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# Constituted Powers in Constitution-Making Processes

## Supreme Court Judges, Constitutional Reform and the Design of Judicial Councils

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## *Abstract*

*This paper focuses on amendment processes, their characteristics and their influence in constitutional development. The paper analyzes amendment processes that adopt or reform judicial councils. The central hypothesis is that the constitutional decision regarding the degree of independence and powers delegated to Supreme Court Judges affect the design of judicial councils in future reforms. In particular, the more independent and powerful Supreme Court Judges are the more likely they will successfully influence future amendments that shape the composition and functions of judicial councils in such a way that serves the judges' interests. Preliminary empirical analysis on all cases of amendments that create or reform judicial councils in Latin America suggests that there is evidence in line with the main hypothesis of the paper.*



## *Resumen*

*Este trabajo analiza los procesos de enmienda o reforma constitucional, sus características y su influencia en el desarrollo de la constitución. En particular, el trabajo se centra en los procesos de reforma constitucional en el que se adoptan o se altera el diseño de los consejos de la judicatura. El argumento central es que los niveles de independencia y poder que tienen los jueces de la Suprema Corte afecta el diseño constitucional de los consejos de la judicatura. Específicamente, argumentamos que mientras más independientes y poderosos sean los jueces es más probable que influyan con éxito en los procesos de enmienda que definen la composición y las funciones del consejo, de un modo que beneficie a los propios jueces de la Suprema Corte. Evaluamos empíricamente nuestra hipótesis en todos los casos de creación o reforma de consejos de la judicatura en América Latina de 1961 a 2005. Los resultados preliminares sugieren que hay evidencia a favor del argumento principal de este trabajo.*

# *Introduction*

> We are to recollect that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the ancient government; and whilst no spirit of party connected with the changes to be made, or the abuses to be reformed, could mingle its leaven in the operation. The future situations in which we must expect to be usually placed, do not present any equivalent security against the danger which is apprehended.
>
> Federalist Papers #49

A nearly ubiquitous assumption of constitutional thought is that constitution-making processes are and must be extraordinary; that the circumstances and motivations that shape the framers' decisions are and must be unrelated to those that characterize ordinary politics (*e.g.* Federalist #49; Buchanan and Tullock, 1962; Gisburg *et al.*, 2009). Thus, the intromission of ordinary politics in constituent processes has been approached as an unusual and undesirable phenomenon.

Jon Elster has discussed the biases that result "when some of those who write the constitution also expect to act within it" by analyzing four episodes of French constitutional history. "In this situation", Elster tells us, the constitution-makers "have a clear incentive to write a large role for themselves into the document and a correspondingly weak role for their rivals" (Elster 1996, 2003, 2006). Ginsburg, Elkins and Blount (2009) tested this "self-dealing" hypothesis and found support for institutional-interest biases resulting from executive-centered constitution-making processes which amount to nine percent of their four hundred and sixty observations. Because the involvement of ordinary politics is almost universally considered marginal, the normative and positive conclusions of these studies do not seem particularly consequential. But, is constitution-making largely an extraordinary process?

We believe that the role of ordinary politics in constituent processes has been underestimated by the focus on the enactment of new constitutions and the neglect of amendment processes as important and common constitution-making episodes. This inattention to amendment processes is probably a consequence of the central role that the American constitutional tradition plays in constitutional studies, and to the extreme rigidity of the American

constitution that makes amendment processes rare events.[1] In any case, as soon as amendment processes are included into the picture the extraordinary character of constitutional politics is called into question, and the study of the role ordinary political actors and their ordinary motivations play in constitutional design gains importance.

In this paper we focus on amendment processes and their characteristics. We argue that the specific nature of the constituent body carrying out a particular amendment make these processes susceptible to the intromission of what we call ordinary politics, "the spirit of party connected to the changes to be made", as put in the epigraph from the Federalist #49. Specifically, the constituent power in constitutional amendments has a double identity. On the one hand it is a super-majoritarian force that embodies the popular will. On the other hand, it is an aggregate of constituted actors whose political identity and functions are defined by the constitution and who act within the constitutional frame. We explore this idea by exploring whether powerful and independent Supreme Court Justices are able to influence the choices of constitution-makers on judicial institutions. Notice that whether Supreme Court Judges can influence constitution-makers in amendment processes depends on their degree of independence and power, two variables that belong to the realm of ordinary politics because they are defined by the particular design of the checks-and-balances system of the constitution that is being reformed.

