## Courting Conflict: The Logic of Risky Judicial Decisions in Latin America

Gretchen Helmke Associate Professor Department of Political Science University of Rochester gretchen.helmke@rochester.edu

Jeffrey K. Staton Assistant Professor Department of Political Science Emory University jeffrey.staton@emory.edu

#### Abstract

The application of rational choice theories to judicial politics in Latin America has yielded several important insights about the emergence of judicial independence and the success or failure of judges to limit governments. But existing theories also contain certain analytical blind spots: If judges are strategic, why are courts in the region still frequently attacked? If courts are routinely attacked, why do judges nonetheless invite conflict? And if courts are often attacked and/or judges are largely strategic, why would litigants continue to seek redress through the judiciary? To begin to answer these questions, we sketch out an alternative integrated model of inter-branch conflict. Building on Vanberg (2005), we demonstrate that uncertainty over both judicial preferences and the willingness of the public to sanction politicians who attack courts support a so-called "clashing equilibrium." By also incorporating litigants into our model, however, we are able to explore several additional non-obvious connections between institution building, on the one hand, and institutional instability, on the other. In particular, it may be possible to induce greater conflict through institutional reforms widely believed to insulate judges form external pressure.

Does democracy lead to judicial independence? Is judicial independence essential for limited government and the rule of law? Can we promote judicial independence through institutional design? Is the judicialization of political conflict a sign that courts are becoming independent and helping to construct the rule of law? These questions have been at the forefront of an emerging wave of literature on courts in Latin America. Despite the initial optimism that democratic transitions would go hand in hand with the establishment of independent courts and the rule of law, reality has been more mixed. While certainly the conditions for judicial independence, if not the rule of law, have improved in some countries (Mexico or Brazil), in many other places (Argentina, Peru, Ecuador, Bolivia, Venezuela) the record has been far bleaker.

To make sense of Latin America's successes and failures, scholars have increasingly turned to rational choice models of institutions. Inspired by the logic of insulation, delegation, or credible commitment, one strand of the literature has sought to understand politicians' decision to create independent courts. Building on separation-of-powers models, another strand of the literature has sought to explain why Latin American judges limit or fail to limit politicians. While such approaches have yielded important advances in our understanding of judicial politics in the region, existing theories confront some key limitations. One, of course, is the lack of suitable data for widely testing various theoretical propositions (Kapiszewski and Taylor 2008). We agree. But our paper takes up a different sort of problem. That is, for all of their virtues, our theoretical models are often in tension with some of the most basic stylized facts about judicial politics in Latin America; and, they are often in tension with each other.

Consider the two idealized worlds most theories imply. In the first, judges have achieved independence. They are able to hand down decisions that reflect their sincere preferences and garner compliance from the parties. What would inter-branch relations look like in such a scenario? We would not necessarily expect judges to constantly strike down the government's policies. Precisely because judges could make such decisions, we might expect that the government would anticipate such rulings

and self-censor its legislation accordingly. When it does not, we should certainly anticipate that litigants will seek relief and legal remedies will be respected. In other words, when judges are independent, interbranch conflict should largely be unobserved. Now consider a world in which judges are not independent. In such an environment, most theories tell us that judges should be prudent, if not entirely subservient, actors. And for the very reason that judges are willing to bend to pressure, the dual implication is that litigants should not seek relief and politicians should have little need to carry out punishments. Although in this state of the world the mechanism is now judicial self-censoring, the consequence is that open interbranch warfare is, once again, averted.

But in Latin America (and elsewhere), judicial politics do not always fit so neatly into such categories. As we document below, inter-branch crises are instead fairly commonplace in the region. In the vast majority of countries, judiciaries have suffered at least one, if not repeated, attacks over the last three decades. Second, even in the most hostile environments, sometimes judges do take risks; they make bold decisions that go against the government, and, more often than not, they pay the consequences. But there are cases of judges that take risks and survive. Rather than simply dismiss these facts as inconvenient, or as evidence that judges simply do not understand the political implications of their decisions, the question we take up below is whether there is instead an underlying logic to such crises. Is it possible, we ask, for judges to rationally court conflict? What conditions would need to hold in order for judges and politicians to engage in such high stakes behavior and for litigants nevertheless to seek relief?

