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The Judicialization of (Separation of Powers) Politics: Lessons from Chile

Druscilla L. Scribner

Abstract: Most analyses of the judicialization of politics focus on judicial policy-making and rights creation; however when judicialization of politics unfolds in a separation of powers political context courts are also involved in distributing power. The task of power delineation among branches of government is different from policy-making or rights adjudication. Judicializing political disputes about power gives courts the opportunity to alter the balance of institutional power, to create stronger executives (or legislatures) and a stronger (or weaker) role for themselves. To illustrate these points, this article examines how the Chilean Constitutional Tribunal (TC) adjudicated a specific type of separation of powers conflict between the Legislature and the Executive from 1990-2005. The analysis of the TC doctrine overtime highlights how the TC has shifted the balance of power in the policy-making process and augmented its influence within the political system.

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Druscilla L. Scribner is Assistant Professor of Political Science at the University of Wisconsin Oshkosh. She received her Ph.D. from the University of California San Diego in 2004 and specializes in Comparative Politics, Latin American Judicial Politics, and Women and Politics. Her current research agenda includes work on judicial politics in Chile and Argentina, a comparative study of gender and constitutions funded by the National Science Foundation, and a project on regional supranational courts and judicialization.

Introduction

Many of the most controversial and politically intense judicial decisions have significant distributional consequences for diverse interests in society.[1] As politicians, social groups, and individuals increasingly turn to the courts to pursue their competing interests, politics become "judicialized."[2] Courts across the region are increasingly asked to weigh in on divisive issues from human rights and economic policy to the provision of social rights. Courts and judges are drawn into policy-making roles and functions, and judicial language, procedures, and processes come to dominate non-judicial bodies like legislatures as well as civil society relations (Tate and Vallinder 1995; Stone Sweet 1992, 2000; Domingo 2004; Sieder, Schjolden and Angell 2005). The result of judicialization is an increased policy-making role for non-elected judicial actors.

Much of the comparative judicial politics research on judicialization has focused on judicial policy-making effects and rights creation – what Couso (2005: 106) terms "court-led social change." Social and political groups have capitalized on the growing political role of national high courts and increasingly utilize judicial venues (among others) as part of their strategies to effect policy change. Minority and opposition parties may successfully force their interests onto the majority political agenda through the threat or employment of judicial action (Taylor 2008). Likewise, judicialization has opened up the policy-making process to politically and socially marginalized groups, such as indigenous peoples and homosexuals, who use judicial strategies to gain new rights and political recognition (Wilson 2005; Wilson and Rodríguez Cordero 2006; Cepeda Espinosa 2005).

In some places, like Chile, court-led social change has not materialized (Couso 2005). This article hence seeks to shift the analytical focus slightly from rights creation to the dynamic interaction of presidents, legislatures, and the expanded judicial power. When the judicialization of politics unfolds in a separation of powers political context the constitutional questions brought to high courts often bear on the relations between legislative and executive authority and the constitutional reach of their powers. In these cases high courts with constitutional review powers have an accountability function (O'Donnell 1994; Chavez 2004; Gloppen, Gargarella, and Skaar 2004; Scribner 2004;

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2 Shapiro and Stone Sweet (2002: 187) define the judicialization of politics as the pursuit of politics through the "medium of legal discourse."

Helmke 2005; Sieder, Schjolden, and Angell 2005; Kapiszewski and Taylor 2008).[3] Courts may aggressively check government authority or exercise their accountability function more selectively or deferentially. In either case, their rulings on conflicts of power carry clear and significant distributional consequences for the exercise of power. These consequences endure because rulings about the constitutional limits of power (re)define the institutional framework in which power is exercised and structure the policy choices and strategies of legislators. Faced with the possibility of policy reversal, legislative (and executive) actors engage in auto-limitation. They revise current policy positions and anticipate the direction of future judicial rule-making so that policy will not be struck down or open to new (perhaps undesirable) judicial interpretations of the boundaries of power (Landfried 1994; Stone Sweet 2000: 73; Ferejohn 2002: 42; Shapiro 2004).

The central argument advanced in this article is that judicializing political disputes over the distribution of power gives courts the opportunity to alter the balance of institutional power, to create stronger executives (or legislatures) and a stronger (or weaker) role for themselves. This raises two additional questions: why do courts reallocate power in one direction (toward the Executive for example) and not in the other; and how does the potential to distribute power inherent in the judicialization of separation of powers conflicts affect inter-branch political dynamics.

I address these questions in the context of the Chilean Constitutional Tribunal (Tribunal Constitucional or TC) during the transition to democracy (1990-2005). The TC is a quintessential agent of horizontal accountability – its purpose is to resolve constitutional conflicts regarding the limits of legislative and executive power and, until constitutional reforms in 2005, its jurisdiction was accessed exclusively by the other branches of power. The analysis presented here focuses on a particular type of separation of powers conflict between legislative authority (law) and executive authority (decrees) known as "law vs. decree" controversies. These cases concern the reach of presidential decree power and are referred to the TC by legislators (primarily from opposition parties). The constitutional conflicts are undeniably political as policy disputes (usually economic) are judicialized and elevated to fundamental constitutional questions about the separation of powers. Moreover, law vs. decree referrals feature starkly competing constitutional interpretations of legislative authority (law-making power) and executive authority (decree-making power). Finally, the TC's interpretations of the boundaries of executive and legislative power, and the scope of its own power, are not consistent.

3 See also Gloppen et al. (2010).

Thus, TC rulings on law vs. decree cases are an excellent lens through which to analyze the inter-branch dynamics and implications of the judicialization of separation of powers conflicts more generally. Section one below provides a brief overview of the reach and separation of powers in Chile and the role of the TC. The second section examines and discusses the impact of law vs. decree jurisprudence developed during the transition to democracy (1990-2005). The analysis is based on all law vs. decree rulings during this time frame. The discussion demonstrates important doctrinal shifts on the TC that affect the balance of power, the process and substance of policy-making (how policy is made and whether concrete policies stand or fall), and the relative political and institutional position of the Court. The third section explains this shift and discusses how the judicialization of separation of powers conflicts has served to strengthen the institutional position of the TC and augment its influence within the political system, both informally and formally.

The Constitutional Context: Separation and Review of Power in Chile

From 1973 through 1989 Chile was governed by a right-wing military dictatorship under the leadership of General Augusto Pinochet. Shortly after taking power in 1973, the military regime convened a commission to begin work on a new constitution that would address the perceived failures of the previous regime. The new Constitution was approved by public referendum in 1980 and replaced the 1925 Constitution that had governed one of Latin America's longest running competitive multi-party democracies. The 1980 Constitution sought to entrench a set of political and economic reforms that reflected the sweeping intellectual project of the military government and to tie future governments to those constitutional commitments. Those changes would profoundly affect the nature of democratic governance and the separation of powers system in Chile.