Several studies have shown that the identity of constitution-makers is consequential for the design of constitutions (Geddes, 1996; Elster, 2000; Knight, 2001; Ginsburg, 2003; Negretto, 2006; Pozas and Ríos, 2010). It follows that the constituted identity of constitution-makers in amendment processes, which is itself defined by the constitution, will be consequential for the outcomes of those processes. If this is true, constitutional development would exhibit a very interesting type of path dependency, one where actors constituted in the constitution-making process at time t will shape later constitutional decisions at time t+1. In terms of the specific area we explore in this paper, we would observe that the constitutional decision regarding the degree of independence and the powers delegated to Supreme Court Justices would affect the shape that judicial institutions take in future reforms.

We focus on amendment processes that adopt or reform judicial councils, in particular regarding their functions and composition. Judicial councils were first adopted in Europe in order to take away from the executive (*e.g.* the ministry of justice) the control over the appointment and future career of lower court judges. In this paper, our empirical arena is the Latin American region where, unlike Europe, before the adoption of judicial councils the

[1] In a sense, most amendments to the American constitution have been part of "extra-ordinary" political events, such as the Civil War.

Supreme Court had the power to appoint lower court judges and to manage their career (Hammergren, 2007: 116). Because of this particular *status quo*, the adoption and reform of judicial councils in the region has produced interesting political battles. In particular, Supreme Courts have either tried to block the creation of the council that would take administrative power away from them, or if they cannot impede the adoption of the council they have fought to shape the functions of the council and/or to control a majority of its seats. The argument of this paper is that whether the adoption of the judicial council enhances or diminishes the power of Supreme Court judges depends on the degree of independence and power that the Justices can muster in this political battle. In other words, our central hypothesis is that the more independent and powerful Supreme Court Justices are, the more likely they will successfully shape the design of judicial councils in such a way that serves their interests.

The paper is divided in four parts. In the first part, we discuss the characteristics of reform processes and argue that they make them susceptible to the intromission of ordinary politics. In the second part, we present the reasons for focusing on the role of judges in the constitutional creation of judicial councils and the mechanism by which Justices can influence amendment processes. The third part offers a preliminary empirical analysis of our theoretical claims in all the amending processes that adopted or altered judicial councils in Latin American countries from 1961 to 2005. The last part briefly concludes.

## *1. Ordinary Politics in Constitution-Making*

### *1.1. Constitutional Superiority: Constituent* vs. *Constituted Powers*

The superiority of constitutional law *vis-à-vis* ordinary law is theoretically grounded on the dichotomy constituent/constituted powers. "Who is the author of constitutions?" or in other words "who is the constituent power?" The answer to this question is one of the normative pillars modern constitutionalism. Sieyes' answer is paradigmatic: it proceeds from the old idea that the hierarchy of laws signals the hierarchy of their authors. The first step in Sieyes' answer is to distinguish constitutions from other written laws, to establish "the sequence of *positive* laws". Constitutional laws, Sieyes tells us, have the first order of precedence since they create the government, *i.e.* they establish the government's organization and functions. In other words, constitutional laws *constitute* the government "because [governmental] bodies… can exist and can act only by way of these laws" (Sieyes, 2002: 136).

Notice that if the government is a constituted power, *i.e.* if its existence is due to the constitution and its actions are delimited by it, then the

government cannot make or change the constitution. As Sieyes notes, "…In each of its parts a constitution is not the work of a constituted power but of a constituent power. No type of delegated power can modify the conditions of its delegations. It is in this sense and in no other that constitutional laws are *fundamental*" (2002: 136). "Fundamental law" is precisely one of the definitions of "constitution" under the modern constitutionalism paradigm. This definition implies an opposition between fundamental and ordinary law, and considers fundamental law as the subset of positive law that cannot be made or transformed by the constituted government.[2] Therefore, intrinsic to the modern concept of constitution is the difference between those who can make and transform the constitution and those who can make and transform ordinary law: the constituent and the constituted power. Constitutional law is defined vis-à-vis ordinary law, and what makes it "constitutional" is that its author is the *constituent* power.

The central distinction between constituent and constituted powers can be further illuminated by James Bryce's category of "rigid constitutions". Rigid constitutions are constitutions that:

> *…stand above the other laws of the country which they regulate. The instrument (or instruments) in which such a constitution is embodied proceeds from a source different from that whence spring the other laws, is repealable in a different way, exerts a superior force. It is enacted, not by the ordinary legislative authority, but by some higher or specially empowered person or body. If it is susceptible of change, it can be changed only by that authority or by that special person or body. When any of its provisions conflict with a provision of the ordinary law, it prevails, and the ordinary law must give away* (Bryce, 1901: 129).