In this paper, we begin to sketch a model of inter-branch conflict. We present a first cut at an incomplete information game, which aims to describe the conditions under which 1) governments enact potentially unconstitutional policies, 2) litigants seek judicial protection against such policies, 3) judges provide constitutional protection, and 4) governments attempt to punish courts for doing so. Drawing on Vanberg (2005), we assume that judges are guided by preferences over the outcomes of the cases they review, whether derived from raw political ideology or a recognized legal theory of interpretation; and, we assume that judges value their seats – that there is some cost to being purged. In this sense, we model

policy and institutional preferences. But we also suggest that judges can value having cases to review. Above and beyond holding their posts, judges may value playing a role in managing a state's constitutional order, whether because it increases the prestige of their post or because, to impact policy, they must have cases to resolve (see Ginsburg 2003, 76 or Staton 2007).<sup>1</sup> Second, in our model, cases do not come to courts at random, but rather litigants bring complaints, so that our account of inter-branch conflict must wrestle with why litigants come to court when courts are under threat. Finally, we begin to explore how temporal dynamics, induced by the fact that constitutional politics play out across cases over time rather than all at once, might influence inter-branch policy-making. In particular, we consider how victims of state action can learn about the value of potential litigation from past judicial decisions and from governmental reactions to those decisions.

Once time and learning are modeled, a novel proposition emerges. In so far as judges care about either policy outcomes or building judicial institutions (and especially so if they care about both), constitutional adjudication presents a tradeoff between avoiding direct political assaults on their seats and avoiding the construction of inaccurate litigant beliefs about their usefulness as guardians of the constitution. If judges derive value purely from being asked to resolve cases or if judges wish to influence future policy conflicts, they have an incentive to risk being purged. The way that judges evaluate this tradeoff can have important implications both for political conflict and the institutional development of the judiciary. The proposition suggests a theoretical implication for institutional design and a practical implication for institutional research. As we discuss below, institutional reforms designed to insulate judges from external interference (e.g. life tenure) may have competing impacts on the chances of political conflict. Further, because of these competing effects, it may be extraordinarily difficult to draw unbiased causal inferences about the impact of formal rules on political conflict and judicial choice using field data, even if rules are quite important to both outcomes. We elaborate on these implications below.

<sup>&</sup>lt;sup>1</sup> We might imagine that judges value leisure, as well (Posner 1996), which is in tension with the assumption we make. Although we grant that it cannot possibly be that a judge wants to be as busy as possible, it certainly cannot be that judges wish to have no work at all. Although we do not model the optimal level of work precisely, this is not a difficult problem. We will assume that judges can identify the marginal benefit associated with reviewing another case. This can be zero in our model, and an extension would allow it to be negative, without harming the results.

The remainder of the paper proceeds as follows. In the next section we turn to empirics. We document the frequency, distribution, and types of attacks on courts in Latin America, reference the region's growing demand for judicial services, and cite several key examples of unexpectedly bold judicial decisions. Section three then discusses the limitations existing theories face in offering an integrated account of the empirical patterns we observe. To overcome these limitations, sections four and five present our alternative theoretical approach and discuss various implications that our model suggests. The final section concludes with directions for future research.

#### Attacks on Judges, Anti-Governmental Decisions, and the Judicialization of Politics: The Facts

We begin with some stylized facts about judicial crises, demand for judicial services, and judicial decision-making in Latin America. To give a brief overview of the number and nature of crises involving courts in the post-transitional period, we draw on a subset of Helmke's *Institutional Crises in Latin America* (ICLA) Dataset (in progress), which covers eighteen Latin American countries (Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela) from 1985 (or from the year of the country's most recent transition to democracy) through 2008. Using the *Latin American Weekly Report* and variety of other sources, the dataset identifies and codes systematically all events that meet the following basic criterion: one or more branches of government (executive, legislature, or judiciary) attempted to dissolve, replace, or reduce the powers of another branch of government (executive, legislature, judiciary). With respect to courts, such threats or attacks included all recorded attempts, successful or otherwise, by executives and/or legislatures to impeach, pack, dissolve, or strip the jurisdiction of a country's high court or courts. Of the total 120 inter-branch crises captured in the dataset, fully 52 involve the judiciary as the object of attack.

Figure 1 shows the overall distribution of such judicial crises by country. All but a handful of countries in the region have entirely escaped judicial crises. In terms of the sheer number of conflicts,

Ecuador (10) clearly leads the pack, followed by Bolivia (7), Chile (6), Argentina (5) and Venezuela (5).<sup>2</sup> This figure also hints at a kind of bi-modality to judicial crises: With very few exceptions, most countries in the region either experience multiple attacks (>2) against their courts, or none at all (Costa Rica, Mexico, Panama, El Salvador, Dominican Republican).<sup>3</sup>

## [Figure 1]

The pattern of judicial crises also casts doubt on the assumption that judiciaries in older and wealthier democracies are automatically immune from crisis. Although the Costa Rican judiciary has been free of crises, this is hardly true of courts in two of Latin America's other longest-lived democracies, Colombia and Venezuela. Ecuador may have ushered in the region's third wave of democratization at the end of the 1970s, but it's judiciary compares most unfavorably to Mexico, which did not make the transition to <sup>full</sup> democracy until 2000. In terms of wealth, Chile, Argentina and Venezuela are significantly richer than Ecuador, Bolivia, and Peru, yet judicial crises are all too common across all six countries.