The 1980 Constitution increased and reinforced presidential power, altering the relations between the executive and legislative branches (Caldera Delgado 1980; Blanc Renard and Pfeffer Urquiaga 1989; Cea Egaña 1988, 1989; Nogueira Alaclá 1994; Frei Ruiz-Tagle 2000).[4] This clear shift toward greater presidential decree authority was based in two key provisions. The first of these provisions is the establishment of a maximum legal reserve (*reserva legal máxima*) that lists the kinds of matters requiring congressional

4 The faculties exclusive to the President are enumerated in Art. 32 of the 1980 Constitution.

action. Matters excluded from of the maximum legal reserve fall under presidential decree power, thus increasing the formal powers of the executive branch to exercise legislative power (Cea Egaña 1998).[5] Second, within the delineated area of legislative activity (hereafter, "legal reserve"), the 1980 Constitution restricted the reach of legislative action to establishing only the essential nucleus and fundamental framework of law. The Executive is given the task of developing, fine-tuning, and implementing law by presidential decree.[6]

Both the legal reserve and the restriction to legislate only the basic framework of law extended and widened executive decree authority beyond the separately recognized private power of the President to dictate executive orders necessary to implement the law. Thus, the Chilean President is empowered with several types of decree power that together formalize a co-legislative role for the Executive in an already heavily presidential system (Caldera Delgado 1980).[7] These constitutional provisions are sufficiently imprecise in practice to invite opposing political views about where the constitutional boundaries of executive decree authority do or should lie (Alliende Crichton 2000; Carmona Santander 1998, 2001; Cea Egaña 1998; Frei Ruiz-Tagle 2000; Soto Kloss 1980). Competing interpretations of the legal reserve and the scope of decree authority have generated important inter-branch conflicts that are referred to the TC for resolution.

The TC was originally created as part of constitutional reforms in 1970 and charged specifically with resolving constitutional separation of powers conflicts. It was dissolved following the military coup in 1973. The TC was then recreated by the Pinochet regime with the promulgation of the 1980 Constitution, which increased the number of justices (called ministers), altered appointment mechanisms, and ultimately expanded the jurisdiction of the TC to judge the constitutionality of executive action and referee legislative and executive branch conflict. The TC exercises an obligatory abstract review of organic constitutional laws and laws interpreting the Constitution,

5 See the *Actas Oficiales de la Comisión de Estudio de la Nueva Constitución*, Session 345, 2094 and Session 355, 2278. The maximum legal reserve is outlined in Art. 60 of the 1980 Constitution, and Art. 63 of the reformed 2005 Constitution. The 1925 Constitution followed a system of a minimum legal reserve (*reserva legal mínima*) in which certain matters necessarily had to be decided by law, but other matters could also be the subject of legislative activity. The maximum legal reserve was a significant innovation. The change reflected a concern that the minimum legal reserve had produced an excessive amount of personalistic legislation (Tapia Valdés 1993).

6 This restriction is found in numbers 4, 18, and 20 of Art. 60 of the 1980 Constitution.

7 In 2005 the 1980 Constitution was reformed to remove several "anti-democratic" provisions that were considered longstanding obstacles to the consolidation of democracy. These reforms did not alter the relationship between law and decrees.

an abstract review of ordinary laws at the request of Congress (or the President), and an *a posteriori* review of executive decrees at the request of a portion of congressional membership. The abstract review of legislation represented the majority of the cases decided by the TC prior to 2006 (Bertelsen Repetto 1993; Zapata Larraín 1991, 1993, 1994, 2002). Law vs. decree cases are a minority of those decided by the TC; yet, they are typically politically charged. In fact, both the executive branch and the TC recognize law v. decree cases as potentially highly conflictive for inter-branch relations.[8]

The formal powers of the TC to constitutionally review and essentially veto legislation and presidential decrees make it a logical venue for the judicialization of politics. Once democracy was re-established in 1990, the politics of democratic transition found its way into the courts. Political supporters of the former military regime, entrenched in the center-right alliance of the Independent Democrat Union (UDI) and National Renewal (RN) parties (the *Alianza*), formed a formidable opposition to the center-left governing *Concertación* coalition and used the TC (and the ordinary judiciary) as one of multiple political strategies to defend the status quo or promote their political agenda. In this political context, constitutional ambiguity with respect to the relationship between legislative and executive authority produced a series of important law vs. decree constitutional controversies.[9]

Before analyzing TC decisions on decree challenges, it is imperative to place the TC in the wider judicial context of Chile's mixed system of constitutional review. Three key institutional actors come into play in cases concerning the constitutionality or legality of decrees: the TC, the Controller General (the Contraloría General de la República or CGR), and the ordinary judiciary. When the executive branch issues a decree, it must be previously reviewed with respect to legality and constitutionality and registered by the CGR's juridical division; the decree may then be published and considered legally valid (Aylwin Azócar 1984; Soto Kloss 1977, 1999). Subsequent to this process (known as the *toma de razón)*, the decree may be challenged in the courts (Aróstica Maldonado 1989, 1991) and before the TC. When a law vs. decree conflict reaches the TC, the CGR issues a statement summarizing its official justifications for its prior registration of the decree in question and weighing in anew on relevant questions of doctrine.

Presidential decrees are challenged in all of these venues (CGR, ordinary courts, and the TC). In practice, opposition to a specific decree is often voiced while review in the CGR is still pending. Political pressure on the Controller

8 See Cea Egaña (2006), and Couso (2004: 77).

9 In practice the two branches were substantially fused during military regime; inter-branch controversy did not manifest in law vs. decree challenges until the practical separation of branches of government under democratic conditions.

General to reject a controversial decree or force modifications to the decree before registration can be intense (ranging from attacks on the decree or the CGR in the media to legislative threats of impeachment of the Controller General) (Scribner 2007). Moreover, law vs. decree conflicts referred to the TC often are adjudicated previously, or simultaneously, in the appellate courts using the writ of protection (*recurso de protección*) or before the Supreme Court under the writ of inapplicability for unconstitutionality (*recurso de inaplicabilidad*). Legislators (rather than individuals) who object to the decree may refer the executive-legislative conflict to the TC for resolution.

Such a referral may be solicited by either house in the Legislature or by more than one quarter of congressional members within 30 days of the official publication of the decree.[10] The typical law vs. decree case seeks a declaration of unconstitutionality for an executive decree that has encroached upon legislative authority. The constitutional charge most often levied against the executive branch is that the President has invaded the legal reserve by issuing a decree in a matter, such as fundamental rights, that is reserved exclusively for congressional action. Referrals of decrees are generally brought to the TC by members of congressional opposition parties as part of a strategy to protect or otherwise affect the legislative status quo and very often invoke claims concerning property rights and the right to engage in an economic activity (fundamental rights that fall within the legal reserve). Across the time frame of democratic transition (1990-2005), the TC has been drawn into adjudicating the competing political and ideological projects of the government and opposition.

From 1990, when the first TC decision on a presidential decree was handed down, through 2005 there was substantial change and development in the types of arguments and models of constitutional interpretation utilized to delineate the borders between powers and define the authority of the TC to engage in review of those borders. The next section draws on an analysis of the full universe of law vs. decree decisions to outline major doctrinal shifts evident in TC jurisprudence and reflect on the implications of these shifts for distributing power between branches of government and defining the political role of the TC.

10 These two different requirements – one-quarter of membership versus the whole house (Art 82 n.5 and n.12 of the 1980 Constitution) – created uncertainty and conflict between 1990 and 2005 over standing law vs. decree referrals. The constitutional reforms of 2005 combined the two into a single rule (Art. 93, n.16); an innovation that generates greater coherency in the review of presidential decrees.

Distributing Power: Law vs. Decree Doctrine

In adjudicating the constitutional conflict over where to draw the line between decree power and legislative faculties, TC ministers focus on the hierarchical relationship between the decree, the law, and the Constitution. There are two clear positions among TC ministers from 1990 to 2005. These positions are distinguishable by their different constitutional interpretations of the relationship between law and decrees defined by the maximum legal reserve.[11] The two positions also fundamentally differ with respect to their view of the scope of TC authority and the justiciability of a *legal* decree (one that validly executes the law); a question that is fundamental to the TC taking on a more or less active constitutional review role.