Bryce's account clarifies the relation of rigid constitutions and modern representative governments, since as he notes it implies a clear distinction between the people and their representatives: "It is not till the growth of some scheme of representation has made familiar the distinction between the authority of the people themselves and that of their representatives that truly Rigid constitutions appear, for it is not till then that a method suggests itself of enacting a kind of law which shall be superior to that which the ordinary legislative body creates" (Bryce, 1901: 138).

[2] As Madison said in Federalist 53: "The important distinction so well understood in America, between a Constitution established by the people and unalterable by the government, and a law established by the government and alterable by the government, seems to have been little understood and less observed in any other country".

In sum, the superiority of constitutional law is intrinsically linked to the idea of popular sovereignty and the illegitimacy of parliamentary sovereignty.[3]

## *1.2. The constituent power: from theory to practice*

For concrete constitution-making processes "the people" needs to be instantiated in a particular form. In other words, a constitution-making body needs to become "the operational form of the sovereignty of the people" (Griffin, 2007). While the identity, legitimacy and democratic credentials of the constitution-makers varies greatly across time and space they can all be clearly grouped into two subsets: those whose task is to write a whole new constitution and those who are to amend it. Using Sieyes' classical classification, we name them the *original* and the *derived* constituent power, respectively.

Given the importance ascribed to codified constitutions it is not uncommon for original constitution-making processes to be presented as extraordinary events.[4] The uniqueness of the processes can then be used to legitimize the outcome. In this connection, the paradigmatic example is the American Constitution. As Wood notes, "only a convention of Delegates chosen by the people for that express purpose and no other …could establish or alter the constitution". According to Wood, the convention was an extraordinary invention because "it not only enabled the constitution to rest on an authority different form the legislature's but, it actually seemed to legitimize the revolution" (Wood, 1998: 342).

In contrast, constitutional amendments are not vested with a halo of uniqueness. Their task is much less impressive and the identity of their authors is *derived* from the constitutional text itself. The derived constituent body is usually composed by a collection of constituted powers, some of which are required to make decisions by supermajority votes. As discussed previously, a central tenet of modern constitutionalism is the distinction between constituent and constituted powers. In order to preserve this tenet, codified constitutions resort to an institutional maneuver: though supermajoritarian norms they create a body out of constituted powers that has a new and distinct identity but that also inherits the capacity to represent the people from its constituted components. Thus, each individual participant

[3] As Thomas Paine argued in *Common Sense*: "Sovereignty, as a matter of right, appertains to the Nation only, and not to any individual; and a Nation has at all times an inherent indefeasible right to abolish any form of Government it finds inconvenient, and establish such as accords with its interest, disposition, and happiness…Every citizen is a member of the Sovereignty, and, as such, can acknowledge no personal subjection; and his obedience can be only to the laws." (Paine, 1790: 76).

[4] It is worth noting that the conventional wisdom that links original constitution-making processes to great changes has proven false: only about half of new constitutions are promulgated within three years of military conflict, economic or domestic risis, regime change, territorial change or coup (Elkins *et al.,* 2009).

in a derived constitution-making process has a double identity. On the one hand, it is a member of the constituent body that embodies the popular will. On the other hand, it belongs to a constituted organ inserted in ordinary politics. Such a double identity makes derived constitution-making processes vulnerable to the infiltration of ordinary politics' motivations, *i.e.* motivations that correspond to an actor's constituted identity and that are exogenous to the constituent process per se.

We are not arguing that original constitution-making processes are never open to the infiltration of ordinary politics' motivations. As Ginsburg, Elkins and Blount (2009) have shown, the composition of original constitution-making processes varies greatly, from a popularly elected constituent assembly with the unique propose of drafting a new constitution all the way to executive-lead processes. If, as we have argued, derived constitution-making processes are vulnerable to ordinary politics because constitution-makers have a constituted identity, then we can expect original constitution-making processes to be infiltrated by ordinary politics' motivations if constitution-makers *have the expectation* of acquiring such role in the post-constitutent period (Elster, 2003).

## *2. Judges and Constitutional Design of Judicial Institutions*

### *2.1. Supreme Court Judges and Ordinary Politics in Amending Processes*

While fifty years ago the judicial branch was an obscure and unfamiliar actor today it is a central player of everyday politics in most democracies. Judicial review has become an almost universal characteristic of democratic states. As Hirschl (2004: 1) claims, paraphrasing Tocqueville, "there is now hardly any moral or political controversy in the world of new constitutionalism that does not sooner or later become a judicial one". For this reason, studying the influence that Supreme Court Justices with constitutional adjudication faculties have on amending processes is a good way to approach the impact of ordinary politics on derived constitution-making processes.