Perhaps we should not be surprised that those with the highest frequency of attacks against the judiciary also include some of Latin America's most distressed democracies: Ecuador, Bolivia, Argentina, Venezuela, and Peru (*e.g.* see Hagopian and Mainwaring 2005). However, in Chile, one of the region's much-touted success stories, politicians have at least attempted to target the Supreme Court a fair number of times since Pinochet left power. Conversely, judiciaries in several troubled democracies in region (Paraguay, Guatemala, Honduras) have undergone relatively fewer crises than one might expect.

More interesting still is how the distribution of attacks on courts jibes with standard measures of judicial independence for the region. Even a casual glance at Figure 1 reveals that some measures fit

<sup>&</sup>lt;sup>2</sup> As we mention below, Chile is something of an outlier here. The majority of the "crises" coded for the Chilean case involve threats not followed up on or clearly unsuccessful attempts to modify the Court following the regime transition.

<sup>&</sup>lt;sup>3</sup> Note that because Mexico was not a full democracy until 2000, inter-branch crises prior to then are not included in the dataset. Since 2000, the Court has been relatively stable, although there were threats to impeach judges as recently as 2004 (Staton 2009), which should be incorporated into the ICLA Dataset.

better with the record of attacks than others.<sup>4</sup> Thus, we find relatively little correspondence between, say, the frequency of attacks against high courts and Henisz's dichotomous measure of judicial independence.<sup>5</sup> Some of the most crises prone countries we identify are indeed coded by Henisz as dependent (Bolivia, Venezuala, and Peru), but just as many are classified as independent (Ecuador, Chile, and Argentina). Meanwhile, several countries with so-called dependent courts have experienced relatively few crises by our count (Honduras, Uruguay, and Brazil), or none at all.

Verner's (1984) six-fold typology classifying Latin American courts in the mid-20<sup>th</sup> century provides a somewhat better match. Drawn from mostly case-based literature, his categories blend, in different degrees, information on regime instability, formal institutional protections for courts, incidents of tenure violation despite such rules, executive powers, and anecdotal evidence on judicial behavior. Verner's typology is thus more impressionistic than systematic. Nevertheless, there are some intriguing continuities between his data and ours. With the exception of Chile, most of the judiciaries ranked in Verner's bottom three categories during the mid-20<sup>th</sup> century have gone on to be the most crisis-ridden courts during the 1990s and 2000's.

There also appears to be a rough correspondence between the distribution of recent attacks against courts and Rios-Figueroa's (2006) measure of de jure external judicial independence. Based on a meticulous coding of Latin America's constitutions between 1950 and 2002, his measure ranks each country's judiciary on a scale of 1-4 according to the relative ease of judicial appointments, removals, and salary reductions. Although certainly not all of Rios-Figueroa's low scoring countries have suffered repeated attacks against their courts (Dominican Republic, Honduras, Uruguay, El Salvador), most of the attacks do tend to cluster in countries where formal protections are weakest. As we discuss below, however, such a correlation is not necessarily evidence that formal protections automatically lower the incidence of inter-branch conflict.

<sup>&</sup>lt;sup>4</sup> As Rios-Figueroa (2006) has argued, this surely reflects the fact that existing measures of judicial independence for Latin America are strikingly inconsistent with one another.

<sup>&</sup>lt;sup>5</sup> Henisz's measure combines the executive constraints from Polity IV and the law and order measure contained in the International Country Risk Guide (Henisz 2000, cited in Rios Figueroa 2006, p. 14)

#### [Figure 2]

Figure 2 provides additional support for the view that attacks against Latin America courts have continued even as democracies otherwise consolidate. Although certainly the mid- $20^{th}$  century oscillations between dictatorship and democracy often resulted in the *en masse* removal of sitting justices (cites),<sup>6</sup> the frequency of removals since the third wave crested is hardly encouraging. The number of crises involving courts jumped nearly three times from just five attacks the late 1980s to fourteen in the early 1990s. Since 1995, the average number of attempted attacks has been roughly stable at eleven every five years. Moreover, if we look closer at whether the attack succeeded or failed, we find that the success rate against courts has actually risen over the last decade. Judicial attacks succeeded just 40% of the time between 1995-1999, rose to 57% in the first five years of the new millennium, and hit 83% between 2005-8. With respect to different types of attacks waged against judiciaries in the region, there is a relatively even split overall in the data between the frequency of individual-centered attacks (impeachments or individual resignations under the shadow of impeachment) (n=22) versus institutional attacks (packing or dissolution) (n=19). Although individual attacks against justices have somewhat abated in the new milennium, institutional attacks have remained relatively constant over the last two decades.