The first of these two positions interprets the legal reserve as "absolute." This means that matters within the reserve (such as fundamental rights) cannot be regulated by presidential decree, and should be specified by Congress in formal law. This same position sustains that the TC has the authority to directly review the constitutionality of decrees, even in cases in which the decree is consistent with the law and thus considered "legal." This "absolute reserve" position dominated opinions of the TC from 1990 through 1996.[12]

The second clear doctrinal position on the TC argues that executive decrees should be understood as the instrument by which the Executive collaborates with the Legislature in the specification and execution of the law. The legal reserve is characterized as "relative" rather than absolute – the role of the Legislature is to formulate the essential legal framework, leaving the details to decree power. Moreover, doctrine associated with this position argues that the legal reserve is more "intense" in some areas than in others (Cea Egaña 1998). With respect to fundamental constitutional rights (such as the right to property) the legal reserve is strong and strict; demanding that the Legislature clearly specify and detail how the Executive can regulate or execute the law. Accordingly, in these areas legislative remission (or delegation) to executive discretion is unconstitutional. However, the legal reserve does not exclude or diminish the President's separate constitutional decree power to execute law.[13]

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11 See Articles 60 (legal reserve), 32 (presidential powers) and 19 (fundamental constitutional rights) of the 1980 Constitution.

12 See especially decisions 146, 153, 167, 183, 245, 246 and dissents in 253, 254, and 282 summarized in the supplementary material to the article on the journal's website, online: <www.jpla.org>.

13 During the 1990-2005 period decisions demonstrating the "relative reserve" position include: 253, 254, 282, 325, 370,373, and 388.

In addition, the second position self-limits the scope of TC authority, maintaining that the TC may only rule on the constitutionality of decrees when the decree is illegal (that is, the decree departs from the law which it is supposed to implement). The TC does not have the authority to judge the constitutionality of laws that are already valid, since this power falls to the Supreme Court under the writ of inapplicability.[14]

An analysis of all TC decisions on law v. decree cases from 1990 to 2005 illustrates the shift between the "absolute" and "relative" legal reserve positions in TC doctrine and a subtle refinement of the second position at the turn of the century.[15] An appendix provides a brief overview of all the cases decided during this time frame highlighting how each ruling defines the scope of TC authority and distributes power.[16] The discussion below chronicles the shift from one doctrinal position to the other, demonstrating how, in the context of separation of powers decisions, courts may shift the balance of power toward the Executive or the Legislature, and away from or towards themselves.

The TC was faced with its first decree challenge in 1990, in *Subsidios para Viviendas* (Rol 116; December 27, 1990). The majority relied on an originalist textual interpretation of the Constitution that establishes the TC's constitutional authority to consider the constitutionality of the substance and form of a decree. The majority found the decree a constitutional exercise of decree authority to execute the law. In the early 1990s, the first position discussed earlier (absolute legal reserve, wide scope of authority) dominated TC jurisprudence in law vs. decree controversies. The result was that the TC majority asserted its authority to directly review the constitutionality of executive decree power and argued for an interpretation of the legal reserve that significantly restricted executive and administrative action.

A leading example in this line of jurisprudence is *Letreros Camineros I* (Rol 146; April 21, 1992) in which the TC majority argued that the legal reserve was absolute and that matters within reserve (property rights in this case) could not be regulated by decree or administrative action, but only by law (Carmona Santander 1998). Moreover, the decision articulates the authority of the TC to directly review the constitutionality of decrees regard-

14 This is the same thesis formulated by the CGR for the problematic situation presented by a decree that faithfully executes the law (a legal decree), but may still contradict the Constitution. In this case the real or supposed unconstitutionality is imputable to the law in which the decree is founded. In this situation the CGR registers the decree; it does not have the power to "implicitly" review the acts of the Legislature (Aróstica Maldonado 1999; Silva Irarrazával 2007).

15 All final rulings of the TC are available at: <http://www.tribunalconstitucional.cl/>.

16 See supplementary material to the article on the journal's website, online: <www.jpla.org>.

less of whether or not they faithfully execute the law. In brief, the ruling established that decrees may be compared directly against the Constitution when they depart from the habilitating law (an "illegal" decree) and/or when the decree departs from the constitutional framework (in this case the decree violated economic rights).[17] This majority view on the role of the TC and on the distribution of power between the Legislature and the Executive is reiterated in *Plan Regulador La Serena-Coquimbo* (Rol 153; January 25, 1993), *Letreros Camineros II* (Rol 167; April 6, 1993), and *Acceso a las Playas* (Rol 245; December 2, 1996).

Acceso a las Playas, the last of this line of cases, clearly delineates the ability of the TC to hold decrees directly to the Constitution. In reviewing the constitutionality of a decree that required property owners to freely cede access to waterways, the decision appealed to Art. 6 and 7 of the Constitution (constitutional supremacy and separation of powers) and found the executive action an unconstitutional incursion into matters exclusively reserved for the Legislature. This position (wide scope of constitutional authority; absolute legal reserve) would suffer a permanent reversal within the year in *Cesión Gratuita de Terrenos* (Rol 253; April 15, 1997*)*.

Cesión Gratuita de Terrenos examined a similar type of decree challenge as in *Acceso a las Playas*. The decree executed a law requiring that all urban construction cede land for green space, access, and equipment. The decree set the percentage of land to be ceded. The constitutional case, referred to the TC by 12 senators, characterized the decree as a privation of property rights and claimed that in dictating the decree the President had invaded the legislative sphere. The arguments made against the decree followed similar lines to those seen in *Acceso a las Playas*; however, the TC reached a distinct conclusion that fundamentally redefined the role of the TC in reviewing decree power and shifted the balance of power toward the executive branch.

The majority found the property rights restrictions to be a valid use of the President's exclusive constitutional power to execute the law. The decision elaborated on the nature of the relationship between decrees and the law they execute, arguing that decrees and law form a juridical whole, "harmonious, united, and insoluble." This view of the relationship between law and decree implies a complementary and collaborative relationship and a relative view of the legal reserve in which the President has the authority and the obligation to execute the law. The majority then turned to the question of the TC's ability to review a legal decree. When faced with a legal decree, the majority reasoned, the true object of the constitutional question is the

17 Considerations 8 through 15 of the ruling.

law in which the decree is founded and not the decree itself. Judicial review of a valid law is exercised by the Supreme Court.[18]

Moreover, the *Cesión Gratuita de Terrenos* ruling reinforced the presumption of constitutionality that formal law enjoys in the Chilean system. The TC follows the Spanish Constitutional Tribunal in maintaining a presumption of constitutionality for law, and has developed a doctrine of reasoned deference (*deferencia razonada*) that respects the will and autonomy of the Legislature and presumes acts of the Legislature are constitutional (Peña Torres 2006: 176; Zapata Larraín 2002: 72). In her dissenting opinion, Minister Bulnes objected vehemently to the possibility that the mere "legality" of the decree (which in turn presumed that the Legislature acts constitutionally) served to justify a constitutional violation.[19]

Cesión Gratuita de Terrenos thus redefined the role of the TC in controlling decree power and established major aspects of the second doctrinal position outlined above (restrictive scope of authority; relative legal reserve). The position reflects a model of constitutional interpretation that is flexible and pragmatic rather than originalist. The key features of post 1997 law vs. decree doctrine include: the presumption of constitutionality and legality of law, the subordinate, but harmonious and united, relationship between decrees and law, and, in later cases (discussed below), an increasingly more specific elaboration of the intensity of the legal reserve. This interpretation of the boundaries of power between the branches of government provides the Executive with co-legislative authority and tips the balance of power toward the Executive. At the same time the TC majority self-limited the reach of its authority to hold presidents accountable for the constitutionality of their actions.

