

Regimes and the Rule of Law: Judicial Independence in Comparative Perspective

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Abstract

According to popular wisdom, judicial independence and the rule of law are essential features of modern democracy. Drawing on the growing comparative literature on courts, we unpack this claim by focusing on two broad questions: How does the type of political regime affect judicial independence? Are independent courts, in fact, always essential for establishing the rule of law? In highlighting the role of institutional fragmentation and public opinion, we explain why democracies are indeed more likely than dictatorships to produce both independent courts and the rule of law. Yet, by also considering the puzzle of institutional instability that marks courts in much of the developing world, we identify several reasons why democracy may not always prove sufficient for constructing either. Finally, we argue that independent courts are not always necessary for the rule of law, particularly where support for individual rights is relatively widespread.

INTRODUCTION

To read the popular press, judicial power is on the rise. In recent decades, constitutional reform in more than 80 countries has transferred power from representative institutions to judiciaries, by establishing bills of rights and judicial review (Hirschl 2002). After World War II, many old democracies in Europe that had long embraced the principle of “legislative sovereignty” reacted to fascism by establishing constitutional courts. More recently, the international community has pushed for the establishment of powerful independent courts as part of a broader effort to shore up the rule of law in new and struggling democracies. The World Bank is currently using its financial muscle to facilitate judicial reform in developing countries, citing statistics that link the rule of law to economic growth (*Economist* 2008).¹ With and without World Bank help, postcolonial and post-Soviet countries transitioning to democracy have typically strengthened courts’ power to undertake constitutional review of the political branches of government (Hirschl 2002, Horowitz 2006).

The phrase “democratic constitutionalism” has a comforting ring, implying as it does that independent courts enable the proper functioning of democracy by both enforcing the laws passed by legislative majorities and stopping majorities from violating individual and minority rights (Ely 1980). But the notion that independent courts should or would play this guardian role is not as obvious as it seems. As Dahl (1957) has pointed out, entrusting unelected bodies such as courts with the counter-majoritarian task of protecting minorities entails a significant degree of optimism. On the one hand, it is not obvious why a judiciary cordoned off from political accountability would protect rights, and if it did, which minorities and which rights the judiciary would protect. On the other hand, to the extent that judges would take on this protective role because they

are politically accountable in some way, it becomes unclear what the judiciary adds to majoritarian politics.

From Brutus onward, critics of judicial independence have concentrated on the first concern, fretting over the so-called counter-majoritarian difficulty unelected courts pose in a democracy (Bickel 1986 [1962]). Dahl’s famous answer to them was essentially, “Not to worry.” In his view, courts in fact should not replace elected representatives in deciding politically vital matters such as what rights should be protected, and for whom. For Dahl, Locke’s defense of majority rule on grounds that it is the system most likely to oppress the fewest people trumps Madison’s concern that the majority could tyrannize the minority. But Dahl sees democracies as fundamentally Lockean, even where they make a putative commitment to judicial review, because political appointments of judges ensure that the judiciary ultimately stays in line with the attitudes and ideologies of the majority. Dangers of runaway courts in a healthy democracy, for Dahl, are often exaggerated.

In this article, the classic counter-majoritarian debate is an implicit backdrop to our consideration of how the type of regime affects judicial independence and whether judicial independence is indeed necessary for establishing the rule of law. To motivate our analysis, we begin with the simple set of relationships depicted in **Figure 1**, in which democracy purportedly leads to judicial independence, and judicial independence automatically results in the rule of law.²

If this figure—however crudely—reflects the implicit mantra of today’s policy makers and pundits, it sparks questions about which causal mechanisms connect democracy to judicial independence, the conditions under which the

¹Haggard et al. (2008) review the literature linking the rule of law and economic growth.

²The concepts of judicial independence and the rule of law are contested and, to a large extent, overlapping. The various conceptual debates and measures of judicial independence and the rule of law are reviewed elsewhere (Larkins 1996, Burbank & Friedman 2002, Ríos-Figueroa 2006, Ríos-Figueroa & Staton 2008, Haggard et al. 2008).

rule of law depends on judicial independence, and which of these causal relationships might instead run in the reverse direction.

Even a quick glance at the scholarly literature on courts reveals both the limits and the power of this basic formulation. Consider the link between democracy and judicial independence. Dahl's story of judicial subordination, as we have just seen, provides one of the clearest challenges to the assumption that democracy necessarily leads to judicial independence. More recent scholarship highlights that whether the government has the means to bend the judiciary to its will depends not only on appointment power but also on variables such as the ability of the political branches to agree among themselves on how to deter or upend judicial rulings. A hamstrung political actor poses little threat to a defiant judiciary (Ferejohn & Weingast 1992a, Spiller & Gely 1992, Epstein & Knight 1998). Or if a government's security relies on public approval, then it risks reprisals for heavy-handed behavior toward judicial rights with wide support, but not otherwise (e.g., see Stephenson 2004, Vanberg 2005, Carrubba 2009; J.K. Staton, unpublished manuscript³).

Judicial independence in democracies is simply far more variable than this preliminary formulation suggests. Specifically, it depends on the ability of the political branches to collude against the courts, and their expected electoral penalty for doing so. Institutionally fragmented governments are less capable of reining in independent-minded courts, but even unitary governments may face voting publics with a strong preference for legal neutrality.

These basic dimensions of political fragmentation and electoral vulnerability suggest that courts are likely to achieve meaningful independence in democracy only under certain conditions, but they also provide important clues about just why judicial independence is so

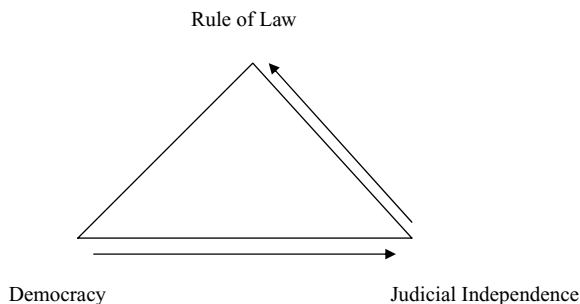


Figure 1

The conventional causal chain.

hard to achieve in nondemocracies. Although authoritarian regimes may have an incentive to foster investment by securing property rights, for example, they are not likely to be willing or able to guarantee judicial discretion over politically sensitive issues. To the degree that a regime has a monopoly of political power, its commitments to judicial neutrality and the protection of rights of any kind are only contingent, not truly credible.

Whether judicial independence is necessary for the rule of law also depends on the regime setting. In principle, as Madison feared, an unchecked legislature even in a democracy could impose a tyranny of the majority. In practice, electoral competition often appears quite effective in inhibiting legislators from riding roughshod over minority interests because of the danger of alienating voting majorities. In democratic regimes such as the United Kingdom or the Netherlands that have an explicit commitment to legislative supremacy, majority governments have nevertheless maintained a commitment to the rule of law in the absence of powerful judicial guardians. Thus, democratic accountability alone, even without judicial independence, can be a sufficient condition for the protection of minority rights—in societies that value those rights.