The design of judicial institutions is of particular interest to Supreme Court Justices, and thus they will have an interest in seeing their preferences enacted when constitutional amendments deal with those institutions. Of particular importance among the judicial institutions are the judicial councils. In Latin America, the adoption of judicial councils altered the Justices' power by either removing the administrative control over the judiciary and over the judicial career of lower court judges, or by adding, to those faculties, the control over the judicial budget. Hence it is reasonable to assume that the Justices would try to influence the amending processes that introduced or

alter the competencies of those councils. Moreover, focusing on this phenomenon has another advantage: it is possible to assess the power of Supreme Court Justices to influence members of the derived constitution-making body.

The power of Justices *vis-à-vis* the derived constituent power is determined by two central factors: *i)* their constitutional powers to adjudicate conflicts in which members of the derived constituent body can be a part and *ii)* their degree of independence vis-à-vis those constituted powers. These two factors are established *de jure* and we can expect them to be effective only if the distribution of power in the polity is such that no single political group monopolizes power (Pozas Loyo and Ríos Figueroa, 2007). In other words, if political power is not monopolized by a single group then we can expect that the Justices' influence over derived constitution-makers is correlated with the Justices' judicial review powers and their independence from the political branches.

Let us now give account of the mechanism by which Justices can influence derived constitution-makers when designing judicial councils. In a constitutional reform constitution-makers belong to constituted organs, and they are or can expect to be parts in conflicts that Justices with judicial review powers adjudicate. In a politically fragmented context Justices adjudicate among governmental organs with different political identities, and thus the coordination of political branches to punish then becomes very difficult (*e.g.* Ferejohn and Weingast, 1992; Bill-Chávez, 2004; Iaryczower *et al.*, 2002; Tsebelis, 2000). In this context, Justices can influence the strategic decisions of the members of a derived constituent body by influencing the expectation of future adverse decisions in the adjudication of political conflicts and the interpretation of the constitution. In other words, independent and powerful Supreme Court judges can signal their intention of deciding against the interests of the constituted organs whose members opposed the Justices' preferences in an amendment process. If the political context is fragmented, the Justices would not fear from a coordinated retaliation from the political branches.

## *2.2. Judicial Councils*

To analyze judicial councils it is important to distinguish between the composition of the councils and their competencies. Regarding the latter, judicial councils' strength vary depending on whether the council is capable of *(i)* administering the material resources of the judiciary, *(ii)* participating in or controlling the appointment of judges at some or all levels in the judicial hierarchy and *(iii)* managing the career of judges through sanction and promotion mechanisms. Regarding the composition of the councils, they can be dominated by judges from the highest echelons of the judicial hierarchy,

by judges from all levels of the judiciary, or by persons who are external to the judiciary who can be either politicians from the elected branches or councilors nominated by other external actors such as the deans of the law schools or the members of the bar association.

Tom Ginsburg and Nuno Garoupa combine both dimensions to create a typology of judicial councils. In one extreme, they place councils dominated by Supreme Court judges and that concentrate the three functions mentioned in the previous paragraph. In the other extreme, they locate councils dominated by actors external to the judiciary that perform administrative tasks but do not participate in the appointment of judges or in managing the judicial career. In between, we find strong councils in terms of competencies who are dominated by actors external to the judiciary, councils controlled by judges from different levels of the judiciary with different levels of competencies and so on (Ginsburg and Garoupa, 2009).

Judicial councils were first adopted in European countries as a means take away from the executive branch (usually through the ministry of justice) the power to appoint judges and to influence in the management of the judicial career. In France, Italy, Portugal and Spain the council is composed of a majority of judges and representatives of other branches of government and professional associations. These councils basically participate in the appointment of judges and supervise the judicial career (Hammergren, 2002: 2; Guarnieri and Pederzoli, 1999). In contrast, Latin American councils were adopted as to alter the faculties of Supreme Court justices in particular, regarding their power to appoint lower court judges and to control of the judicial career (Hammergren, 2002).[5] Not only the origins of the councils differ across the Atlantic Ocean, their composition and competencies also vary greatly.

The composition of Latin American councils varies considerably from country to country, to the extent that we can find examples of the three types identified by Ginsburg and Garoupa (2009). Regarding competencies, Latin American councils tend to be stronger than their European counterparts because, in addition to the appointment of judges and the management of the judicial carrier, councils also have control over the material resources of the judiciary and, in some cases, even over the number and jurisdiction of the courts (Hammergren, 2002: 2; see also Fix Zamudio and Fix Fierro, 1996).