Through the rest of the time period, the majority "relative reserve" doctrine was applied and incrementally extended. Relevant decisions include *Ley de Presupuestos* (Rol 254; April 26, 1997) and *Décimo Protocolo con Bolivia* (Rol 282; January 28, 1999) in which the TC began to articulate a view of the legal reserve as less intense in some areas (thus allowing greater latitude for executive decree authority). The majority refined and further clarified doctrine concerning the relative intensity of the legal reserve in the first half of the first decade of the new centrury. Leading examples include *Restricción a Catalíticos* (Rol 325; June 26, 2001) and *Plan de Impacto Vial* (Rol 370; April 9, 2003). These decisions demonstrate the flexibility and pragmatism of the dominant (post 1997) interpretation of the bounds of power. These later decisions also evidence some flexibility in the self-restricting stance on justiciability of legal decrees.

18 Considerations 4 and 5.
19 Considerations 7 and 8.

In *Restricción a Catalíticos*, for example, the challenged decree had restricted the circulation of vehicles with catalytic converters on days of high ambient contamination. The decree was the subject of intense political debate before and after its promulgation and opposition to the decree was pursued in multiple judicial venues as well as in the media (Scribner 2007). The final tactic of the opposition was to refer the decree to the TC. The TC found the decree constitutional (in light of public health concerns), but argued that the law in which the decree was based did not adequately meet the constitutional tests of *specificity* and *determination*. Specificity requires that the law specify the measures the Executive may take to restrict rights and under what conditions; determination requires that the law explicitly determine what constitutional rights may be affected or restricted.[20] Subsequent to the *Catalíticos* decision, challenges to decree power have been decided on the basis of the adequacy of the law with respect to specificity and determination. This doctrine suggests a move away from a strictly self-limiting view of TC authority with respect to decrees.

In *Plan de Impacto Vial*, the TC explicitly expanded and clarified how the tests of specificity and determination are intimately linked to the view of the legal reserve as relative and more intense in some areas than in others.[21] Drawing on the precedents of *Ley de Presupuestos* and *Restricción a Catalíticos,* the TC argued that the legal reserve envisions two levels of legislative power.[22] In the first level the law should be general and give ample room to the President's power to detail, complement, and execute the law. In the second level the legal reserve is more intense (i.e., fundamental rights) and the law must explicitly determine what constitutional rights may be affected or restricted by administrative power and specify the measures the Executive may take to restrict rights and under what conditions. *Plan de Impacto Vial* thus establishes a clear framework for interpreting the relationship between law and decree depending on the intensity of the legal reserve. Subsequent TC decisions have been decided on the same grounds; resulting in limitations on the discretion of executive decree power by requiring that the Legislature provide greater protections against administrative discretion when fundamental rights are involved (Hernández Emparanza 2006).

The law vs. decree cases reviewed here demonstrate how TC doctrine after 1997 shifted the balance of power toward the Executive and away from itself, restricting its ability to review "legal" decrees until the end of the decade. This raises important questions. What factors best explain shifts in doctrine? Why did the TC reallocate power in one direction (toward the

20 Consideration 40.
21 Considerations 16-18 and 34-36.
22 Consideration 15.

Executive, for example) and not in the other? How have these doctrinal shifts affected the TC's institutional position at the end of the transition to democracy (2005 and beyond)? These questions are addressed below.

The Inter-branch Dynamics of Distributing Power

In response to the first two questions (what explains the shift in 1997; and why allocate power toward the executive branch), the comparative judicial politics literature highlights two broad explanations for judicial behavior: one mainly stressing factors in the political environment that are external to courts, and one focused on factors, such as legal culture, institutional structure, and court composition, that are internal to courts. The first type of explanation views judges as constrained by political forces, either explicitly due to court-curbing policies or intrinsically by the desire of judges to maintain the institutional legitimacy of the Court. Courts thus do not venture far from majority political preferences (Dahl 1957). Separation of powers approaches to judicial decision-making, center on the idea that legal policy outcomes are a function of the dynamic interaction of all three branches of government (Epstein and Knight 1998; Epstein, Knight and Shvetsova 2001; Helmke 2005; Iaryczower, Spiller and Tommasi 2002; Scribner 2004). Judges face incentives to decide cases within the policy "comfort zone" of the Legislature and Executive, who may choose to overturn, ignore, or refuse to implement judicial decisions and thus thwart the ability of the court to attain its objectives.

One of the central findings in this literature is that political fragmentation affords judges greater political room for maneuver (Eskridge 1991a, 1991b; Segal 1997; Gely and Spiller 1990; Iaryczower, Spiller and Tommasi 2002; Chavez 2004; Scribner 2004; Ríos-Figueroa 2007). Conversely, when the President enjoys majority congressional support, this political space shrinks. If pushed beyond their comfort zone, the elected branches may coordinate to initiate and/or pass court-curbing policies that could damage the institutional legitimacy and integrity of the Court, or the individual careers of its members. In this context, judges have an incentive to defer to the executive position rather than risk some form of reprisal. Public support resources available to courts also affect the ability of courts to balance against the Executive and Legislature, and thus affect the strategic calculations of judicial actors (Vanberg 2005; Staton 2002; Caldeira and Gibson 1992).[23]

23 For example, judges might be more likely to hold governments accountable if they enjoy popular support such that politicians face costs for challenging the Court (López-Ayllón and Fix-Fierro 2003; Staton 2002)

Broadly speaking, then, judges are more likely to engage the other branches of government (act as an agent of accountability) when government is divided, politics is competitive or transparent, the Court enjoys popular legitimacy, or alternation from government to opposition is likely. Importantly, however, Chile during the transition to democracy presents us with a case of stable political fragmentation among stable coalitions. The post-transition dominance of the center-left *Concertación* coalition has meant little variation on the variables at the heart of political explanations for judicial behavior. According to the separation of powers approach, this stable fragmented political context would provide the TC with the political space necessary to behave "sincerely."[24] In short, immediate "causes" of the shift in doctrine are likely internal to the TC rather than external.

A second broad approach to understanding judicial behavior views judges as fundamentally unconstrained by political forces; as such judges vote according to their ideological, political, or legal policy preferences. According to the attitudinal model, the ideological attitudes and values of justices affect their decision-making (Segal and Spaeth 2002: 87). The implication is that the composition of the Court, and the resulting mix of political and/or ideological attitudes with respect to constitutional review and the relationship between the state and individual, best explain decision-making. Perhaps the strongest explanation of the construction of a new majority interpretation of the relationship between law and decree power in 1997 is a change in the composition of the TC.[25] Transition politics slowly altered the composition of the judiciary and subsequently (though sometimes subtlety) the judicial doctrine on the distribution of power. The electoral successes of the *Concertación* coalition, which held the presidency in Chile from 1990 to 2010, lead to changes in TC membership over time.[26]

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24 There is no guarantee that justices sincerely prefer to take on an active role with respect to reviewing government power or advancing individual rights.

25 Interview, Presidential Lawyer, August 2001.

26 Until constitutional reforms enacted in 2005, the TC was a seven-member body with three members selected by the Supreme Court, two by Chile's National Security Council, one by the President, and one by the Senate. The last two were additionally required to have previously served as substitute justices for the Supreme Court for at least three consecutive years. Thus the historically conservative Supreme Court figured prominently in the composition of the TC and the choices of the President and the Senate were restricted in ways that promoted greater Supreme Court influence (Nogueira Alcalá 1995). Constitutional reforms enacted in 2005 (Art. 92 of the Constitution promulgated in 2005) increased TC membership to ten and altered appointment procedures. The President now chooses three members, the Supreme Court chooses three and Congress chooses four. Ministers now serve nine-year terms.