Unfortunately, we lack comparable systematic cross-national data to be able to offer a similar overview of the judicialization of politics, though we can infer from the literature, that the phenomenon is generally increasing around in Latin America (Stotzsky 1993) as in many other parts of the world (Tate and Vallinder 1995; also see Gauri and Brinks 2008). Along the same lines, the consensus from reports produced by the World Bank, USAID, and other non-governmental agencies is that there is substantial and growing demand for judicial services throughout the region (e.g. see Dakolias 1996; Hammergren 2007).<sup>7</sup> To cite two specific examples, between 1974 and 1984 the average number of cases entering the

<sup>&</sup>lt;sup>6</sup> In the last wave of transitions to democracy, high court justices were successfully replaced en masse in Bolivia, Ecuador, Peru, and in Argentina (see *Latin American Weekly Report* 10-15-1992). Additional attempts to replace judges following a democratic transition occurred in Uruguay and Chile.

Argentine Supreme Court was roughly 4,000. By 1997, the figure had skyrocketed to 36,000 cases (FORES 1988; Molinelli et al 1999 cited in Helmke 2005). Brazil has experienced a similar explosion in the demand for judicial resolutions. Since the transition to democracy, the number of cases in the judiciary overall has gone from 339,000 in 1989 to 2.1 million in 2001, although there is some evidence that the trend is now being reversed (cited in Taylor 2008:38).

Turning to judicial decision-making in the region, our understanding of how courts behave is still far from complete.<sup>8</sup> As Kapiszewski and Taylor (2008) document, most research on the question of whether Latin American judges are willing to check the government has been confined either to qualitative case studies or to systematic analysis of judicial decisions within a single country. As one might expect, this literature provides no shortage of examples of constrained judges caving to political pressure: Menem's "automatic majority" comes to mind, as does the Venezuelan Supreme Court's well-known quip about "committing suicide in order to avoid being killed" following Chavez's accession to power in 1999. Likewise, there are more reassuring signs that insulated judges do occasionally stand up to governments: witness the Uruguayan Supreme Court's controversial decision in 1986 to flout the Naval Pact by allowing civilian courts to hear human rights cases, or the Mexican Supreme Court's 2000 decision demanding that President Zedillo make public sensitive financial information (see Staton 2009).

What interests us the most here, however, are the more unexpected cases in which seemingly vulnerable judges take on an otherwise powerful the government. Consider the following examples.

*Peru*. Starting in 1991, despite repeated threats from Fujimori's government, the Tribunal of Constitutional Guarantees struck down as unconstitutional key aspects of President Fujimori's economic proposal (Kenny 2003: 225-6). Following the 1992 *autogolpe* which effectively dissolved both the

<sup>&</sup>lt;sup>7</sup> Hammergren (2007) acknowledges that this is the leading wisdom of the policy community, but she goes on to argue that, despite the problems of access to justice and case backlog that plague the region, demands placed on Latin American judges are not particularly egregious. Compared to advanced industrial democracies, average annual filings per judge are relatively low (ranging from 136 in Honduras up 1,357 in Brazil compared to 1,992 in the US District of Colombia) (p.72). Still, she does not dispute the basic point that demands on Latin American courts are generally increasing.

<sup>&</sup>lt;sup>8</sup> To begin to fill this gap, we are currently engaged in a large N cross-national data collection process as part of a pilot project funded by the National Science Foundation on judicial decision-making, which includes most constitutional courts in Latin America. For details on the project, see Carrubba et al 2008.

Legislature and the courts, several justices on the reconstituted Tribunal refused to allow Fujimori to run for a third term; these same judges were subsequently impeached for doing so.

*Venezuela.* In 2002 President Hugo Chavez was briefly deposed in a coup. Following Chavez's quick return to power, the Supreme Tribunal openly defied the government by dropping charges against the military officers allegedly involved in the failed coup. During the same period, Court also began to clash with Chavez in a series of cases involving the government's economic policies and police power (Helmke 2005:161). Most recently, in 2007 the Court raised the ire of the government again in a tax case, prompting Chavez to form a legislative Commission of Moral Power to investigate alleged corruption on the Supreme Court.

*Ecuador*. Shortly after coming to power, President Correa's efforts to reform the Constitution set him on a collision course with Congress. In the 2007, several opposition legislators were barred from Congress for trying to thwart a referendum on whether to convoke a Constituent Assembly. Later that year, the Constitutional Tribunal voted to overturn the Electoral Tribunal's decision to bar the legislators and demanded that the majority of legislators be reinstated. Correa refused to comply with the ruling and in 2008 the legislature was permanently disbanded.