In highlighting the role of electoral competition and public opinion in democracies, we challenge the notion that the rule of law represents an apotheosis of judicial power at the expense of politics, at least in democracies. The rule of law rests, first, on the inability of the

³Staton JK. *Going Public from the Bench: Strategic Communication and the Construction of Judicial Power*. Unpublished book manuscript.

one or the few to control the many, and second, on the willingness of the many to leave some scope for universal rights, rather than reserving rights only for members of the majority.⁴ Institutionalized political fragmentation created by separation of powers may undergird judicial independence, but contrary to much popular and scholarly writing, judicial independence is neither necessary nor sufficient to achieve those ends.

The role of judicial independence regarding the rule of law in other types of regimes, however, is different. On the one hand, courts, like constitutions, may provide a focal point around which citizens can coordinate to protect their rights (Weingast 1997). In dictatorships and in unstable democracies, where a culture of democratic norms may not exist, an independent judiciary committed to rights protection may provide an important substitute. Yet, for reasons we hint at above and detail below, it is precisely in such settings that judicial independence is likely to be the most fragile. Thus, although there may be situations in which authoritarian leaders use laws to govern, which we might term “rule by law” (or “rule of will”), in no case is “rule of law,” which entails nonarbitrariness, fully achieved. Rule of law obtains only when law is unavailable as an instrument of control by any particular actor but rather functions as a contractual benchmark for all members of society.

Put differently, judicial insulation from politics may be more important in countries where electoral competition is muted in some way, but in such countries one of the central pillars supporting judicial independence—institutional fragmentation—is missing. Likewise, if courts are meant to somehow make up for the lack of a popular rights culture, then another potential source of judicial security—public support for judges who protect minority rights—is also absent. This reasoning surely accounts for the empirical regularity that the rule

of law, as measured by the inability of the government to act outside of the law or to change it in opportunistic ways, typically accompanies well-established democracy (e.g., Stephenson 2003). It also underscores why would-be reformers often face a Sisyphean task in establishing independent courts where they are most needed.

We develop these claims further by surveying the broad comparative turn in judicial politics. This growing literature reveals the varying uses to which both courts and law are put in different types of regimes, across different regions, and over time. Because judicial independence, in the narrower sense of the institutional independence of the court, has been the focus of much of the literature on judicial politics, we begin by reviewing the normative defenses and positive accounts of judicial independence. The next section returns to the larger notion of the rule of law as nonarbitrary rule and reviews some empirical research on how it functions across a range of established democracies. We then examine the role of courts in dictatorships and reflect on their rather anemic capacity to generate the rule of law. Finally, we focus on why judicial independence often fails in new democracies and speculate on why courts fall into “instability traps.”

JUDICIAL INDEPENDENCE

It is hard to think of a concept that enjoys stronger normative support than the rule of law. It would seem that everyone in society is better off behind a veil of ignorance in a system that adjudicates disputes according to agreed-upon principles without regard to the political power, social position, or economic resources of individuals. By reducing the stakes of conflict, the rule of law “domesticates revolution” and averts untold human misery that comes of civil war on one extreme or totalitarian oppression on the other (Weingast 1998, Ginsburg 2002). Individuals and minorities are free from bullying by shifting majorities (Dworkin 1996). Neutral enforcement of contracts encourages private economic investment, reduces the cost

⁴Presumably, this is because democratic politics is inherently multidimensional and fluid, giving members of the majority reason to expect to be in the minority on some issues now or in the future.

of government debt, and promotes economic growth (North & Weingast 1989). And at least hypothetically, countries with constitutional review may adopt a more risk-accepting approach to legislating; they need not suffer from the effects of ideas gone wrong, since the courts can tamp them down in fairly short order (Rogers 2001).

Despite its normative appeal, the conditions for the rule of law remain hard to pin down empirically. Societies are notoriously bad at providing themselves with public goods, and, as Stephen Holmes quips, law as one of those public goods does not “descend upon societies from a Heaven of Higher Norms” (Holmes 2003, p. 53). Any politically plausible account of the rule of law must explain why politically dominant actors are forced to refrain from instrumentalist uses of power, including legal instruments that could be used to enhance their chances of staying in office.

A vibrant literature at the intersection of law, politics, and economics approaches this question by focusing on a proximate cause of nonarbitrariness, the institutional independence of the judicial system. Here we consider two types of institutional explanations for judicial independence: historical legacy, as in the case of common law systems, and ahistorical delegative models, in which politicians have reasons to tie their own hands vis-à-vis an independent judiciary.

Probably the most popular explanation for why some countries have independent judiciaries focuses on the difference between common law and civil code countries (La Porta et al. 1998). Common law countries, which also happen to be of Anglo lineage in one way or another, charge courts with developing and interpreting a body of case law that supplements statutory law. Judges are trained to think about, and if necessary to create, the connective tissue between pieces of legislation. The common law judge's power to interpret and create law is contrasted with the civil law judge's mandate to implement and enforce existing bodies of law. Economists advising the World Bank seem to assume that judicial independence is high in

common law countries on account of this structural difference in the nature of judicial practice (*Economist* 2008).

Damaging for explanations of this kind is that common law status is a poor predictor of empirical levels of judicial independence. Although the United Kingdom is the mother of the world's common law systems, the rise of parliamentary sovereignty in the wake of the Glorious Revolution of 1688 circumscribed the independence of British courts in practice (Roe 2006). Common law judges, too, can be overruled by new legislation. The contrast between activist U.S. courts and quiescent U.K. courts begs for a different explanation, and differences across the civil law countries of Europe reinforce the skepticism.

A second set of explanations for judicial independence assumes that legislators make a deliberate choice to delegate judicial authority to courts, building intentional institutional walls against political intervention in judicial decisions. For these models, legislatures can create judicial independence by means of a supermajority-protected set of rules ensuring long judicial tenure, wide jurisdiction, budgetary autonomy, and the like. Delegative models supply a range of possible motivations for why politicians may want to restrict themselves in this way.

Landes & Posner (1975) suggest that legislators have an interest to create an independent judiciary that can enforce the deals struck by enacting legislatures, thereby increasing the value of campaign contributions that legislators can extract from contributors on whose behalf they made those deals. The judiciary solves politicians' time inconsistency problem, namely that their short-run interest to sell new deals to the highest bidder undermines the price they are able to get for these deals in the longer run.

This model implausibly denies the possibility that courts, like legislators, are strategic actors. Unless we can be sure that courts will rule in support of (their understanding of) the enacting legislation rather than in strategic anticipation of the preferences of the incumbent legislature, this argument breaks down. Judges

may instead try to achieve outcomes as close as possible to their own preferences by taking into account the possibility that the incumbent legislature can write new legislation if it is sufficiently unhappy with the court's ruling. If this is true, and we see no reason why it should not be, the court's value in prolonging the life of legislation—and hence its value for legislators extracting rents—is significantly hampered.

