbook case for studying judicial appointments due to the extreme diversity of the mechanisms implemented. Tables 3 and 4 document this diversity by identifying the actors involved during each stage of the appointment process, as well as the most frequent combinations of actors (percentages refer to country-years in each category between 1900 and 2010). A distinctive feature of Constitutional Tribunals vis-à-vis Supreme Courts is that members of the former are more likely to be selected through representative procedures. According to Table 3, multiple actors

[6] The structure of the legislature varies across countries. For instance, some constitutions may assign no role to the lower house, but they may require that senators confirm nominations, while other constitutions may assign no role to the Senate as such, but they may demand confirmation by a joint session. We estimated the index for the lower (or only) house, for the Senate, and for the joint sessions of Congress. The score for congress reflects the sum of the scores for the House and the Senate, or alternatively the score for the joint session for each country.

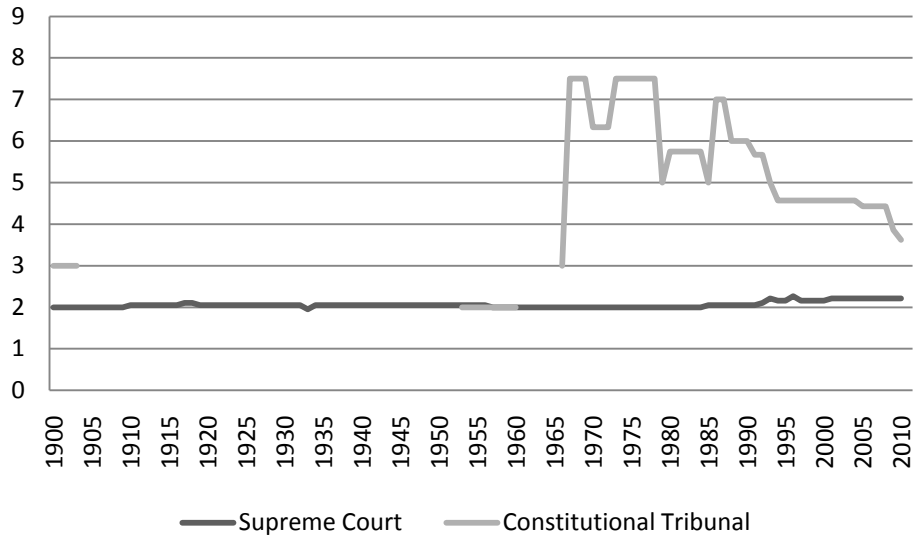
participated in the nomination of Constitutional Tribunals in about 71% of the country-years observed, and they did so for confirmations in 47% of the cases. By contrast, multiple actors were involved in the nomination of Supreme Court members only in about 4% of the cases and in their confirmation in about 3% of the instances. This pattern is corroborated by Figure 4, which depicts the evolution in the average number of actors involved in the appointment process (nomination and confirmations) for Supreme Courts and Constitutional Tribunals since 1900. While the average number of actors involved in the appointment of Supreme Court justices (usually in a cooperative manner) has consistently fluctuated around 2, the number of actors involved in the appointment of Constitutional Tribunal members (usually in representative ways) has been significantly greater—although with a decline in recent years.

Table 3: Actors involved in each stage during the appointment process (%)

	Supreme Courts	*Constitutional Tribunals*
Nominations		
President	33.6	10.0
Legislature*	45.2	18.8
Judicial Council	7.9	0.4
Supreme Court	5.8	
Multiple actors	4.1	70.7
Others	3.3	
Confirmations		
Legislature*	79.8	51.5
President	8.2	
Multiple actors	3.2	47.2
Supreme Court	3.1	
Others	5.7	1.3

*Lower House, Senate, or joint session

Figure 4. Number of actors involved in the appointment process



For the Supreme Court, the president and the legislature are the two actors with the greatest involvement in the selection of justices. However, Table 4 shows that the US appointment mechanism has not been the most commonly adopted by Latin American countries (it was applied by only one fifth of the cases). Rather, a congressional model of candidate selection has been typical (37%). Overall, the table confirms that legislatures (alone) have been the most common institution in charge of the selection of Supreme Court justices. Regarding the most frequent combination of actors for the selection of Constitutional justices, Table 4 again reveals that representative procedures have been widespread, with legislatures playing a relevant role.