For a broader range of constitutional controversies than I review here, Zapata Larraín (1991) suggests that the composition of the TC best accounts for differences in the TC's position vis-à-vis the government during the decade preceding the democratic transition (1981-1989). He finds that during the first half of that period (1981-1985), TC decision-making is dominated by the strict *orginalista* or *literalista* jurisprudence of Enrique Ortúzar, who was one of the key authors of the 1980 Constitution. Ortúzar was supported by Marco Aburto and Eduardo Urzúa. In the second half of the decade an alternative line of jurisprudence representing a more expansive interpretation of the 1980 Constitution begins to take shape under the leadership of Eugenio Valenzuela, and supported by Julio Philippi and Luis Maldonado. Ministers Ortúzar and Valenzuela thus represented conflicting power poles on the TC during the 1980s and held opposed positions on how to interpret the Constitution.

For the decades following Zapata Larraín's analysis the explanatory power of composition and majority blocks remains persuasive. On the eve of the transition to democracy in 1990 the TC was dominated by ministers of the political right and operated under an *originalista* model of constitutional interpretation. The jurisprudential outlines of a conservative originalist interpretive model are evident in the 1990-1997 law vs. decree cases (and in Minister Bulnes's position as shown in the appendix[27]). Luz Bulnes, one of the members of the Ortúzar Commission that wrote the 1980 Constitution, was appointed in 1989 to replace Eugenio Valenzuela. Gradually the composition of the TC changed during the second half of the 1990s as some of the more conservative ministers were replaced by *Concertación* coalition or compromise appointments. A significant change was Eugenio Valenzuela's return to the TC in March of 1997. Valenzuela revived his more expansive interpretation of the 1980 Constitution. Where Ortúzar and Bulnes tended to follow an originalist or literalist model of interpretation; Minister Valenzuela took a pragmatic *finalista* approach to constitution interpretation.[28]

By 2001 Valenzuela (1997-2006) was joined in the TC by several more politically centrist and moderate members, like Mario Verdugo Marinkovic (1997-2001), Hernán Alvarez García (1997-2005), and Juan Colombo Campbell (1993-2010). This trend has continued and is reflected in the appointments of José Luis Cea Egaña (2002-present), and most recently Carlos Carmona Santander (in 2009), individuals who had been involved in the development of law vs. decree doctrine in various capacities before their

27 See supplementary material to the article on the journal's website, online: <www.jpla.org>.
28 Interview, July 2001.

appointments to the TC.[29] In sum, shifts in composition, politically driven or otherwise, and the accompanying shift in dominant models of constitutional interpretation, have had important consequences for the distribution of power between branches of government in Chile.

The role of judicial culture and identity in constituting judicial goals represents another set of internal factors affecting judicial decision-making. It is widely argued and generally accepted that judicial resistance (across Chilean history) to engage in constitutional (rather than legal) review is the result of Chile's legal culture (Peña González 1997; Couso 2004; Hilbink 2007; Faundez 2007; Hunees 2010). Historically, a judicial culture of legalism and institutional and ideological conservatism has been reinforced by formalistic and positivist legal training. In turn, a rigid judicial hierarchy combined with the Supreme Court's discipline and promotion power, have reinforced the social and political isolation of the Chilean judiciary, and promoted a perception of the judicial role founded in classical constitutionalism with a dominant separation of powers doctrine that discounted the reciprocal control of public power. The result is antipathy toward constitutional review, a persistent understanding of statutory law as supreme, and a private law perspective on questions of constitutional rights (Peña González 1997; Couso 2004; Hilbink 2007; Faundez 2010). The predominance of a private law approach to constitutional adjudication and the de facto presumption of constitutionality given formal law by ordinary and constitutional judges in Chile featured prominently in the *Cesión Gratuita de Terrenos* decision reviewed above, and has been a recurrent element of law vs. decree doctrine, tipping the balance of power toward the Executive in these types of conflicts. As a result, observers of judicial decision-making in Chile have described the TC's performance as fundamentally disappointing (particularly with respect to rights); noting that the TC has been "largely passive, usually deferring to the legislature's judgment concerning the constitutionality of the laws it passes" (Couso 2005: 114).

Explanations stressing factors internal to the court, such as judicial culture, would predict uniform judicial deference and little doctrinal change. Yet, the review of law vs. decree jurisprudence suggests that neither the use of deferential doctrines or judicial conceptions of the institutional role of the TC have been uniform over time. Appreciating how the wider political context interacts with these judicial-cultural and institutional factors may shed additional light on why an incremental approach to defining the boundaries of decree power has prevailed on the TC, and, furthermore, how doctrinal shifts

29 Cea Egaña has written extensively on doctrine in this area and Carmona Santander had served, since 1990, in the executive branch as a legal advisor to the President (in the secretary general of the presidency).

on the TC have affected its institutional position at the end of the transition to democracy (2005 and beyond). The separation of powers approach briefly outlined above has important insights for understanding the proclivity of courts to defer to the political branches, favor one branch over another, or auto-restrict the scope of judicial review authority. For example, Epstein, Knight and Shvetsova (2001: 138), argue that in new or transitioning democracies a new court may prefer to "promote its legitimacy and adjust the status quo policy slowly" by adopting a strategy of "soft" or semi-deferential review. In short, a strategy of deliberate passivity with respect to various judicial functions is logical, even in politically fragmented contexts, when a court's legitimacy is not well established, its legitimacy is contested or damaged, or the legal culture itself significantly and conservatively circumscribes the definition of legitimate judicial action. This is arguably the case for the TC, particularly during the first decade of the transition to democracy.

The TC played a pivotal role in events that led to the end of the military regime, and expectations surrounding its role in a new democratic framework were high (Couso 2005: 114).[30] Nonetheless, it is not surprising that the TC (or the Supreme Court) did not embrace a new activist role with respect to constitutional review. At the beginning of the transition time period, the TC was not well established, the political context was in flux, and the judiciary as whole (in which members of the TC were deeply embedded) was heavily criticized politically and publicly because its record on human rights adjudication (Huneeus 2010). As Murphy (1964) notes, judges will not injure or destroy judicial power and they will not attempt to expand their power beyond the limits which would be legitimate under accepted theories of the judicial function. Without a public consensus in Chile about what alternative principles to traditional legal positivism and reasoning should govern judicial activity, judges (even constitutional judges aware of their political role) are unlikely to leave the safety of the traditional model of legitimacy, especially in politically contentious cases. Consequently, the judicial advancement of strong counter-majoritarian rights protections or assertive "checking" of the elected branches arguably would not have served the institutional goals of the TC (or ordinary judiciary) well during the transition period.

30 One of the TC's most transcendental decisions was to require the 1988 plebiscite be held according to the organic constitutional law governing elections (Rol 33; September 24, 1985). That law ostensibly gave the opposition a legal leg to stand on in organizing and advertising a campaign to vote NO in the plebiscite. General Pinochet narrowly lost the 1988 plebiscite, setting in motion the transition to democratic elections in December of 1989 and the inauguration of a new democratically elected government in March of 1990.

In sum, we might best appreciate the contours of law vs. decree doctrine in light of changes in court composition and the TC's need to build institutional legitimacy. Concurrent with changes in composition and the ascendency of the finalist model of constitutional interpretation among a majority of ministers, we see a pattern of non-confrontational rulings and incremental development of doctrine. The TC's development of the doctrine of reasoned deference is consistent with this view. This doctrine has allowed the TC to exercise its powers "vigorously and creatively" while avoiding extreme politicization or permanent conflict with the political powers (Zapata Larraín 2002: 71).[31] From roughly 1997 to 2001 the TC rearticulated the bounds of power to favor presidential governance, self-limiting the reach of its own power. This incremental strategy reinforced the TC's position vis-à-vis the Supreme Court and the CGR, and helped it maintain cordial relations with the co-legislative branches while protecting and advancing its long-term legitimacy and political relevancy. Post 2001 the TC has been more assertive, establishing limits on executive (and legislative) discretion by refining the intensity of the legal reserve.