Another delegative account of judicial insulation points to politicians' desire to duck blame for unpopular policies. Graber (1993), Salzberger (1993), Holmes (1996), and Wittington (1999) argue that a legislative majority might want to delegate politically divisive issues to the court, echoing Fiorina's (1981) blame-avoidance explanation for why politicians might want to delegate to bureaucrats. But it is not clear that it is possible for legislatures to tie their hands in this way, both because of the problem with cooperative delegation arguments we have already discussed and because politically strategic courts may have an interest in throwing the matter back rather provoking public wrath themselves. [Stephenson (2004) articulates an alternative critique of the blame-avoidance argument.] In Hungary, for example, the courts deliberately dodge issues such as abortion that they consider to be "political questions" (Pogany 1993). U.S. courts also display a tendency to keep one or two steps behind state and federal legislatures on contentious issues such as abortion or gay rights. Harvey & Friedman (2006) argue that the Supreme Court is systematically more likely to deny certiorari to cases on which the political branches are likely to have the votes to oppose the court. In addition, we expect, courts protect their future range of maneuver by staying within the broad bands of public support.

A third delegative rationale is supplied by McCubbins & Schwartz (1984), who suggest that an independent judiciary can be useful to the legislature in helping to keep executive agencies from veering from legislative intent. Without wasting resources on monitoring the bureaucracy, Congress can count on unhappy constituents to sue the offending

agency in court. But the McCubbins & Schwartz rationale for independent courts is weak for parliamentary systems, where motivating bureaucratic performance is typically more straightforward than in presidential systems because of the unified political leadership. In postwar Japan, for example, the longstanding LDP government chose to keep the courts on a tight leash and used other means to control the bureaucracy (Ramseyer & Rosenbluth 1993; Ramseyer & Rasmusen 1997).

Political insurance against being dominated by a future majority is a fourth delegative explanation for why an incumbent legislative majority might willingly transfer some of its power to the judiciary. A political party expecting to fall into minority status, and expecting at best to alternate in government with another party, might want to lock the door against majority tyranny and throw away the key, so to speak (Ramseyer & Rosenbluth 1993, Ramseyer & Rasmusen 1997, Ginsburg 2002, Finkel 2008). This argument for judicial independence parallels explanations for administrative reform (Geddes 1994) and for central bank independence (Horn 1995, Boylan 2001).

Although the insurance scheme seems a plausible explanation for why politicians would choose to establish an independent judiciary in the first place, it shares with other delegative accounts the difficulty of explaining why a majority government, if in possession of a sufficiently large legislative majority, might not renege on the deal once it returns to office. The willingness of sitting majorities to accept a longer time horizon implies something about the expected costs of noncompliance—presumably imposed by voters—that is not fully modeled in these explanations.

A focus on institutional rules purporting to insulate courts misses the incentives that politicians have to ignore or change those rules when they become inconvenient, or at the other extreme, reasons to refrain from the arbitrary use of law even in the absence of those rules when such behavior comes at an electoral cost. A fully strategic model of judicial politics embeds judicial institutions in a broader political

environment in which both the costs to amend judiciaries and the opportunities to use alternative institutional mechanisms to impose discipline on the government may vary. Political systems characterized by separation of powers between the legislative and executive branches, such as that of the United States, give the judiciary a wider range of freedom when the political branches do not agree on policy. Judicial independence is higher in countries with separation of powers, but it also varies with the coherence across the political branches over time. In countries where there are few institutional barriers in the path of legislatures wishing to dominate the courts—such as in England, its common law system notwithstanding—electoral discipline on legislative majorities is the principal safeguard of minority and individual rights. This way of thinking about the rule of law, in which judicial independence is but one mechanism for slowing down legislative majorities, places a large burden on public opinion to protect a strong conception of rights that goes beyond majority rule.

We have deemphasized the motivations of the judges themselves in order to focus on the ways judges are constrained by other political actors, but it is important to note that judges have ideological values and career ambitions of their own. We expect, of course, that judges are chosen by politicians who share their values. But where judges have lifetime tenure, incumbent political actors must constrain judges through means such as jurisdiction and budget control, legislative override, and at the extreme, judicial impeachment.⁵ Although the standard assumption is that most judges pursue policy goals (Epstein & Knight 1998), judges also undoubtedly care about other goals, ranging from their individual careers and wider professional standing to legalism and “principled” decision

making (Baum 1997). A future challenge for such theories of judicial behavior is to incorporate these other goals (Baum 2006).⁶

Strong public support for courts, or judicial legitimacy, is also of value to sitting judges, we can assume, not only because it gives them resources with which to resist political interference, but also for its consumption value. The insight that public support matters for protecting courts is not new (Caldeira 1986, Gibson et al. 1998), but contemporary scholarship seeks to identify the specific conditions under which public support serves as an effective enforcement mechanism (Vanberg 2001, 2005; Staton 2006; Carrubba 2009; C.J. Carrubba, M. Gabel, unpublished manuscript⁷). For example, Vanberg (2005, ch. 2) argues that public support for judges matters in inducing compliance with judicial decisions as long as the transparency of the decision is relatively high and the political salience of the case is sufficiently low.

THE RULE OF LAW IN ESTABLISHED DEMOCRACIES

Public support also plays a critical role in establishing and maintaining the rule of law directly. In democracies, judicial independence varies over time and across countries according to how easily the political branches can credibly commit to overriding or chastising the judiciary for politically unfriendly rulings. But, as we argue below, judicial independence alone is ultimately a poor predictor of how deeply committed governments are to minority and individual rights. In the developing world, where formal institutions are routinely ignored, public support for rights often undergirds the rule of law more reliably than formal institutional provisions for judicial independence (e.g., see

⁵Note, however, that in the context of stable democracy (e.g., the United States), where judicial tenure is generally respected, most strategic models assume that judges behave strategically simply to avoid having their decisions overturned.

⁶Ferejohn & Weingast (1992a) provide an important step in this direction by analyzing the consequences of the standard separation-of-powers game for a diverse set of judicial motivations. Helmke & Sanders (2006) extend this approach to the Argentine Supreme Court.

⁷Carrubba CJ, Gabel M. A *Comparative Study of the Institutionalization of Judiciaries*. Unpublished book manuscript.

Brinks 2006, 2008). Public support for rights, however, also provides the foundation on which the rule of law rests in much of the developed world.⁸

The U.S. judiciary is famous for being more independent than most of its counterparts elsewhere, and for that matter, more independent than the Constitution requires. Although the U.S. Constitution outlines only vaguely the role and status of the judiciary in American politics, Chief Justice John Marshall created judicial review, civics textbooks tell us, in the precedent-setting *Marbury v Madison* in 1803. But the textbook account makes little sense because in that ruling and in the parallel *Stuart v Laird* case, the Supreme Court claimed a right to engage in judicial review at the same time that it obsequiously allowed the new Democratic/Republican government to nullify the previous administration's appointments of Federalist judges to the Supreme Court, contrary to the wishes of the Court's majority (Ackerman 2005). The Court's enunciation of new judicial powers at the same time that it refrained from flexing muscle sounds a little like Woody Allen's description of a fight in which he punched the other guy in the fist with his stomach.