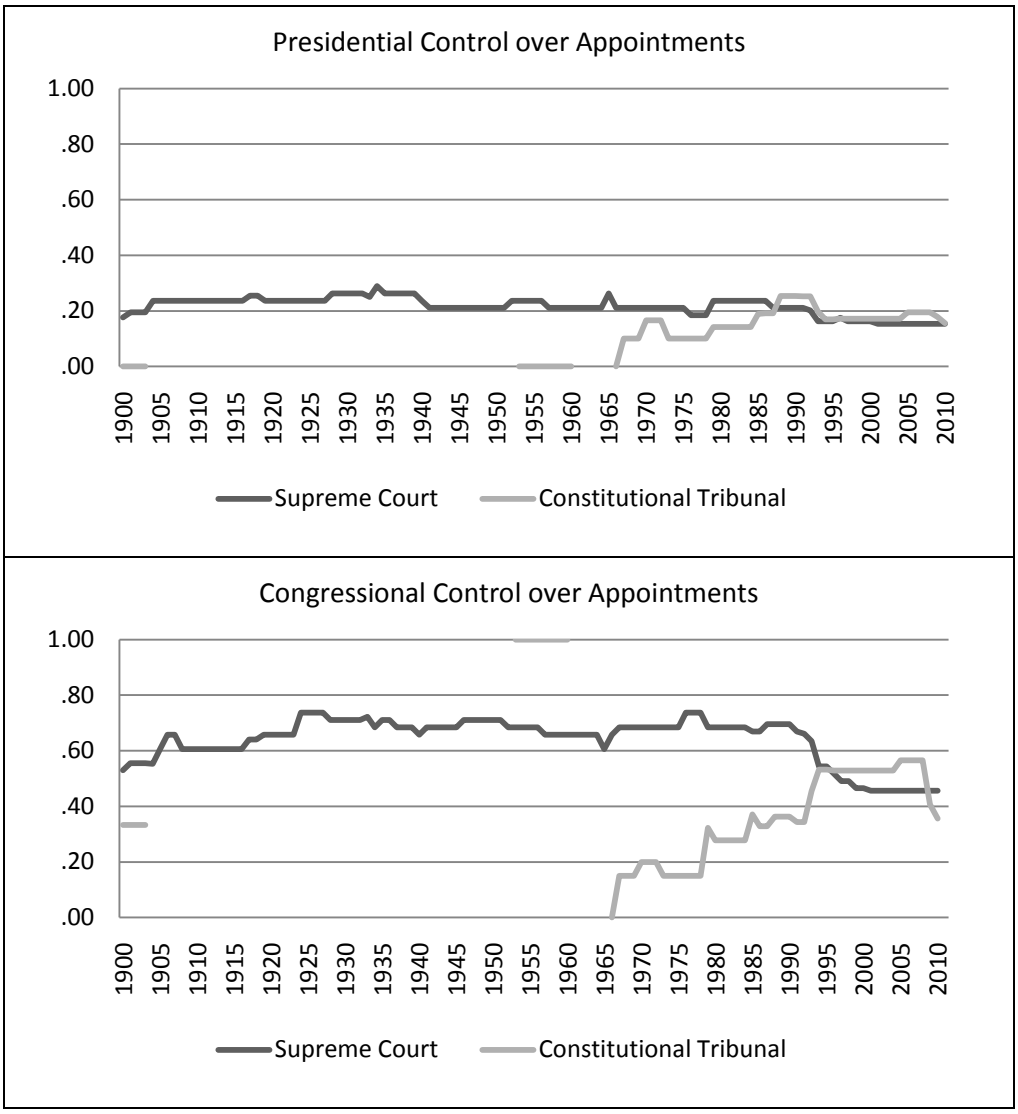
Table 4: Most frequent combination of actors in the appointment process