Engaging a strategy of "soft" review has, in turn, served to strengthen the political-institutional position of the TC and augment its influence in the policy-making process. First, the distributional consequences of the judicialization of separation of powers decisions made the TC a politically significant player in inter-branch political dynamics across the transition time frame, and contributed to its increased political stature informally through processes of auto-limitation. Auto-limitation occurs when elected policy makers anticipate future possible court decisions and sacrifice or modify initial policy or process goals in order to reduce the possibility of referral to a high court, judicial reversal, or the development of unfavorable doctrine (Stone Sweet 2000: 73-75; Ferejohn 2002: 42; Shapiro 2004). Beyond the effects on an individual ruling, law vs. decree doctrine shapes legislative and executive behavior (as well as that of the CGR). One of the most important TC doctrines affecting legislative strategy is that of specificity and determination with respect to laws that affect fundamental rights (discussed above) (Peña Torres 2006: 183).[32]

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31 See Zapata Larraín (2002) for a discussion of the doctrine and its constitutive elements ("presumption of legality and constitutionality" of legislative acts and "autonomy of the Legislature") in Chilean and comparative jurisprudence.

32 Zapata Larraín (2002: 71) also cites examples of the explicit use by the Legislature of the doctrine reasoned deference; and Peña Torres (2006) also mentions the criteria by which a law is considered an organic constitutional law (thereby requiring preventative constitutional review by the TC) as influential for legislative behavior.

In a context in which the opposition may challenge decrees before a court and win, executives have an incentive to engage in auto-limitation. A president may be expected to follow two key observable strategies: monitoring and justifying (Stone Sweet 2000: 77). Presidents from Patricio Aylwin (1990-1994) through Michelle Bachelet (2008-2010) and their legal staffs have not only pursued composition changes on the TC through new appointments, they have also closely monitored TC jurisprudence and doctrine and explicitly incorporated TC language, rules of constitutional interpretation, and precedents into the language justifying the content and form of decrees.[33] The GCR also incorporates TC doctrine on law vs. decree cases in its resolutions on decrees and in its communication with the President over the legality and constitutionality of decrees under consideration (Verdugo Marinkovic 2006).

The Executive "won" law vs. decree conflicts fairly often after 1997; however, these wins were not automatic. Faced with concrete cases before the TC, the Executive (as well as the legislative opposition) worked hard to convince TC ministers to move in a direction favorable to their interests.[34] One form of this convincing is the submission of "friend of the court" letters by interested parties. Typically these letters are filed by congressional members, the CGR, local interest groups, and constitutional law experts (some of whom now sit on the TC): groups or individuals who want to weigh in on the case and ultimately move TC doctrine closer to their preferred interpretation of executive or legislative power. These groups also publicize their position in the media. TC decisions sometimes draw on the logic and information provided in "friend of the court" letters to develop or support different opinions. In short, political actors pay attention to, try to influence, and ultimately incorporate TC language and doctrine as part of their political strategies to advance their policy and institutional goals (Scribner 2007).

Second, the political stature of the TC has increased formally. At the beginning of the new century the TC quietly lobbied for and gained, in 2005, legislative and executive support for constitutional changes that concentrate constitutional review power in the TC and increase access to its jurisdiction. During the time frame under investigation here, access to the TC was restricted to the Executive and the Legislature. The 2005 constitutional reform shifted the writ of inapplicability for unconstitutionality from the Supreme

33 Interviews with presidential legal staff (2001) and CGR juridical division staff (2001). This language (found in TC precedent and legal scholarship) is highlighted in accompanying documents submitted to the TC by both the executive branch and the CGR.

34 President Frei characterized executive branch success in these cases as the result of "serious work" and "well thought defenses" (quoted in Couso 2005: 126).

Court to the TC, effectively creating a direct popular action for citizens to reach the TC as well as an avenue for lower court justices to bypass the Supreme Court and directly access the TC. These institutional changes will significantly increase processes of judicialization and shift power from the Legislature (and the Supreme Court) to the TC. These processes are just beginning to unfold as the first writ of inapplicability cases were decided in 2006. Such cases now form the vast majority (roughly 85 percent in 2009) of the TC's docket and represent a considerable increase in the number of cases overall.[35]

These institutional changes invariably signal the initiation of a new era for the TC. Will these institutional changes result in judicial activism, as in the case of Costa Rica (Wilson 2005; Wilson and Rodríguez Cordero 2006)? The 2005 reforms have been accompanied by important new trends in judicial culture that suggest, at least with respect to rights, we might expect increased judicialization to result in greater judicial activism (Couso and Hilbink 2009). Changes in two factors discussed above stand out in particular. First, an intellectual anchor for the legitimacy of judicial decisions alternative to the historically dominant positive law model of constitutional interpretation appears to be emerging. Lack of such an alternative, I argue above, helped to shape the TC's "semi deferential" strategy in law vs. decree doctrine; and is the main reason for the judiciary's (as a whole) antipathy toward constitutional review (Couso 2005; Hilbink 2007). Huneeus (2010) reminds us that judicial culture is "contested, heterogeneous, and dynamic." Competing models of constitutional adjudication have been circulating and gaining purchase over the last decade or more. The transition from an "originalist" to a "finalist" approach in TC jurisprudence in law vs. decree cases across the transition time frame is characteristic of wider systemic changes which have gained legitimacy within academic circles (Couso and Hilbink 2009). Second, as indicated above a "finalist" model of constitutional interpretation has been solidified on the TC through changes to its composition both before and after the 2005 reforms. The changing terrain of judicial culture provides judges with a new (increasingly accepted) ideological anchor for judicial decision-making, just as increased access to the TC provides new avenues for judicialization.

35 The TC has generally maintained the narrow admissibility rules for writ of inapplicability cases developed by the Supreme Court (Saenger G. 2007), and the vast majority are rejected.

Conclusion

The judicialization of political separation of powers conflicts have wide-ranging implications for the nature of the policy-making process, the relative balance of power between the branches of government, and the political role of courts in presidential systems. In the case of Chile, judicialization during the transition to democracy did not result in the judicial creation of individual rights or the empowerment of marginalized minorities. However, a focus on a judicial role in distributing power highlights the dynamic inter-branch context in which presidents and legislatures interact with expanded judicial power. The Chilean case demonstrates how the constitutional review of the way power is exercised in the formation of policy, and thus the (re)distribution of power, shapes the political strategies of all three branches of government.

As detailed above, the Chilean Constitutional Tribunal refined the original constitutional bargain with respect to the boundaries of power through its decisions in law vs. decrees cases. Over the time period analyzed (1990-2005) the TC shifted the balance of power in the policy-making process toward the executive branch at the same time that it developed a progressively clearer doctrine that clarifies the "intensity" of the legal reserve, limits legislative remission (delegation) in matters pertaining to fundamentally rights, and thus limits administrative discretion. The shift in doctrine and the changing institutional role of the TC are best understood by appreciating the interaction between internal factors (judicial culture and composition) and the political context of inter-branch relations. Moreover, the very political processes by which such separation of powers conflicts reach the TC have served to strengthen its institutional position as a site for the adjudication of contentious political disputes over the policy process. TC decision-making in turn has been incorporated into the decision-making processes and strategies of political and administrative bodies through judicialization and auto-limitation. Additionally, at the end of the time frame, the TC's formal institutional position and influence within the political system is significantly enhanced by the 2005 constitutional reforms.