If we begin by granting that judicial independence is a necessary precondition for the rule of law, strategic models would seem to provide a compelling explanation of the rule of law. Although Congress can—and sometimes does—curtail the Supreme Court's authority by controlling the Court's jurisdiction, personnel, and budget, the American separation-of-powers system often places the two houses of Congress in the hands of different parties. To pass new legislation, moreover, a political coalition must steer clear of an executive veto requiring a super legislative majority to overturn. As a result, the political branches are often in a jumbled configuration that gives the U.S. Supreme Court significant room for maneuver (Ferejohn

& Shipan 1990, Ferejohn & Weingast 1992a, Epstein & Knight 1998, Shipan & Moraski 1999, Harvey & Friedman 2006). A review of American judicial history in fact reveals that the Court's readiness to deviate from legislative and presidential preferences has indeed waxed and waned in proportion to disagreements within and among the political branches (Chavez et al. 2003).

To the extent that judicial independence blocks the political branches from instrumental uses of law, we would thus expect the commitment to minority and individual rights in the United States to rise and fall along with fragmentation of the political branches. One could argue that the *Lochner* decision⁹ by the Supreme Court reflected an aggressive property-rights orientation of the political branches at the federal level at the turn of the twentieth century, and that the Warren Court of the 1950s and 1960s reflected a swing to comparably skewed interests, this time lined up on the left against capital. On this view, it is only when the political branches are divided across parties that the rights of minorities on both the right and the left are secured.¹⁰

The U.S. Supreme Court does appear to have ruled more energetically when its preferences were in line with those of the political branches, and to have ruled more cautiously when it needed to keep clear of congressional obstructionism. In mainstream democratic theory, the "positive rights" to property or to welfare are contested ideologically and are appropriately debated in legislatures and decided in elections. The jurisprudence of the *Lochner*

⁹In *Lochner v The State of New York*, the Supreme Court upheld a baker's right to keep his employees overtime against the New York legislature's desire to extend worker protections, on grounds that New York's worker protections violated constitutionally guaranteed property rights of employers.

¹⁰As one anonymous reviewer has noted, among Latin American countries there appears to be a strong correlation between dominant parties and politicized judiciaries. Judicial independence tends to be weaker in countries historically dominated by hegemonic parties (Mexico under the PRI, Paraguay under the Colorados, Argentina under the Peronists) and stronger in countries with two-party systems (Colombia and Uruguay) or multi-party systems (Brazil).

⁸For a different type of "bottom up" argument, which emphasizes the support structure for legal mobilization as opposed to widely shared cultural norms or popular support for rights, see Epp 1998.

and New Deal eras, respectively, each of which reflected the ideological preferences of the ruling coalitions of the time, may have come close to stepping on the interests of minorities on the left in the one case and on the right in the other. But it was shifts in electoral politics, rather than a reappearance of the mighty arm of the rule of law, that pushed the courts back into the political middle. In both instances, the Court reverted to the historically more typical American jurisprudence that emphasizes the “negative rights” of due process and equality under the law, reflecting the Court’s cautious strategic stance vis-à-vis the political branches.

The United States does not provide an ideal laboratory for gauging the separate effects of divided government and of electoral politics driven by shifts in public opinion, because these two features have tended to operate in tandem. Divided government tends to occur when voters lose confidence in a single partisan approach to issues of the day. A better place to look for the effects of electoral politics on the rule of law is in European countries that remain committed to legislative sovereignty, where the rule of law has been sustained in the absence of any meaningful separation of powers for centuries.

It is ironic that the United Kingdom, which by the eighteenth century was already moving seamlessly into a structure of unitary parliamentary democracy as the monarch atrophied into a figurehead, should have been the inspiration for Montesquieu’s paean for separation of powers. The common law tradition that emerged under the Plantagenet kings to bridge multiple traditions of indigenous and Norman law, and took on political force in the parliament’s mid-seventeenth-century struggle against the Stuarts, became in the eighteenth and nineteenth centuries as much an arm of the legislative will as the courts in the civil law systems of continental Europe (McIlwain 1910). To be sure, English law draws on a rich tradition of resistance to oppression, as memorialized in the Magna Carta of 1215 and the 1688 Bill of Rights. But the highest appellate court in England possesses no power of judicial review, and the incumbent legislative majority has

the last word on the interpretation of laws and legal tradition. The nineteenth-century jurist A.V. Dicey argued strongly for a guardian role of the common law bench in protecting minority and individual rights, but he conceded that in the end the court’s power is in raising the alarm when legislative majorities overstep legitimate limits, and in reminding politicians and voters of England’s grand tradition of the rule of law (Dyzenhaus 2007).

In spite of the institutionally weak basis for English rights, the English citizen has by all accounts fared as well as those of other democracies at the hands of the law (Williams 2003). Much has been said in the popular and scholarly press about the incorporation of European Convention of Human Rights (ECHR) guidelines into British law through the Human Rights Act of 1998 (Jenkins 2001). But Parliament continues to play a larger role than the courts in setting the boundaries of human rights for U.K. citizens and residents. On the one hand, the United Kingdom was the only member of the ECHR to opt out of the ECHR bylaw 5(1) by passing the Anti-Terrorism, Crime and Security Act of 2001 and subsequent laws that curtailed the civil liberties of non-national suspected terrorists (Henning 2002, Walker 2006). On the other hand, the British Parliament itself decided against lengthened detention of suspected terrorists. In a telling comparison, popular opinion, rather than stronger judicial independence or the prospect of simple political alternation, seems to be responsible for the fact that antiterrorist legislation against unpopular minorities is enforced less strongly in the United Kingdom than in France (Fisher 2008).

The Netherlands, another democracy in which the legislature reigns supreme, also has a strong record of rights protection in practice. When the filmmaker Theo van Gogh was murdered in 2004, Dutch “hooligans” reacted by attacking mosques, but the Dutch government “reacted...with a mixture of moderation and social engineering slightly tilted in favor of the Muslims” (O’Sullivan 2005). The British and Dutch examples do not add up to a conclusion that the expression of popular opinion through

democratic politics provides adequate protection of human rights, but only that politics, in practice, often overwhelms the romanticized view of judicial safeguards. However fragile it may be, tolerance is the lifeblood of civil liberty in countries where parliaments are the highest authority.