Supreme Courts			*Constitutional Tribunals*		
Nomination	**Confirmation**	**%**	**Nomination**	**Confirmation**	**%**
Legislature*	Legislature*	37.1	Multiple actors	Multiple actors	47.2
President	Senate	20.1	Multiple actors	Lower (only) house	13.1
President	Legislature*	7.4	President	Senate	10.0
Senate	Lower house	4.5	Joint Session	Joint session	10.0
Supreme Court	President	3.6	Multiple actors	Senate	10.0
Senate	Senate	3.2	Lower (only) house	Lower (only) house	7.9
Others	Others	24.1	Others	Others	1.8

* Unicameral or joint session

Even though the previous data reveals that presidents and legislatures have an active role in Latin America, it is not clear to what extent they can control the appointment process. Our indices help us address this question. Figure 5 presents the average value of presidential and congressional control over the appointment process for all countries between 1900 and 2010. On average, presidents have had a limited *formal* role in deciding appointments, while legislatures have occupied a critical position. A score of 0.6 for congressional control over Supreme Court appointments indicates that the typical legislature in Latin America has shared the appointment process with "less than an actor" during the twentieth century. Congressional control over Constitutional Tribunal appointments was moderate in early years (when few tribunals existed), but as time went by legislatures took over the control of appointments in Constitutional Tribunals as well. Because partisan mechanisms often ensure that the president influences congressional decisions, the typical procedure in Latin America appears to be biased against external independence in the case of Supreme Courts, and perhaps slightly less so in the Case of Constitutional Tribunals, where representative procedures are more common. But, are legislative appointments necessarily detrimental for judicial autonomy? We discuss this issue in the next section.

Figure 5. Political Control over Appointments (Average Index for All Countries)



Are Political Appointments Bad for Judicial Independence?

Any assessment of external independence based on formal institutional designs requires two assumptions. The first one is that certain designs empower some political actors vis-à-vis judges. The second one is that, given such concentration (or dispersion) of institutional power, judges will react strategically, ultimately making external independence a function of the constitutional design. In the previous pages we explored the first assumption systematically. The central claim of this paper is that

we need a sound theoretical foundation to assume the consequences of institutions, in order to design empirical indicators. In this concluding section we explore the second assumption empirically. Even if the president or Congress gain control over the appointment process, to what extent can we expect that such concentration of institutional power will undermine judicial independence?

In order to test this claim, we employ our indicators of *presidential control* and *congressional control* of appointments for Supreme Courts and Constitutional Tribunal members in 18 Latin American countries between 1981 and 2009. The dependent variable is a trichotomous indicator that reflects the annual assessment of judicial independence made by the United States Department of State in its *Country Reports on Human Rights Practices*. Information was obtained from the Cingranelli-Richards (CIRI) Human Rights Dataset, which codes assessments of judicial independence for each country-year into three categories: not independent (0), partially independent (1), and generally independent (2).[7]

Given the panel structure of the dataset and the nature of the dependent variable, we estimate the impact of presidential and congressional control over appointments using a random-effects ordered logit estimator, presented in Table 5. Following our early discussion of institutional factors, we include several control variables in the models:

Tenure: We measure the impact of rules about tenure using two indicators. The first one is a dummy variable that captures whether the members of the Court enjoy life tenure. The second one is a count variable that reports the number of justices that completed their terms and left office in any given year. In systems with short terms and unlikely reelection, this variable adopts positive values at very short intervals.

Court Size: Following the discussion in our literature review, include two indicators of court size. One reflects the number of seats in the Court (at December 31 of each year), and the second one is a dichotomous measure reflecting whether that number is fixed in the Constitution.