*Paraguay.* In 1999, the Paraguayan Supreme Court stepped into the middle of a political firestorm involving different factions of the ruling Colorado Party. Upon coming the office, President Raul Cubas immediately commuted by executive decree the sentence of his political mentor, General Oviedo, who was being held on charges of sedition (Perez-Linan 2007:30). Opponents in the legislature appealed to the Supreme Court to block Cubas' efforts. The Court, in turn, swiftly ordered Oveido back to prison and threatened to impeach Cubas when he threatened to not comply with the Court's decision.

Although these aggressive judges largely have been disciplined firmly, the case of Paraguay reminds us that this is not always true – sometimes judges survive inter-branch conflict. Sincere judicial behavior is not always a losing cause. Events outside the region, both the recent and the historical, reinforce this fact. While the Supreme Court of Pakistan was attacked severely by President Pervez Musharraf, it was resurrected following the public protest that followed. And clearly, the United States

Supreme Court was not harmed in the long run by its decision in *Brown II*, despite massive resistance and threats to its institutional structure in the wake of the case. If anything, *Brown II* is a key part of the Court's institutional legacy.

Taken one by one, each set of facts—on attacks, demand, and decision-making--arguably fits within an already familiar portrait of Latin American courts. That Latin American politicians manipulate courts is hardly news, though certainly documenting the scope and frequency of attacks is. Problems of access to justice and growing case backlog that suggest rising demand for judicial services are widely discussed in policy-making circles. Likewise, the imperfect, but also sometimes surprising, nature of checks and balances in the region has been fodder for a growing number of judicial politics scholars over the last decade.

Yet, if we put the facts together and try to interpret them through the lens of existing theories, the picture is suddenly much less clear. Judicial crises in Latin America may be relatively commonplace but, as we elaborate below, most models of inter-branch relations tell us that such attacks should not be observed. Likewise, to the extent that ruling against the government is often highly risky for judges, most existing theories cannot explain why—short of martydom, misinformation, or the downfall of the government--any Latin American judge under the shadow of attack would ever check politicians. Finally, if judges are routinely attacked and thus routinely bend to the government of the day, how can we account for the growing demand for judicial relief that appears to be occurring throughout the region?

## Assessing the Literature: Theories and Puzzles

In this section we show that the existing theoretical literature cannot fully account for the series of facts outlined above. Although some explanations take us further than others, none solves the threefold puzzle we lay out above. Here, we focus specifically on two of the most prominent classes of explanations in the judicial politics literature: reform theories and separation of powers theories.<sup>9</sup> As summarized in Table 1, the bottom line is that while each of these theories offers a compelling logic for at

<sup>&</sup>lt;sup>9</sup> This discussion draws on Helmke and Rosenbluth, forthcoming, and Staton 2009.

least one set of facts (attacks or decisions), most cannot account for anti-governmental decisions under the shadow of crises; and none addresses the question of demand for judicial services.

#### [Table 1]

Starting with reform models, one branch of the literature argues that politicians rationally choose to delegate power to courts in order to solve a variety of dilemmas. For example, according to the well-known credible commitment story first laid out by North and Weingast (1989), and recently elaborated by Moustafa (2007), economic growth is stymied by the fact that otherwise unconstrained politicians cannot commit to respect property rights. By delegating independent authority to courts, politicians are able to effectively tie their own hands and thus ameliorate the risks to investors. In a similar vein, other scholars explain politicians' decision to create an independent judiciary in terms of benefits ranging from the court's ability to enforce legislative deals (Landes and Posner 1975; also see Carrubba 2009), monitor lower level bureaucrats (McCubbins and Shwartz 1984; Rosberg 1999; Moustafa 2007), allow politicians to avoid blame (Salzberger 1993; Wittington 1999; Magaloni 2008), or provide legislatures with valuable information about legislation (Rogers 2001).

While each of these theories offers a compelling rationale for the creation of independent courts, the simple fact that courts vary tremendously in their level of independence is harder to explain. Unless we assume that politicians in Ecuador or Venezuela, say, are somehow less interested in encouraging economic growth, or avoiding controversy than their counterparts in Costa Rica and Mexico, such theories cannot easily make sense of why attacks against independence routinely happen in some Latin American countries, but not in others.