[5] It is interesting investigate further the reasons behind the decision to place such important powers in the Supreme Courts in the first place in the Latin American region. According to Lynn Hammergren (2002: 4), only in Argentina and Colombia had the Ministry of Justice been responsible for judicial administration, and in both countries, the supreme court had already succeeded in reversing that practice. Only in Argentina and Peru did the ministry manage judicial appointments. "Elsewhere in Latin America, the supreme court has traditionally exercised the role of governing body for the judiciary as well as that of court of last resort […] On the whole, Latin America's ministries of justice have been so weak that they have disappeared in a number of countries (Bolivia, Mexico, Nicaragua and Panama)".

Assuming that Supreme Court Justices prefer to maximize their power over the judiciary's administration and over the other judges- by controlling their carreer and appointment- we can derive the following preferences over the judicial council functions and composition:

1. A powerful council controlled by Supreme Court judges
2. A weak council controlled by judicial members
3. A weak council controlled by politicians
4. A powerful council controlled by politicians

Independent and powerful Supreme Court Justices would try to influence amendment processes where judicial councils are either created or reformed in order to satisfy these preferences.

## *3. Constitutional Creation of Judicial Councils in Latin America*

The first Latin American judicial council was adopted in the Venezuelan constitution of 1961 (although it was actually formed in 1969).[6] The council was consciously modeled on European trends, in the sense that it was created to manage judicial appointments and did not receive responsibility for judicial administration until 1988. The second council in the region was adopted by the military government in Peru in 1969,[7] and it was in charge of judicial appointments that had formerly been managed by the Ministry of Justice, an organ eliminated by the military. The examples of Venezuela and Peru were not followed in the rest of the region until the late 1980s and early 1990s (Hammergren, 2002: 3-4).

Since the late 1980s several countries have created judicial councils: Argentina, Brazil, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama and Paraguay. The composition, functions and constitutional status of these councils, however, varies considerably across time and space. For instance, whereas some councils were given considerable power, independence, and constitutional status from the moment of their creation (*e.g.* Mexico and Colombia), other councils were born as organs internal to the judiciary that received no constitutional status (*e.g.* Costa Rica, Guatemala, Panama and pre-2004 Brazil's). Still other councils are simply mentioned in the

[6] The Venezuelan Constitution of 1947 actually mentions, in Article 213, that "[…] the law could create a Judicial Council with representatives from the Executive, Legislative, and Judicial branches in order to foster the independence, efficacy and discipline of the members of the judiciary …", but apparently it was not created until more than two decades later.

[7] Hammergren (2002: 2-3) reports that the military governments of Brazil and Uruguay also created judicial councils.

constitution but the details on their composition and functions are left to the organic laws of the judiciary (*e.g.* El Salvador, Argentina, Ecuador and Dominican Republic), although interestingly in some of these cases the details on the composition and functions of the council were later constitutionalized (*e.g.* El Salvador and the Dominican Republic). Finally, in Venezuela the council disappeared in the Constitution of 1999.

Table1 shows the year of the constitutional adoption of judicial councils in Latin America, distinguishing between original and derived constitution-making processes. For instance, the first Colombian judicial council was created through a constitutional amendment in 1979, and the new constitution of 1991 in that country also included a judicial council. The Table does not include the countries that have created a judicial council but where the council lacks constitutional status (*e.g.* Costa Rica, Guatemala and Panama), but it includes the countries where the council is mentioned in the constitution even though the details on their composition and functions are left to an organic law. The argument defended in this paper directly applies to the twelve country-year observations in the right column of Table 1, which are the judicial councils either adopted or reformed in derived constitution-making processes.[8]

**TABLE 1. CONSTITUTIONAL ADOPTION OF JUDICIAL COUNCILS IN LATIN AMERICA**

| COUNTRY | ORIGINAL CONSTITUTION-MAKING PROCESS | DERIVED CONSTITUTION-MAKING PROCESS |
|---|---|---|
| ARGENTINA | | 1994* |
| BRAZIL | | 2004 |
| BOLIVIA | 1995 | 2002, 2005 |
| COLOMBIA | 1991 | 1979 |
| DOMINICAN REPUBLIC | 2010 | 1994* |
| ECUADOR | 1998, 2008 | 1993* |
| EL SALVADOR | 1983* | 1991*, 1996 |
| HONDURAS | | 2000 |
| MEXICO | | 1994, 1999 |
| PARAGUAY | 1992 | |
| PERU | 1979, 1993 | |
| VENEZUELA | 1947*, 1961 | |

*Council simply mentioned in the constitution, details of its composition and functions are left to the organic law of the judiciary.