References

Alliende Crichton, Fernando José (2000), *La Reserva de Ley. Memoria para optar al grado de licenciado en ciencias jurídicas y sociales*, Santiago: Universidad de Chile, Facultad de Derecho, Departamento de Derecho Público.

Aróstica Maldonado, Iván (1999), La Constitución en Riesgo, in: *Ius Publicum*, 3, 57-72.

Aróstica Maldonado, Iván (1991), ¿Qué Queda de la "Presunción de Legalidad"?, in: *Revista de Derecho y Jurisprudencia*, 88, 1, 1-7.

Aróstica Maldonado, Iván (1989), Impugnabilidad de los Actos Administrativos, in: *Revista Chilena de Derecho*, Universidad Católica, 16, 455-464.

Aylwin Azócar, Arturo (1984), Limite de la Potestad Reglamentaria del Presidente de la República, in: *Revista Chilena de Derecho*, Universidad Católica, 11, 449-453.

Bertelsen Repetto, Raúl (1993), Sistemas de Control de Constitucionalidad entre 1960-1989, in: *Diagnostico Histórico Jurídico del Poder Legislativo en Chile*, Valparaíso: Centro de Estudios y Asistencia Legislativa, Universidad Católica de Valparaíso, Ediciones Universitarias de Valparaíso.

Blanc Renard, Neville, and Emilio Pfeffer Urquiaga (1989), *Reflexiones en torno al equilibrio ejecutivo – Parlamento*, Documento de Trabajo, 8, Corporación de Estudio Liberales, Santiago.

Caldeira, Gregory A., and James L. Gibson (1992), The Etiology of Public Support for the Supreme Court, in: *American Journal of Political Science*, 36, 635-664.

Caldera Delgado, Hugo (1980), Bases para el Control Jurídico de la Potestad Reglamentaria Autónoma Contemplada en el Anteproyecto de la Nueva Constitución, in: *Décimas Jornadas Chilenas de Derecho Público*, Universidad de Chile en Valparaíso, Facultad de Ciencias Jurídicas, Económicas y Sociales – Edeval, 187-191.

Carmona Santander, Carlos (2001), Tres problemas de la Potestad Reglamentaria: Legitimidad, intensidad y control, in: *Revista de Derecho*, Consejo de Defensa del Estado, 1, 3, 29-62.

Carmona Santander, Carlos (1998), Tendencias del Tribunal Constitucional en al relación ley-reglamento, in: *Revista de Derecho Público*, 61, 180-192.

Cea Egaña, José Luis (2006), *Cuestionario sobre el Juez Constitucional en Chile*, Trabajo previo a la V Conferencia Iberoamericana de Justicia Constitucional, online: <http://www.tribunalconstitucional.cl/documentos/)>.

Cea Egaña, José Luis (1998), Los principios de Reserva Legal y Complementaria en la Constitución Chilena, in: *Revista de Derecho*, Universidad Austral, 9, 65-104.

Cea Egaña, José Luis (1989), La Separación de Poderes en la Democracia Constitucional Chilena, in: *La Experiencia Constitucional Norteamericana y Chilena sobre la Separación de Poderes*, Instituto de Estudios Juriciales, Santiago: Editorial Jurídica Ediar – Conosur.

Cea Egaña, José Luis (1988), Visión de la Presidencia y el Congreso en la Constitución de 1980, in: Arturo Aylwin Azócar (ed.), *Constitución 1980: Estudio Crítico*, Santiago: Editorial Jurídica Ediar – ConoSur.

Cepeda Espinosa, Manuel José (2005), The Judicialization of Politics in Colombia: The Old and the New, in: Siri Gloppen, Robert Gargarella, and Elin Skaar (eds.), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies*, Portland: Frank Cass Publishers.

Chavez, Rebecca Bill (2004), *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina*, Stanford: Stanford University Press.

Couso, Javier A. (2005), The Judicialization of Chilean Politics: The Rights Revolution That Never Was, in: Rachel Sieder, Line Schjolden, and Alan Angell (eds.), *The Judicialization of Politics in Latin America*, New York: Palgrave.

Couso, Javier A. (2004), The Politics of Judicial Review in Chile in the Era of Domestic Transition, 1990-2002, in: Siri Gloppen, Robert Gargarella, and Elin Skaar (eds.), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies*, Portland: Frank Cass Publishers.

Couso, Javier, and Lisa Hilbink (2009), *From Quietism to Incipient Activism: The Institutional and Ideational Roots of Rights Adjudication in Chile*, Paper presented at the 2009 Annual Meeting of the American Political Science Association, September 3-6, 2009, Toronto Canada.

Dahl, Robert (1957), Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker, *Journal of Public Law*, 6, 2, 279-295.

Domingo, Pilar (2004), Judicialization of Politics or Politicization of the Judiciary: Recent Trends in Latin America. in: *Democratization*, 11, 1, 104-126.

Epstein, Lee, and Jack Knight (1998), *The Choices Justices Make*, Washington, DC: Congressional Quarterly Press.

Epstein, Lee, Jack Knight, and Olga Shvetsova (2001), The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government, in: *Law & Society Review*, 35, 1, 117-164.

Eskridge, William N., Jr. (1991a), Reneging on History? Playing the Court/Congress/President Civil Rights Game, in: *California Law Review*, 79, 613-684.

Eskridge, William N., Jr. (1991b), Overriding Supreme Court Statutory Interpretation Decisions, in: *The Yale Law Journal*, 101, 331-455.

Faundez, Julio (2010), Chilean Constitutionalism before Allende: Legality without Courts, in: *Bulletin of Latin American Research*, 29, 1, 34-50.

Ferejohn, John (2002), Judicializing Politics, Politicizing Law, in: *Law and Contemporary Problems*, 65, 3, 41-68.

Frei Ruiz-Tagle, Eduardo (2000), *Doctrina Constitucional de Presidente Eduardo Ruiz-Tagle Frei*, Vol. 1 and 2, Santiago: División Jurídico Legislativo, Ministerio Secretaria General de la Presidencia.

Gely, Rafael, and Pablo T. Spiller (1990), A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases, in: *Journal of Law, Economics, and Organization*, 6, 2, 263-300.

Gloppen, Siri, et al. (2010). *Courts and Power in Latin America and Africa*, New York: Palgrave.

Gloppen, Siri, Robert Gargarella, and Elin Skaar (eds.) (2004), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies*, Portland: Frank Cass Publishers.

Helmke, Gretchen (2005), *Courts under Constraints: Judges, Generals, and Presidents in Argentina*, Cambridge: Cambridge University Press.

Hernández Emparanza, Domingo (2006), Control de constitucionalidad de actos administrativos por el Tribunal Constitucional. Precedentes Constitucionales, in: *Estudios Constitucionales*, 4, 001, 207-222.

Hilbink, Elisabeth C. (2007), *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile*, Cambridge: Cambridge University Press.

Huneeus, Alexandra Valeria (2010), Judging from a Guilty Conscience: The Chilean Judiciary's Human Rights Turn, in: *Law & Social Inquiry*, 35, 1, 99-135.

Iaryczower, Matías, Pablo T. Spiller, and Mariano Tommasi (2002), Judicial Decision Making in Unstable Environments, Argentina 1935-1998, in: *American Journal of Political Science*, 46, 4, 699-716.

Kapiszewski, Diana, and Matthew M. Taylor (2008), Doing Courts Justice? Studying Judicial Politics in Latin America, in: *Perspectives on Politics*, 6, 741-767.

Landfried, Christine (1994), The Judicialization of Politics in Germany, in: *International Political Science Review*, 15, 2, 113-124.