Other reform-based explanations of judicial independence provide a clearer answer for why the level of judicial attacks might vary country by country or over time. According to the insurance logic of judicial independence, politicians facing the possibility of losing power seek to limit their opponents by constructing an independent judiciary (Ramseyer and Rosenbluth 1993; Ramseyer and Rasmused 1997; Ginsburg 1997; Hirschl 2002; Finkel 2008). As Finkel (2008) argues, Mexico provides an excellent illustration of this rationale. Under the longstanding hegemony of the PRI, politicians routinely

undermined judicial independence. As Mexico began to democratize in the 1990s, however, the PRI hedged its bets against losing to the opposition by reforming the judicial system and granting more authority to the courts. Along similar lines, we are also struck by the fact that some of the most well-known attacks against courts identified in the *ICLA Database* – Peru under Fujimori, Argentina under Menem, Venezuela under Chavez, and Ecuador under Correa -- roughly coincide with a relative decline of political competition.

Yet, proponents of the approach need to explain why incumbents believe that the next government will honor judicial independence. On-going competition and the expectation of constant alternation are not necessarily sufficient conditions. As Ramseyer (1994) points out, cooperation is only one of several possible equilibrium that emerge in the sort of repeated Prisoner's Dilemma that such an approach invokes. Another, quite reasonable, equilibrium in this game is for politicians to simply remake courts every time they come to power. Indeed, such a logic may provide a better fit for cases like Argentina and Ecuador, where attacks against courts are carried out by most incoming governments, not just Menem's and Correa's. The key theoretical challenge then, is to specify why politicians (incumbents and the opposition) *expect* future majorities will respect the constraints that they place on power in the present. In other words, while the logic of tying hands is clear for the current government, it is not clear why it would presume that future coalitions will respect the independence they intend.

A second potential shortcoming of delegation models is that they neglect to model explicitly the choices judges make. Anti-governmental decisions are treated primarily as evidence that judicial independence has been achieved; pro-governmental rulings signal that judicial independence has not arrived. Ginsburg (1997) and Moustafa (2007) provide noteworthy, if only partial, exceptions. Complementing the logic of delegation, both Ginsburg and Moustafa sketch out parallel arguments in which newly independent judges consciously shore up their power through cautious decision-making.<sup>10</sup> But while such approaches shed light on an important element of judicial behavior, neither provides

<sup>&</sup>lt;sup>10</sup> Carrubba (2009), which we describe in greater detail below, also develops a unified formal theoretical model showing the conditions under which politicians delegate authority to courts and courts gradually generate compliance through prudent decisions.

leverage on understanding why the most compromised judges -- whether in Latin America, or Egypt and Pakistan for that matter – might instead throw caution to the wind and risk ruling against the government.

The second class of explanations we consider largely ignores politicians' decision to create independent courts, but consistently incorporates the idea that judges are strategic actors. Such models fall under the broad heading of separation of powers games. In the classic agenda setter model (Marks 1989; Ferejohn and Weingast 1992; Spiller and Gely; Epstein and Knight 1998; Ferejohn et al. 2007), the basic idea is that the concentration of political power across the branches of government forces judges to behave strategically in order to avoid having their decisions overturned. Assuming that judges have policy preferences that diverge sufficiently from the government's, the expectation is that anti-governmental decisions are more likely to occur in environments where political power is fragmented.

While there is systematic evidence for this claim in the United States (Harvey and Friedman 2006), and in Latin America countries, such as Argentina (Bill Chavez, et al 2003) and Mexico (Ríos-Figueroa 2007; Staton 2006), such an explanation has little to say about why constrained judges would ever dare to rule against the rulers. Moreover, precisely because in these models the threat of reprisal is sufficient to keep judges in line, such an approach cannot explain why inter-branch crises would ever actually occur. Simply put, this approach tells us that as long as judges are strategic, attacks are not in equilibrium.

Alternative separation-of-powers models also take us only so far. For example, Helmke's (2005) theory of strategic defection modifies the static agenda setter models by introducing a temporal dimension and uncertainty about judicial types. This allows her to show the conditions under which insecure judges will rule against the incumbent government. One of these conditions is that judges believe that the incumbent government's days in power are limited. Yet, while such an account provides a rationale for why judges hand down anti-governmental decisions under the shadow of uncertainty, it does not speak easily to instances such as Peru under Fujimori, Paraguay under Cubas, or Ecuador under Correa, where judges rule against presidents who are arguably in their prime. Nor, again, can it account for the instances in which judges are ultimately sacked despite behaving strategically.

Some of the models that include the public in a separation of powers framework push the strategic agenda further still, but nevertheless encounter similar limitations when it comes to explaining the puzzle of anti-governmental rulings and judicial attacks. Stephenson (2004) develops a model based on imperfect information to explore the conditions under which the public punishes politicians who defy courts. However, because courts should only veto when the public is willing to protect them, inter-branch crises also never emerge in equilibrium. Either judges veto the government's policies and get away with it; or, judges behave strategically and obviate the need for politicians to intervene directly into the judiciary. Carrubba's (2009) recent model of endogenous institution building, which breaks new ground by offering the first formalized account of how judicial prudence translates into institutional legitimacy, is also ill-suited for our particular questions. Again, precisely because the only sensible strategy for judges without such support is to behave cautiously, the model tells us very little about the logic of risky judicial behavior and actual attacks on judges -- let alone how institutional building might fit with either of these strategies.