In other parts of Europe, legislative supremacy has given way to various levels of constitutionalism. After World War II, many old European democracies, still reeling from the speed with which fascism captured electoral processes across Europe in the 1930s, opted to give courts some powers of constitutional oversight in hopes of preventing the repeat of such horrors (Ferejohn & Pasquino 2004). There is some irony in this move, given that the Weimar judiciary had officially blessed the 1934 plebiscite in which the Germans threw away their own constitutional protections in favor of installing Hitler as *fuehrer*. The court used its judicial independence in this instance to back stability and order rather than parliamentary democracy, and justified its failure to uphold the constitution on the grounds that the country needed a firm hand in unstable times (Maravall 2002). Leery of the judiciaries that had been complicit in fascist regimes, but unable to staff regular courts solely with freshly minted judges, Germany, Italy, and later Spain lodged constitutional review in a newly formed constitutional court entirely outside the regular judiciary.¹¹

But compared to the U.S. Supreme Court, European constitutional courts are more tentatively insulated from parliaments, leaving electoral politics to infuse the application of constitutional review powers more strongly. As Vanberg (2005) recounts, the German Constitutional Court takes bold positions when the preferences of the bench are in line with those of the voting public, such as in disallowing

“hate speech” against minority groups of one kind or another, and is timid in the face of strong public support for the government’s policy, e.g., for the continued use of crucifixes in school classrooms in Bavaria. The French Conseil Constitutionnel, which is structured as a nonpartisan court to review the constitutionality of legislation before it is passed, ruled against the Mitterand government’s plan to nationalize industry, arguing that it amounted to the unconstitutional expropriation of private property. Although the Mitterand government had a legislative majority sufficiently large to override the court’s ruling, it chose instead to increase the compensation of private shareholders by almost 25% over the original scheme, in deference to public support for the court’s position (Stone Sweet 2002). In 1993, however, when the court struck down legislation that would have tightened immigration and asylum policy, the government rode the tide of popular opinion to amend the constitution itself (Stone Sweet 2002). The differences across these German and French cases do not rest so much on the composition or institutional strength of the court, but on whether public opinion sided with the court or with the government.¹²

Compared to the United States, where the Supreme Court tends to ground its decisions to the extent possible on the “negative liberties” of procedural fairness and equality under the law, European constitutional review often explicitly embraces “positive rights” such as the economic and emotional wellbeing of citizens. This is not surprising, given the larger role of public opinion and consensus in judicial politics under conditions of weak institutional independence. Even in the United States, the positive right to private property had its day in the sun when the *Lochner*-era Court was politically aligned with political branches and public opinion on the right, and again when the Warren Court championed the positive right to economic welfare in the years of New Deal hegemony. But more

¹¹This system, which preserves a stricter division of labor between the “political” role of the legislature and the guardian role of the constitutional court, was conceived by the Austrian jurist Hans Kelsen in the 1920s as a compromise between the idea of legislative sovereignty and rule of law.

¹²Public opinion plays a comparable role in shoring up or undermining central bank independence (Lohmann 1998).

often in U.S. judicial history, the Court majority has room to forge its own positions in the interstices of divisions in the political branches. The American Supreme Court's emphasis on negative freedoms, not to be mistaken for the rule of law as a whole, reflects the care with which the American judiciary picks its way around the sleeping beast of politics when it can.

Our brief tour through judicial politics in rich democracies reveals that the rule of law, manifested in the respect for individual and minority rights within the context of majority rule, takes on a variety of flavors. The U.S. Supreme Court is best known for its vigilance on behalf of negative freedoms from government abuse and control. This results in the elevation of the freedom of speech, for example, to a level considered obscene in Europe, where hate speech is still associated with the great calamity of fascism. But on both sides of the Atlantic, it is the electoral publics, more than the courts themselves, that have insisted on moderation in the use of law as an instrument of power. Insofar as majority restraint rests on the transience of majority status and the multiple dimensions along which someone might find him- or herself in a minority, it remains to be seen if European voting publics will remain as vigilant on behalf of minority rights as floods of immigrants deepen the insularity and unpopularity of some minorities. It is possible, perhaps, that in the future it will become more important to entrench the institutional independence of the European Court of Justice to protect the rule of law in Europe. Because the institutional prescription requires that courts are not themselves the reflections of the majorities that appoint them, it is not only more hopeful, but ultimately more realistic, to trust in the quality of European democracy.

COURTS UNDER DICTATORSHIP: CHALLENGING OR REINFORCING CONVENTIONAL WISDOM?

Thus far, we have called into question both the assumption that democracies automatically

lead to independent judiciaries and the assumption that independent judiciaries are essential for creating the rule of law. Here we flip the question around and ask instead whether judicial independence and the rule of law require democracy. To provide an answer, we shift our attention to the growing literature on courts under dictatorship. We find that most accounts reinforce the original intuition that democracy (or its prospect) is usually necessary for judicial independence. Conventional wisdom is further supported by the fact that in those instances where dictatorships do create independent courts, such courts rarely, if ever, succeed in establishing the rule of law.

History provides no shortage of reasons to doubt the compatibility of dictatorships with judicial independence, let alone the rule of law. During the 1970s and 1980s, judges throughout Latin America notoriously failed to protect human rights against transgressions from military juntas. At the height of the so-called Dirty War in Argentina in the late 1970s, the *modus operandi* of the military-appointed Supreme Court was simply to dismiss writs of habeas corpus (Nino 1996, Helmke 2005; but also see Gabrielli 1986). Likewise, under Pinochet, Chilean courts routinely refused to grant *amparo* to aggrieved citizens. Summarizing a 1985 report of the Inter-American Commission of Human Rights, Hilbink (2007) notes "that the courts only challenged the legality of the military regime's detentions in *two or three tenths of a percent* of cases" (pp. 115–16, original italics). The Chilean Supreme Court was even less responsive to its citizens: It challenged the government on human rights issues in exactly zero percent of cases between 1973 and 1980 (Hilbink 2007, pp. 116–17).

For much of their history, single-party regimes in Japan, Taiwan, Mexico, and several African nations also routinely thwarted judicial independence. Under Japan's hegemonic LDP, judges who dared to rule against the government were systematically punished through transfers to less prestigious posts (Ramseyer & Rosenbluth 1993, Ramseyer & Rasmusen 1997). Despite Taiwan's 1947

Constitution, which establishes independent judicial review, under the ruling KMT the Council of Grand Justices was completely marginalized (Ginsburg 2003). During most of the PRI's 70-year dominance in Mexico, judges not only lacked jurisdiction over politically salient cases but also served entirely at the discretion of an all-powerful president. Despite formal constitutional provisions for secure life tenure, the average tenure for Mexican Supreme Court justices between 1934 and 1994 was just 10 years, and 40% served <5 years (Magaloni 2003, pp. 288–89). In Africa the story has been somewhat more mixed. Although the Appellate Division in South Africa made some effort to protect rights in the early 1950s, the apartheid regime quickly asserted political control over the courts (Haynie 2003). During the 1970s, judicial independence in Botswana and Kenya proved relatively stable, but it suffered a dramatic decline postindependence under emerging authoritarian regimes in Tanzania, Uganda, and Malawi (Widner 2001).

The emerging literature on courts under authoritarianism also reveals a less obvious set of points: Notwithstanding the clear constraints judges face, not all are utterly subservient to dictators. And, despite their ability to do so, not all dictators necessarily quash judicial independence. Indeed, sometimes judges challenge dictators and sometimes dictators appear to underutilize their capacity to tame judges. Why?