[8] We have codified the constitutional amendments in which judicial councils were adopted or reformed, and many of these amendments processes were devoted to judicial reform per se, but we still have to investigate whether other political institutions were reformed during the same amendment process and if the design of the judicial council was affected by negotiation over the design of different institutions. This is important because when different institutions are being reformed, there is a greater potential for bargaining among the members of the derived constituent power. For instance, it may be the case that the adoption or reform of the judicial council is preferred by a certain political party which, in exchange for this institutional creation, supports changes in say the electoral system that are important for another party.

The functions and composition of judicial councils vary considerable across time and space in the Latin American region. Following Garoupa and Ginsburg (2009), we distinguish the councils' powers to participate in the administration of the material resources of the judiciary and their powers to appoint lower court judges and manage their judicial career. To assess the councils' administrative power, we created a preliminary index based on Latin American constitutions coding whether the council participates in, or controls, the number and jurisdiction of courts and the preparation and administration of the judiciary's budget. To assess the council's power over the judicial career, we focused on whether the council participates in, or controls, the appointment, promotion, transfer and removals of lower court judges. Finally, we also coded whether the council is composed by a majority of judges. The results of this preliminary analysis are shown in Table 2, which shows the rich regional variation. For instance, there are councils with high levels of administrative power but low levels of appointment powers (*e.g.* Brazil), councils with the opposite combination (*e.g.* Argentina), councils with high levels of both types of powers (*e.g.* Mexico), and councils with low levels of both (*e.g.* Dominican Republic and Ecuador). Composition of the councils also varies, with councils dominated by judges (*e.g.* Mexico) and others where judges are in the minority (*e.g.* El Salvador). Table 2 also distinguishes councils where the majority of judges is controlled by the Supreme Court (*e.g.* Mexico, 1999) and councils where this is not the case (*e.g.* Mexico, 1994; Brazil, 2004).

**TABLE 2. POWERS AND COMPOSITION OF JUDICIAL COUNCILS**

| | POWERS OF COUNCIL | | COMPOSITION OF COUNCIL | |
|---|---|---|---|---|
| | ADMIN. | APPOINTM. | MAJORITY OF JUDGES? | CONTROLLED BY SC JUDGES? |
| ARGENTINA 1994* | MEDIUM | HIGH | NO | NO |
| BRAZIL 2004 | HIGH | LOW | YES | NO |
| BOLIVIA 2002 | LOW | MEDIUM | NO | NO |
| BOLIVIA 2005 | LOW | MEDIUM | NO | NO |
| COLOMBIA 1979[A] | LOW | MEDIUM | NO | NO |
| DOM. REPUBLIC 1994* | LOW | LOW | NO | NO |
| ECUADOR 1993* | LOW | LOW | NO | NO |
| EL SALVADOR 1991* | LOW | MEDIUM | NO | NO |
| EL SALVADOR 1996 | LOW | MEDIUM | NO | NO |
| HONDURAS 2000 | LOW | LOW | YES | YES |
| MEXICO 1994 | HIGH | HIGH | YES | NO |
| MEXICO 1999 | HIGH | HIGH | YES | YES |

*The constitution does not provide many details on the functions and composition of the council, it rather refers to the organic law of the judiciary. Since the law can be changed by simple majorities in the executive and legislative organs we considered the composition of these councils not to be dominated by judges. Regarding functions, if the constitutions do not mention the capacities of the council we assume for the same reasons that the level of powers given to the country is low.

[A]The Colombian Constitution, in its 1979 reform, specifies that the members of the Judicial Council will designate their succesors. However, a transitory article establishes that the first councilors are to be designated by the president of the republic. We decided to code this case based on the transitory article.

The argument of this paper is that the more independent and powerful Supreme Court Justices are, the more likely they will successfully shape the design of judicial councils in amendment processes in a way that serves their interests. Let us illustrate this argument with the creation and reform of the Mexican judicial council. The Mexican judicial system, as established in the Constitution of 1917, has been reformed several times since the enactment of the constitution. From the aftermath of the Mexican Revolution, circa 1920, until the consolidation of the hegemonic party regime in 1944 the reforms affected basically the appointment and tenure of Supreme Court judges.[9] Once the hegemonic party regime and the preeminence of the executive were clearly established, there were a series of constitutional amendments aimed at helping the Supreme Court to deal with the increasing caseload. In 1987 a constitutional amendment transferred to the Supreme Court the power to control the material resources of the judiciary, including not only the budget, but also, decisions over the number and jurisdiction of courts. These new capacities added to the Supreme Court's control over the appointment and promotions of lower court judges, a prerogative that the Court had enjoyed since 1917. In sum, by 1987 the Mexican Supreme Court had been constitutionally transformed into a powerful institution with considerable control over the material and the human resources of the Mexican judiciary.