López-Ayllón, Sergio, and Hector F. Fix-Fierro (2003), "Faraway, So Close!" The Rule of Law and Legal Change in Mexico 1970-2000, in: Lawrence Friedman and Rogelio Pérez Perdomo (eds.), *Legal Culture in the Age of Globalization: Latin America and Latin Europe*, Stanford: Stanford University Press.

Murphy, Walter F. (1964), *Elements of Judicial Strategy*, Chicago: University of Chicago Press.

Nogueira Alaclá, Humberto (1994), Forma de Gobierno, distribución de funciones y controles inter-órganos en el régimen político Chileno, in: Carlota Jackisch (ed.), *División de Poderes*, Buenos Aires: Fundación Konrad Adenauer.

Nogueira Alcalá, Humberto (1995), El Tribunal Constitucional Chileno, in: *Una Mirada a los Tribunales Constitucionales: Las Experiencias Recientes*. Lima: Comisión Andina de Juristas.

O'Donnell, Guillermo (1994), Delegative Democracy, in: *Journal of Democracy*, 5, 1, 55-70.

Peña González, Carlos (1997), *Practica Constitucional y Derechos Fundamentales*, Santiago: Corporación Nacional de Reparación y Reconciliación.

Peña Torres, Marisol (2006), El precedente constitucional emanado del Tribunal Constitucional y su impacto en la función legislativa, in: *Estudios Constitucionales*, 4, 001, 173-184.

Ríos-Figueroa, Julio (2007), Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994-2002, in: *Latin American Politics & Society*, 49, 1, 31-57.

Saenger G., Fernando (2007), Acción de inaplicabilidad e inconstitucionalidad. Facultades del nuevo Tribunal Constitucional. Algunos casos jurisprudenciales, in: *Estudios Constitucionales*, 5, 001, online: <http://redalyc.uaemex.mx/redalyc/src/inicio/ArtPdfRed.jsp?iCve=82050111>.

Scribner, Druscilla (2007), The Political Dynamics of Vehicle Emissions: A Constitutional Tale of Public Policy in Santiago, *Journal of Latin American Urban Studies*, 8, 1-16.

Scribner, Druscilla L. (2004), *Limiting Presidential Power: Supreme Court Executive Relations in Argentina and Chile*, Ph.D. Dissertation, Political Science, University of California, San Diego.

Segal, Jeffrey A. (1997), Separation-of-Powers Games in the Positive Theory of Congress and the Courts, in: *American Political Science Review*, 91, 1, 28-44.

Segal, Jeffrey A., and Harold J. Spaeth (2002), *The Supreme Court and the Attitudinal Model Revisited*, Cambridge: Cambridge University Press.

Shapiro, Martin (2004), Judicial Review in Developed Democracies, in: Siri Gloppen, Robert Gargarella, and Elin Skaar (eds.), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies*, Portland: Frank Cass.

Shapiro, Martin, and Alec Stone Sweet (2002), *On Law, Politics and Judicialization*, Oxford: Oxford University Press.

Sieder, Rachel, Line Schjolden, and Alan Angell (eds.) (2005), *The Judicialization of Politics in Latin America*, New York: Palgrave Macmillan.

Silva Irarrazával, Luis Alejandro (2007). Insuficiencia del Principio de Supremacía Constitucional en el Control de Constitucionalidad de los Actos Administrativos, in: *Estudios Constitucionales*, 5, 001, 283-304.

Soto Kloss, Eduardo (1999), Ley y Reglamento: sus Relaciones en el Derecho Chileno, in: *Ius Publicum*, 3, 33-47.

Soto Kloss, Eduardo (1980), Estado de Derecho y Procedimiento Administrativo, in: *Revista de Derecho Público*, Universidad de Chile, 27-28, 101-124.

Soto Kloss, Eduardo (1977), La Toma de Razón y el Poder Normativo de la Contraloría General de la República, in: *La Contraloría General de la República, 50 Años de Vida Institucional (1927-1977)*, Santiago: Universidad de Chile, Facultad de Derecho, Departmento de Derecho Público.

Staton, Jeffrey (2002), *Judicial Activism and Public Authority Compliance: The Role of Public Support in the Mexican Separation-of-Powers System*, Ph.D. Dissertation, Department of Political Science, Washington University.

Stone Sweet, Alec (2000), *Governing with Judges*, New York: Oxford University Press.

Stone Sweet, Alec (1992), *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*, New York: Oxford University Press.

Tapia Valdés, Jorge (1993), Funciones y atribuciones del Parlamento entre 1960-1990, in: Raúl Bertelsen Repetto (ed.), *Diagnostico Histórico Jurídico del Poder Legislativo en Chile*. Valparaíso: Centro de Estudios y Asistencia Legislativa, Universidad Católica de Valparaíso, Ediciones Universitarias de Valparaíso.

Tate, C. Neal, and Torbjörn Vallinder (1995), The Global Expansion of Judicial Power: The Judicialization of Politics, in: C. Neal Tate and Torbjörn Vallinder (eds.), *The Global Expansion of Judicial Power: The Judicialization of Politics*, New York: New York University Press.

Taylor, Matthew M. (2008), *Judging Policy: Courts and Policy Reform in Democratic Brazil*, Stanford: Stanford University Press.

Vanberg, Georg (2005), *The Politics of Constitutional Review in Germany*, Cambridge: Cambridge University Press.

Verdugo Marinkovic, Mario (2006), Efectos vinculantes de los precedentes del Tribunal Constitucional en la actividad de la Contraloría General de la República, in: *Estudios Constitucionales*, 4, 001, 223-231.

Wilson, Bruce (2005), Changing Dynamics: The Political Impact of Costa Rica's Constitutional Court, in: Siri Gloppen, Robert Gargarella, and Elin Skaar (eds.), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies*, Portland: Frank Cass Publishers.

Wilson, Bruce, and Juan Carlos Rodríguez Cordero (2006), Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics, in: *Comparative Political Studies*, 39, 3, 325-351.
Zapata Larraín, Patricio (2002), *La Jurispurdencia del Tribunal Constitucional*, Santiago: Biblioteca Americana.
Zapata Larraín, Patricio (1994), *La Jurisprudencia del Tribunal Constitucional*, Santiago: Imprenta VIS Ltda.
Zapata Larraín, Patricio (1993), El Precedente en la Jurisprudencia Constitucional Chilena y Comparada, in: *Revista Chilena de Derecho*, 20, 449-508.
Zapata Larraín, Patricio (1991), Jurisprudencia del Tribunal Constitucional: 1981-1991, in: *Revista Chilena de Derecho*, 18, 2, 261-330.

La judicialización de la (separación de poderes) política: Lecciones de Chile

Resumen: La mayoría de los análisis de la judicialización de la política se centran en la creación judicial de políticas y derechos. Sin embargo, cuando la judicialización de la política se desarrolla en un contexto institucional de separación de poder, los tribunales también están involucrados en la distribución de poder. La tarea de delimitación de poder entre los poderes del Estado es diferente de la formulación de políticas o adjudicación de los derechos. Judicialización de las disputas políticas sobre el poder confiere a los tribunales la oportunidad de alterar el equilibrio de poder institucional, para crear ejecutivos (o legislaturas) más fuertes y un papel para los tribunales altos más dinámico (o débil). Para ilustrar estos puntos, este artículo examina cómo el Tribunal Constitucional Chileno (TC) adjudicó un tipo de conflicto específico entre los poderes legislativo y ejecutivo desde 1990 hasta 2005. Un análisis de la jurisprudencia "ley vs. reglamento" del Tribunal Constitucional pone de relieve cómo el TC ha distribuido el poder entre los ramos políticos y aumentado su influencia dentro del sistema político.

Palabras clave: Chile, Tribunales, Tribunales constitucionales, Sistema judicial/poder judicial, Separación de poderes