One possibility is simply that not all features generally associated with judicial independence—secure tenure, preferences that diverge from the government of the day, and willingness to challenge the government—necessarily covary. This is the starting point for Helmke's (2002, 2005) analysis of the Argentine Supreme Court. Using a modified separation-of-powers model, she argues that once an incumbent regime's power begins to fade, judges who lack secure tenure face incentives to rule against the current government in order to minimize the chances of being punished by the successor regime. This is the logic of strategic defection. In the case of Argentina, this explains why the same judges who had been appointed

by the military and who had loyally served the regime suddenly began to rule against it once the dictatorship's power began to crumble. Note, however, that the twist to conventional wisdom comes in challenging the view that otherwise *dependent* judges automatically support the government of the day, not that judges under dictatorship are suddenly freed from political pressure.

A different possibility is that dictators may tolerate some degree of judicial independence as long as they have little to fear from courts. In Spain under the Franco regime, surveys found that judges frequently held preferences at odds with the government, but ordinary courts also lacked jurisdiction over the important political questions of the day (Toharía 1975). Conversely, in Chile, Supreme Court justices enjoyed a substantial amount of institutional autonomy and power but shared the same ultraconservative views as Pinochet (Hilbink 2007). Under either scenario, tolerating judicial independence is essentially costless for authoritarian rulers. Hilbink argues that the process of training, selection, and promotion within the judiciary essentially guaranteed that justices serving on the Supreme Court held conservative views and would discipline lower-court judges who did not (Hilbink 2007). Indeed, had the Chilean Supreme Court actually challenged Pinochet during the military regime, experts assert that the Court, like Congress, would have been dissolved (Pereira 2008, pp. 27–28).

On this view, judicial independence under dictatorship is hardly a panacea. At best, independent judges are simply extraneous, as in Franco's Spain. At worst, independent judges are accomplices, as in Pinochet's Chile. Such a perspective thus also reformulates conventional wisdom, but only in part. Judicial independence, at least in a narrow sense, may occur without democracy—but without democracy, judicial independence is entirely neutralized by judges' incapacity or unwillingness to challenge the government and, therefore, will not lead to the rule of law.

Other scholars highlight the potential benefits that creating independent judiciaries can

bestow on dictators, but only once their days in power are numbered. Extending the logic of electoral uncertainty to regime transitions, authoritarian leaders may turn to courts as a way to minimize their losses. The key here, of course, is that they do so if, and only if, they face the prospect of democratization (Ginsburg 2003, Hirschl 2004). Thus, in addition to predicting clearly when judicial independence is likely to be established (during regime transition), the theory specifies which autocrats are likely to push for it. Namely, the outgoing parties who suspect that they will lose office in postconstitutional elections are those who will seek to establish strong, independent courts as a form of political insurance to protect against unhindered opposition rule (Ginsburg 2003, p. 18). In line with this logic, exiting authoritarian leaders in South Korea, and to a lesser extent Mongolia, faced highly uncertain electoral futures and pushed to establish independent constitutional courts.

Extending Hirschl and Ginsburg's thesis to Mexico, Finkel (2008) contends that the PRI sought to strengthen the judiciary as an insurance policy against the growing threat that the opposition would come to power (2008, p. 106). In 1994, as the PRI was losing its grip on power, President Zedillo sought to reverse the regime's longstanding practice of subordinating the judiciary to the presidency by passing a series of judicial reforms. Although Zedillo was largely able to maintain control over the Court's membership, the 1994 reforms dramatically expanded the Court's powers of judicial review and thus potentially curtailed the powers of the executive branch.¹³

Connected to the process of democratization, delegation is yet another possible mechanism driving outgoing authoritarian leaders to grant independence to courts. Also examining

the Mexican judiciary, Magaloni (2008) argues that during much of the PRI's 70-year dominance, the president served as the ultimate arbiter in adjudicating disputes between party members and the opposition. But the growth of multiparty politics in Mexico changed the nature of the game, emboldening both the opposition and the other PRI politicians to challenge the president's verdict in interparty disputes. Reacting to this new political context, the president was compelled to increase judicial independence not as a form of political insurance, but in order to make the Mexican Supreme Court the "new arbiter of federalism" (Magaloni 2008, p. 201). But even when the prospect of democratization leads dictators to establish judicial independence, it remains debatable whether courts provide a real check on dictators. In both Korea and Mongolia, authoritarian leaders established independent courts once they were already well on their way out of power, but there is little evidence that the dictatorship was ever held in check by the court. It took several years after the transition to democracy in South Korea for the Constitutional Court to allow the new government to prosecute the former military regime for human rights abuses committed in the Kwangju incident in May 1980 (Ginsburg 2003, pp. 228–32). In Mexico, the authoritarian regime enacted judicial reforms a full six years before finally losing power, but experts fundamentally disagree over whether the newly independent court truly constrained the PRI.¹⁴

A more direct challenge to the conventional wisdom that democracy is somehow essential for judicial independence is if dictators seeking to maintain their grip on power are also

¹³Previously, the Mexican Court's ability to challenge the constitutionality of laws was limited to the particular parties in the case. The new reforms both expanded the range of issues that could be challenged on constitutional grounds and established that the Court's decisions in constitutional controversies would have general effects (Navia & Ríos-Figueroa 2005, Finkel 2008, Magaloni 2008).

¹⁴Finkel (2008, pp. 99–100) argues that the reforms succeeded in creating a Court capable of checking the ruling PRI. The Court's landmark decision against President Zedillo in a campaign finance scandal offers a case in point (see also Staton 2008). However, an analysis of the nearly 700 constitutional controversies brought before the Mexican Supreme Court between 1995 and 2005 reveals a strong bias toward outcomes favorable to the PRI, even after the party lost power in 2000 (Magaloni & Sánchez 2006, cited in Magaloni 2008, p. 203). Staton (2006), however, finds no systematic pro-PRI pattern.

compelled to construct independent courts. Building on Rosberg's (1995) path-breaking dissertation, Moustafa (2007) explains the puzzle of judicial independence under Egypt's dictatorship by arguing that many of the same mechanisms that lead democracies to create independent courts may, in fact, be even more pronounced in authoritarian regimes. Dictators need to offer investors a credible commitment to property rights; they want to monitor lower-level bureaucrats; they want to duck responsibility and maintain their legitimacy (Moustafa 2007, pp. 9–10). A recent edited volume (Ginsburg & Moustafa 2008) applies a similar logic to a range of dictatorships, adding the role that independent courts play in shoring up elite cohesion within dictatorships (cf. Barros 2002).

To the extent that judicial independence limits dictators, autonomous courts may prove far more costly than the regime originally had in mind. Of course, as Ginsburg & Moustafa (2008) point out, autocrats have a range of intermediary mechanisms at their disposal that can help them come close to squaring the circle. Even more than their democratic counterparts, dictators can rely on judges' rational self-restraint. Authoritarians can also unilaterally select judges who share their views, simply deny citizens access to courts, or short-circuit judicial support networks.