In 1994, another constitutional amendment was passed that increased substantially the judicial review powers of the Mexican Supreme Court. Until that year, judicial review in Mexico was limited to the amparo suit that with *inter partes* effects. The 1994 reform created instruments of both abstract and concrete review through which the Court could produce erga omnes effects, increasing substantially the policy and law-making capacities of the Justices, augmenting in particular the capacities of the Supreme Court to adjudicate conflicts among the political actors represented in the executive and legislative branches of government (Magaloni, Sanchez and Magar forthcoming).

The reform of 1994 also created a Judicial Council that was delegated the administrative powers formerly enjoyed by the Supreme Court. The Judicial Council was composed by 7 members: the president of the Supreme Court, three judges selected by lot from the district and circuit courts, two members elected by the senate, and one elected by the executive branch. The council, thus, had judges in the majority but the Supreme Court was effectively removed from controlling the council: the lottery mechanism to elect the other three judges effectively took the control over lower court judges away from the Supreme Court. The Supreme Court, now with independence and

[9] A 1944 constitutional amendment restored life tenure to Supreme Court judges, after an amendment in 1934 that provided for a six-year tenure that coincided with the tenure of the president. After the one party regime and the preeminence of the executive was clearly established, Supreme Court judges regained life tenure but it was no longer effective as a bulwark against political pressures.

power of judicial review, and increasingly becoming an effective power (Ríos Figueroa, 2007), started to strongly lobby to regain control over the administration of the judiciary and the administration of the judicial career (see Fix-Fierro, 2003; Carpizo, 1999). The lobbying was successful and in 1999 a constitutional amendment changed the mechanisms to appoint judicial council members. In essence, the amendment transformed the selection by lot of judges from different levels into a direct designation by the Supreme Court of judges from the district and circuit courts. This effectively gave to the Supreme Court the control over the majority of the seats in the Council which automatically gave it back the control over the material resources of the judiciary and over the careers of lower court judges.

Are the political dynamics in constitutional amendments explored in this paper, and illustrated in the Mexican case, present in the other cases of creation of adoption of a judicial council in the region? A preliminary analysis suggests that the answer is positive. We use two de jure indexes of the independence and judicial review powers of Supreme Court judges as established in the constitutions that *antecedes* the amendment process that creates or reforms the judicial council. The index of de jure independence considers five elements: *(i)* whether the appointment procedure is made by judges themselves or by at least two different organs of government, *(ii)* whether the length of tenure is at least longer than the appointer's tenure, *(iii)* the relationship between appointment procedure and length of tenure, *(iv)* whether the process to remove judges involves at least two thirds of the legislature and, finally, *(v)* whether the number of supreme court judges is specified in the constitution. In turn, the index of judicial review powers that can be used to influence derived constitution-making processes considers whether the constitution specifies instruments of constitutional adjudication that are good for arbitrating political conflicts (*e.g.* instruments that are concentrated in the supreme court, abstract or concrete, and with access restricted only for political actors).[10] All the instances of adoption or reform of judicial councils through amendments analyzed in this paper take place in contexts where no single political party controls all the organs required to reform the constitution, making these de jure indexes valid proxies of de facto independence and power (see Pozas-Loyo and Ríos-Figueroa, 2007).

[10] For details on the indexes see (Ríos-Figueroa, forthcoming). In this paper, if a constitutional tribunal has been created then the judicial review powers of Supreme Court judges equal zero.