Vanberg (2005) and Staton (2009), in different ways, get us the closest to understanding the logic of risky decisions and inter-branch crises. Although Vanberg also focuses on explicating the conditions under which public support enables judges to limit the government, the fundamental difference is that inter-branch crises are possible in equilibrium. In Vanberg's words, "...struggles or confrontations in which a court invalidates a measure, only to encounter resistance and non-compliance... are not necessarily the result of accidents or miscalculations on the part of politicians or judges" (2005:36). Specifically, the so-called "contentious equilibrium" in his model is sustained whenever beliefs about the level of public support for the court and the transparency of judicial decisions fall above the court's threshold for vetoing legislation and the below the legislature's threshold for evading the court ruling.

Vanberg's model thus provides us with an off-the-shelf explanation both for why judges might risk anti-governmental decisions in the most important cases and why such decisions are relatively rare. The short answer is that while courts in Latin America tend to lack diffuse public support, they may enjoy support on specific issues. Thus, the fact that certain cases contain hot-button issues may raise both

public awareness and public support for the judiciary's decision such that courts are put in a "zone" whereby they are willing to take on the government. At the same time, this mechanism also explains why governments choose to punish courts that make such decisions. Precisely because the political stakes in such cases are so high (i.e. the ability to get re-elected or the imprisonment of one's closest supporters or enemies) governments are willing to suffer the costs of public backlash to punish a recalcitrant judiciary.<sup>11</sup> We believe that there are at least two reasons to push the Vanberg logic further. It provides no account of litigant choices. Simply put, cases arrive at courts randomly, and so it cannot account for why litigants might pursue legal strategies in the face of contentious politics. Second, the model is static, yet we know that inter-branch politics emerge over time. Critically, drawing on Helmke (2005) and Carrubba (2009) we believe that we can uncover novel lessons by beginning to model temporal dynamics in this framework.

With the temporal issue in mind, Staton (2009) provides another potentially useful perspective on inter-branch relations. Although his model also contains equilibria in which courts defy the government and incur punishment, such interactions less likely to emerge as the importance of the case increases for the government. Thus, at least in this respect, Vanberg (2005) remains the more relevant model for our purposes. Nevertheless, Staton (2009) highlights pitfalls of strategic deference, which also speaks to our more general question of why judges might risk sanctions and how doing so affects public perception. Here, the important point is that judges who bend to the government in the short term, might hurt themselves in the longer run by failing to disconfirm the public's belief that the judiciary is purely partisan. This insight provides another building block for understanding why courts under pressure nevertheless challenge political authority.

<sup>&</sup>lt;sup>11</sup> Interestingly, the government's prior beliefs about whether the Court shares its preferences have a counterintuitive effect on the likelihood of inter-branch conflict. Where there is a sufficiently high chance that judges have convergent preferences, the government is less likely to engage in self-censoring and more likely to adopt legislation that results in conflict.

### Summary

Existing models of judicial reform and judicial independence provide considerable leverage over a number of features of the Latin American rule of law landscape. On the other hand, though our models collectively explain much, they do not always sit well with each other. We have reform models that persuasively explain the delegation of political authority to judges through the process of democratization, and which suggest rationales for the increasing judicialization of politics. Yet we have models of judicial review that anticipate strategic judicial decision-making in order to avoid costly political conflict, which themselves suggest a restricted political role for courts, even those that have been formally empowered. Yet again, we have models that anticipate daring acts of judicial activism, which also imply corresponding non-compliance in a variety of forms, including overt attacks on the judiciary. If judges are strategic, why do we observe judicial purges? If courts are more or less routinely attacked, why do we see them invite conflict? If courts are attacked and judges are strategic, why would democratic reformers believe that courts will serve as insurance policies or induce credible commitments. Finally, why are litigants seeking redress in courts under threat?