Yet, precisely because autocrats are especially well suited to control the risks associated with judicial independence, we are left wondering just who is fooled by such tactics and who benefits. At best, such independence is circumscribed. Even if dictators are willing to support judicial independence in the area of property rights, there is no guarantee that such independence will be allowed to spill over into human rights or political and civil liberties. Indeed, although Moustafa (2007) provides ample evidence that the Egyptian Supreme Constitutional Court became increasingly activist during the 1980s and 1990s, at the end of the decade the executive had packed the Court with loyal judges and destroyed the judicial support network. More generally, it appears that in the very

environments where judges might play a crucial role in cultivating public support for rights, they are also most at risk. Perhaps even worse, where independent judiciaries do last, their very endurance suggests that they are supporting dictatorship, not building the rule of law.

THE NEXT FRONTIER: EXPLAINING INSTITUTIONAL INSTABILITY

Notwithstanding the "judicialization of politics" that has swept the globe (Tate & Vallinder 1995, Shapiro & Stone Sweet 2002), the fact remains that in much of the world judicial independence and the rule of law are in short supply. For every instance of institutional success, one can just as easily recount a tale of profound failure. Throughout the twentieth century, Mexican and Argentine judges may have enjoyed secure life tenure on paper, but most were routinely dismissed with every change in government. Following the third-wave transitions to democracy, newly minted constitutional courts in Russia and Peru were immediately rendered impotent by presidents whose powers they sought to limit. Since the 1990s, governments from Egypt and Zimbabwe to Bolivia, Ecuador, and Pakistan have dealt with recalcitrant judges through a combination of forced resignations, impeachments, and arrests.

No doubt courts in poorer and newer democracies are especially vulnerable to institutional instability. Of course, Mexico (prior to 2000), Zimbabwe, Pakistan, and Egypt hardly qualify as democracies. In the mid-1990s, Peru and Russia were, at best, semidemocracies. And Argentina, Bolivia, and Ecuador have continued to experience profound institutional instability on the court even as democracy has become otherwise consolidated.¹⁵

¹⁵Although institutional instability is perhaps more common among developing democracies, even justices on the U.S. Supreme Court have suffered repeated threats to their independence (Rosenberg 1992, Clark 2007). Indeed, court-curbing bills actually increased in frequency from the early nineteenth century up to 1982 (Rosenberg 1992).

Creating powerful judicial institutions on paper is clearly not enough: Judicial independence must be self-enforcing. Although we have identified some of the key conditions that prevent the judiciary from achieving independence—the concentration of political power or a lack of public support for courts—the fact that actual political attacks on courts occur at all is still rather puzzling. According to the separation-of-powers theory, for example, judges who face such constraints should simply alter their behavior *ex ante* to avoid punishment. As a result, governments should never have to deploy the “nuclear option” of sacking judges. Assuming that there is sufficient information and that judges are rational, this type of institutional instability should remain strictly off the equilibrium path.

When such interbranch crises do occur, it is tempting to assume that one or the other of these basic assumptions has been violated. At first blush, the claim that judges simply may not adequately understand their institutional environment is especially compelling. This seems to explain the Russian Constitutional Court’s willingness to challenge President Boris Yeltsin during its first years in power (Pomeranz 1997, cited in Stephenson 2004). Moreover, once the Russian Court was reestablished, it was indeed far more reluctant to take on the government (Stephenson 2004, p. 394; also see Epstein et al. 2001). But although this helps us understand why new democracies are especially prone to such crises, it falls short in explaining why chronic instability seems to plague such countries even as their democracies age.

Challenging the assumption of judges’ rationality raises a more complex set of issues. Certainly there are many instances of principled judges standing up to overbearing governments, but it is important to recognize that “speaking truth to power” might, in fact, be entirely rational. Judges may have strategic reasons for “heroic” behavior, particularly where their future careers depend on the professional judgments of their peers,

as opposed to the opinions of incumbent politicians.¹⁶

However, at the very least, such behavior challenges an important strand of literature that predicts judges under threat should always exercise prudence (Ginsburg 2003, Stephenson 2004, Vanberg 2005, Carrubba 2009). According to this perspective, judges gradually build legitimacy precisely by avoiding interbranch conflict. Only once such legitimacy is established, and governments face public sanctions for failing to comply with judicial decisions, will judges be able to provide an effective check on the government. Although the Egyptian Supreme Constitutional Court under Mubarak or the Peruvian Constitutional Court under Fujimori largely bear out the judicial prudence thesis, the downfall of governments that clashed with activist courts in Pakistan and Ecuador suggests that sometimes judicial heroics do pay off. Understanding when and why such risky behavior from the bench is likely to work may give us further insight into attempts that do not pan out.

Here, Staton’s theory of how courts build public support is particularly useful. As he points out, judges who are viewed by the public as behaving strategically are unlikely to garner legitimacy. Indeed, under certain conditions, decisions hostile to the government can increase the public’s belief in judicial impartiality, whereas friendly decisions cannot (J.K. Staton, unpublished book manuscript). This provides a plausible starting point for understanding why judges defy governments, even when they lack strong public support. Even if they cannot avoid triggering a full-blown institutional crisis in the short run, perhaps such decisions can help in the long run.

Other clues as to why judicial attacks emerge stem from some of the theories we have already encountered. For example, in the familiar insurance theory, the conditions that lead politicians to establish independent courts—namely, the expectation that they will continue

¹⁶We thank an anonymous reviewer for this suggestion.

to alternate in power with the opposition—are viewed as necessary but not sufficient (Ramseyer 1994). Cast as an infinitely repeated Prisoner’s Dilemma, the choice to insulate courts when one expects to alternate in power is only one of several possible strategies that can be sustained in equilibrium. Specifically, whether cooperation occurs depends fundamentally on whether politicians expect the opposition to sustain an independent judiciary in the future (Ramseyer 1994, p. 742). When politicians do not hold such expectations, it obviously makes little sense to decrease their present control over the courts. Under such circumstances, a rational strategy for governments might instead be to disband and remake the Court every time they gain power.¹⁷ Thus, particularly if politicians have a history of violating independence, sustained electoral competition alone will not lead to cooperation automatically.

A more recent crop of game theoretic models based on incomplete information incorporates the strategies of both politicians and judges and suggests a different set of answers to this puzzle. In Vanberg’s (2005) influential model of judicial review, for example, judges and legislatures operate in a decision environment in which they are uncertain about both the transparency of judicial decisions and the level of public support for the Court. Of particular interest here is the “contentious equilibrium,” in which the Court rules against the government and the government fails to comply. Such behavior occurs whenever beliefs about the level of public support for the court and the transparency of the court’s decisions fall above the court’s threshold for vetoing legislation and below the legislature’s threshold for evading the court’s ruling (Vanberg 2005, p. 36). Although not applied to the question of institutional instability per se, the model carries two counterintuitive implications that warrant further empirical exploration. First, as public support for

the Court increases, Vanberg’s model suggests that court-legislative disputes may actually become more likely (Vanberg 2005, p. 43). This is because, while politicians are more willing to accept checks on their power, judges are also more willing to check the government. Such a dynamic potentially explains why the Egyptian Supreme Constitutional Court sought to challenge the government just as the Court’s own support network expanded (see Moustafa 2007).