[7] Available at http://ciri.binghamton.edu/index.asp

Table 5. Models of Judicial Independence (Random-Effects Ordered Logit)

	1 Courts	2 Tribunals
Presidential control	1.33**	7.75**
	(0.41)	(2.35)
Legislative control	2.90**	2.24*
	(0.50)	(1.16)
Life terms	4.23**	-3.39**
	(0.49)	(1.44)
Justices ending their terms	-0.09**	-0.10
	(0.05)	(0.11)
Size of the court	-0.19**	0.20
	(0.04)	(0.13)
Fixed constitutional number	0.60*	0.71
	(0.35)	(1.08)
Power of judicial review	0.65**	
	(0.32)	
Polity (t-1)	0.14**	0.11
	(0.04)	(0.09)
Constant 1	-0.86	2.89*
	(0.62)	(1.65)
Constant 2	3.42**	6.74**
	(0.62)	(1.84)
Unit-effect variance	1.90**	0.76**
	(0.19)	(0.28)
Number of observations	493	142
Number of groups	18	7

** p<0.05, * p<0.1

Judicial Review: We conduct the analysis for two sub-samples: Supreme Courts and Constitutional Tribunals (where they exist). For the first sub-sample, we introduce a dichotomous indicator that captures if the Constitution assigns explicit powers of judicial review to the Supreme Court.

Because most Latin American countries transited to democracy during the 1980s, we also include the value of the Polity score for the previous year as a control variable. The intuition is simply

that dictatorships may undermine judicial independence, and this effect may reflect in the State Department's reports the following year.

Our empirical results, presented in Table 5, question some common assumptions about institutional power and judicial independence. For both, Supreme Courts and Constitutional Tribunals, greater control of appointments by the president or Congress is not associated with a decline in *de facto* judicial autonomy. On the contrary, both indicators have positive and significant effects, indicating that appointments controlled by elective institutions are consistent with external independence (at least as it is perceived by the State Department). No other institutional variable has such consistent effects for the two types of courts.

Discussion and Conclusions

To what extent can constitutional rules provide a solid measure of judicial independence? In this paper we have made two claims. First, comparative measures of judicial independence require an explicit theory of how constitutional rules concentrate or disperse power over the judiciary among other institutions. Second, we need sound assumptions about how the concentration or dispersion of institutional power affects the strategic behavior of judges. Our computer simulation showed that, irrespective of partisan politics, presidents and legislators lose control over judicial appointments when they nominate or confirm a smaller proportion of justices in the Court, or when more veto players are added to the appointment process. (By contrast, the majorities required for appointments had no consistent effects.) Based on these results, we developed empirical measures of presidential and congressional control over judicial appointments for 18 Latin American countries. The empirical analysis, however, showed that political appointments do not undermine judicial independence, and may even enhance it.

Our analysis suggests that we must re-consider multiple assumptions about the relationships between constitutional design, the role of political institutions, and external independence. In particular, the idea held in the literature that the participation of more actors (either as veto players or as quota-holders in a representative scheme) strengthens the judiciary seems problematic. An in-depth analysis of the reasons for our counter-intuitive findings exceed the scope of this paper, but it is important to consider some of the arguments advanced by previous studies (Calleros 2009; Lara Borges, Castagnola, and Pérez Liñán 2012). Constitutional reforms of the judiciary are often conducted with a hidden political agenda: the restructuring of the courts allows politicians to gain control of the judicial process in a given historical context. As a result, many of the reforms intended to incorporate new players to the appointment mechanisms ultimately led to the erosion of judicial autonomy, as many of the new players were created and controlled by the politicians in charge of the reform. Paradoxically, conventional systems of nomination and confirmation, centered on representative institutions, were preserved in countries—such as Uruguay or Costa Rica—where legislators historically had made prudent use of their power. This interpretation suggests that we should inevitably assess the endogenous origins of institutions in order to interpret their effects on judicial independence.

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