**FIGURE 1**

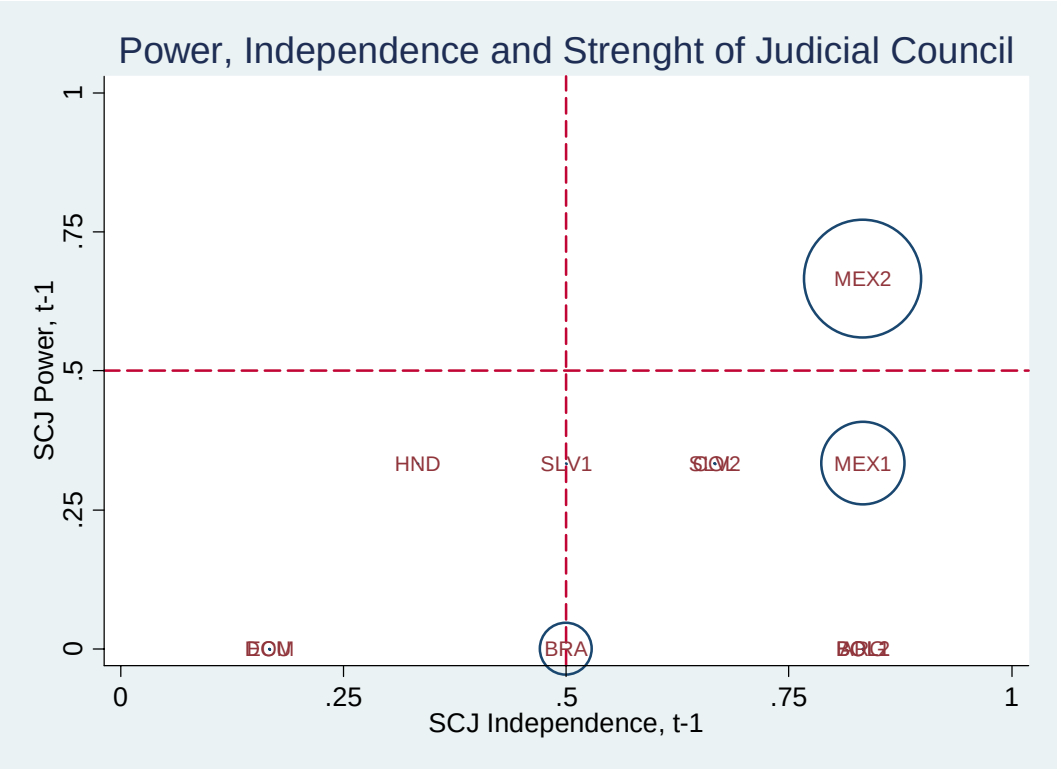


Figure 1 shows the values (normalized to 1) in the de jure indexes of independence (horizontal axis) and power (vertical axis) of Supreme Court judges in t-1, *i.e.* the year before the amendment procedure that creates or reforms the judicial council takes place. Figure 1 also includes a quantified version of the powers and composition of the judicial councils created via amendment procedures: the greater the radius of the circle the more powerful a council with judges in the majority.[11] From Figure 1 we can see a positive association between the level of judical review power of the supreme court judges and the strength of the council, and a less clear but also slightly positive association between the level of independence of the supreme court judges and the strength of the judicial council (correlations are .66 and .38, respectively). This is evidence in line with the hypothesis of this paper, although admittedly very preliminary.[12] Notice the case of Mexico: while the level of independence of Supreme Court Judges remained constant, the

[11] The measure of the strength of judicial councils adds the value of the index of administrative powers plus the value of the index of appointment powers and multiplies this sum by 1, if the council has a majority of judges, and by 0 if it does not. Councils controlled by Supreme Court judges get a value of 2 in composition, councils with judges in the majority a value of 1, and councils appointed by the executive or legislative branches a value of 0.

[12] Future versions of the paper will include a refined measure of composition and functions of the judicial councils, as well as additional case illustrations.

reform of 1994 effectively increased their power (this can be shown in the movement from MEX1 to MEX2). This independent and now powerful Court successfully lobbied for a constitutional amendment that reformed the composition of the Judicial Council according to the Court's interests.

## Conclusions

Constitution-making processes are often considered extraordinary events where, except under certain circumstances, the passions and interests of ordinary politics cede their place to "order and concord", according to the epigraph that opens this paper. We have challenged this view arguing that it is rooted in a scholarship that mostly focuses on the creation of new constitutions (what we called *original* constitution-making processes) and overviews the processes and the politics behind amendments to existing constitutions (*i.e. derived* constitution-making events). Amendment processes are considerably more susceptible to the intromission of "ordinary politics" because actors that participate in the derived constituent power are, at the same time, members of the constituent body that embodies the popular will and constituted actors with an identity and interests exogenous to the constituent process.

To explore the previous idea, the paper focuses in amendment processes that adopted or reformed judicial councils and the influence that Supreme Court judges can exert upon these processes. In particular, we argued that the more independent and powerful Supreme Court Judges are the more likely they will successfully influence future amendments that shape the composition and functions of judicial councils in such a way that serves the judges' interests. We collected all the instances of adoption or creation of judicial councils in Latin America since the first council was established in the region (Venezuela, 1961) until 2005. We also coded the degree of independence and power that Supreme Court judges enjoyed before the cited reform process took place. Preliminary empirical analysis suggests that the argument presented in the paper is supported in our sample of Latin American cases.

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