A second implication that flows from Vanberg’s account is that interbranch conflict is, contra Dahl, more likely the more similar the branches’ preferences are. If the legislature is overconfident that the Court will uphold its policies, it is more likely to adopt legislation that it would not have adopted with a less friendly Court. This provides a novel reason why judges may come to rule against the government that appointed them even if the government remains relatively powerful.

Helmke’s (2005) model of strategic defection provides yet another rationale for interbranch crises. In addition to specifying the conditions under which judges challenge the government, the model contains a “judicial dependence” equilibrium, in which judges rule sincerely against the preferences of the incoming government and are punished for doing so. What makes these strategies self-enforcing is that if judges’ fates are sealed, they have little incentive to act strategically. The overarching point here is that judges behave “sincerely” not only when they are unconstrained (i.e., when a government is hamstrung), but also when they are unable to do anything about the constraints that they face (i.e., judges’ removal at the hands of a successor government is assured). This distinction separates Argentina, where judges occasionally kept their posts or at least were led to believe that they might based on the choices they made (Helmke 2005), from Ecuador, where removal is all but guaranteed and judges thus gain little from strategic behavior (S. Besabe, personal communication).

More recently, Helmke (2008) shows how interbranch strife emerges using a simple crisis bargaining model. The theory highlights

¹⁷According to the Folk Theorem, any equilibrium is possible in repeated Prisoner’s Dilemma games. Thus, to generate testable propositions, the analyst must show why certain equilibria are more likely to emerge than others.

two general triggers of institutional instability: the lack of public support for institutions and the concentration of power in the presidency. Judges who lack public support reduce the costs that politicians face if they decide to attack the bench. Indeed, turning around the well-known idea that public opinion shields judges if they are viewed as legitimate, examples such as Venezuela under Chavez or Peru under Fujimori remind us that governments can actually benefit from attacking courts that are widely reviled. Moreover, if successful attacks on courts drive public support for judges lower still, this provides another reason why countries such as Argentina or Ecuador become mired in institutional instability traps.

Concentrating power in the executive branch provides the other source of interbranch conflict. Strong presidents both increase the opposition's incentives to attack the presidency and increase the president's incentives to attempt to control the other branches of government to stave off such attacks. Thus, strong presidents essentially create a commitment problem among governmental branches akin to preventive war (Helmke 2008; cf. Fearon 1998, Powell 2006). This argument brings formal institutional design back to the forefront of our analyses of interbranch crises but underscores that judicial independence hinges on more than providing judges with life tenure or getting other institutional guarantees for the Court right. Most importantly, it suggests that institutional protections for courts only become self-enforcing if the stakes for controlling other branches are also relatively low.

CONCLUSIONS

If there is any concept of modern governance that enjoys more widespread admiration even than democracy, it is judicial independence. Judiciaries are viewed with as much optimism by investors desiring to secure economic rights as by the downtrodden who seek basic constitutional protections. While keeping a leery eye on each other, the rich and those who despise them join in support of an institution that they

hope embodies fair dealing beyond either the greed of poverty or the perks of privilege.

In this article, we have examined why democracy, judicial independence, and the rule of law go hand in hand in some instances, but not in others. We conclude that democracy is necessary but insufficient for judicial independence. But equally important, judicial independence is not synonymous with—and does not lead automatically to—the rule of law. Separation of powers, as a form of limited government, is often conducive to independent courts, and public opinion can shore up the rule of law irrespective of judicial independence. Sometimes these mechanisms reinforce each other. To varying degrees, however, each may substitute where the other is lacking.

On the supply side, governments that lack institutional checks and balances cannot provide a reliable basis for either judicial independence or the rule of law. No government can make a credible commitment to respect a court that challenges it in politically sensitive cases, unless the government is in fact incapable of acting with one accord against threats to its rule. Authoritarian regimes may wish to lure investors with promises of secure property rights, but those promises are largely contingent on political convenience. Its ephemerality distinguishes “rule by law,” to use Barros’ (2002) term, from “rule of law.”

In democracies as well, many governments promise a host of rights without acknowledging that the legislative majority may redefine or retract those rights when they are inconvenient to guarantee (Horowitz 2006). Even in democracies with a system of separation of powers, the judiciary is only as independent as the political branches are unable to agree; and, partisan differences notwithstanding, judiciaries tend to reflect culturally dominant world views. Free speech that outrages majorities may prompt changes in the definitions of “free” or “speech.”

On the demand side, the public can play a central role both in supporting judicial independence and in ensuring that rights are respected. When judges face a unified government, public support for judicial independence

can insulate judges from political pressure. Conversely, widespread popular dissatisfaction with courts gives politicians a ready-made excuse to tread on judicial independence. In such instances, judicial “reform” often simply exacerbates the problem, reinforcing the public’s perception that judges stand and fall on the strength of the government of the day.

The strength and cohesiveness of public support for individual and minority rights can directly support the rule of law as well. Indeed, in accounting for governments’ respect for such rights, public support on the demand side may be as underappreciated as judicial independence on the supply side is overrated. As we have seen in the cases of English and European parliamentary sovereignty, voting publics routinely insist on deference to political rights even though legislative majorities are not held in check by multiple institutional vetoes. By contrast, lack of public support for minority rights can water down even the most activist judiciary. Experimental evidence from Russia shows that courts have far more power to persuade the public when they hand down decisions that are intolerant of minority rights than when judges support such rights (Baird & Javelin 2007).

Given the fickleness of majorities and the madness of mobs, public opinion would seem a weak reed on which to rest the fate of courts, let alone guarantees of individual and minority rights. We agree. Even if the public has sufficient information about the role courts play and the threats they face, elections are a rather blunt instrument by which to secure judicial independence. Perhaps more importantly, a

respect for rights is not everywhere latent, requiring only to be released by democratic rule. Large, heterogeneous majorities may shift priorities with astonishing speed, playing into the hands of skilled political entrepreneurs; and unpopular minorities carry the added burden of social opprobrium. Our argument is that where public support for rights does exist, both judicial independence and the rule of law will be stronger.

The key question, then, is how publics come to play this constructive role of punishing governments for abuses against the weak, let alone for abuses against majorities. England’s example is of a long history of opposition to oppression, out of which emerged a strong political culture of vigilance. Where this developmental experience is missing, institutional separation of powers or political fragmentation may itself become a partial substitute by hindering political hegemony. But there is only hope, and no guarantee, that a court will find room for maneuver among competing political branches and, if it does, that it will protect individual and minority rights.

The bottom line is that institutions not only provide solutions to commitment problems but also entail commitment problems. For societies to enjoy a wide range of political, legal, and economic rights, either such rights must be self-enforcing, or the institutions that protect those rights—independent courts—must be self-enforcing. If democracies do a better, though still far from perfect, job of this than dictatorships, it is because power under such regimes is more likely to be fragmented or held in check by the public.

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