#### Modeling Attacks, Heroics and Use

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

Also, we will assume that judges are driven by multiple goals and that these goals may be mutually-incompatible in some cases. Following the standard approach in judicial politics, we will assume that judges are guided by preferences over public policy outcomes (e.g. Segal and Spaeth 2003). Judges care not just about getting cases rightly decided, but about having their decisions impact broadly the way that rights and resources are allocated in a society.<sup>12</sup> Yet, we assume that judges have institutional interests, as well. There are (at least) two ways in which this might be so. The first, which we believe is relatively uncontroversial, is that judges value their seats. We will assume that, all else equal, judges prefer not to be sacked (Helmke 2005). This assumption can be motivated in a number of ways, including the obvious interest in their salaries and other perks. One additional rationale is that judges value the prestige associated with sitting on a state's highest court (Ginsburg 2003). Still another derives directly from the judicial interest in policy. In so far as judges value their potential impact on public policy outcomes, they should value the positions that grant them opportunities to make those impacts. Clearly, a seat on a high court is one such position. A second institutional interest we will model involves being accessed. We will assume that judges value having cases to resolve. Again, judges might value being on a prestigious court, and it is hard to imagine how a court could be prestigious if it is never used. As is the case with the interest in maintaining one's seat, we also can imagine that judges value having cases to resolve, because cases represent opportunities to play a role in shaping national policy (Staton 2007). In so far as judges wish to play a role in national policy-making, they simply must have cases to resolve. Below, we allow judges to derive varying utility from their seats and the choices of litigants to come to court.

Numerous accounts in the literature suggest that judges trade off control over immediate policy outcomes in order to benefit a long-run strategy of institution building. By not asking governments to implement decisions that would invite defiance, judges build a norm of compliance, which makes it increasingly difficult to defy orders over time (e.g. Carrubba 2009; Ginsburg 2003).<sup>13</sup> And, by constructing legal principles in decisions that avoid direct political conflict, courts lay the groundwork for future expansions of power (e.g. Moustafa 2007). Time is critical to the logic of these stories. We wonder,

<sup>&</sup>lt;sup>12</sup> Importantly, we do not necessarily assume that these policy interests are themselves driven by raw ideological proclivities. They may derive from a purely legal theory of interpretation. The key is that, however derived, judges are for their preferences to control the outcome to the conflicts they resolve.

<sup>&</sup>lt;sup>13</sup> Carrubba's model does not involve a norm of compliance precisely, but rather demonstrates how courts can influence public beliefs about the appropriateness of allowing them to constrain government systematically via a stream of decisions that are implemented.

however, whether we have come to think about time in an overly narrow sense. These arguments imply that judges must give up short-term policy interests in order to build institutions. Although this account is surely plausible, we question whether this is always true. We wish to ask whether courts might build judicial institutions through sincere, aggressive decision-making.

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

#### Model

The following model is designed to uncover the conditions necessary for such a strategy to be part what we might call a "clashing" equilibrium. In other words, what has to be true about the world in order for judges to invite political conflict, for governments to enter into such conflict and for litigants to nevertheless use courts in such environments?

#### Sequence of Actions

The model we propose, an extensive form game of incomplete information, draws on Vanberg (2005), and we adopt his notation where appropriate. There are four players: a government, a court, and two potential litigants. Figure 3 summarizes the sequence of play. The government moves first. It may

implement a policy agenda  $(p_1, p_2)$ , which includes a pair of public policies.<sup>14</sup> If it does not, the game ends. Unfortunately, the implementation of each policy in the agenda imposes a burden on the two potential litigants, against which there is a colorable constitutional argument. Litigants bear these burdens if the policy continues to be implemented, whether because they do not seek judicial relief, their petition is denied, or because governments refuse to implement a judicial decision voiding the policy. To simplify only slightly, we match policies and burdens with litigants, so that the burden of the first policy falls on the first litigant exclusively and the burden of the second policy falls exclusively on the second litigant. Further, we assume that there is a temporal order to these policies, such that first litigant may seek legal redress prior to the second.<sup>15</sup>

## [Figure 3]

Having observed the government's agenda, the first litigant may seek relief from the court. If asked, the court reviews the litigant's claim, and may uphold the constitutionality of the policy. Alternatively, it may declare it unconstitutional, and thereby request a return to the *status quo*. In the event that the court upholds the policy, the second litigant moves; however, if the court strikes down the first policy, the government must choose whether to accept it. If the government accepts the decision, the government gives up  $p_1$  and the first litigant's burden is removed. If the government does not accept the decision, it continues to implement  $p_1$  and seeks to replace the court with partisans – judges whom it knows share its preferences perfectly. Finally, as in Vanberg (2005) and Stephenson (2004), in the event that the government defies the court, it may confront a public backlash, which occurs probabilistically, but which will induce the government to comply with the court's decision. The probability of a backlash is  $q_i$  for policies i=1,2. Conceptually, the indexing of q highlights that we do not necessarily assume that

<sup>&</sup>lt;sup>14</sup> In a parliamentary system, we might alternatively say that the government enacts its legislative agenda. In a presidential system, we might imagine two executive orders, or frankly, its own legislative agenda, which is adopted.

<sup>&</sup>lt;sup>15</sup> This ordering might be imposed by the law itself, in the sense that the procedures necessary for pursuing relief are more involved for the second burden than the first. It might emerge out of the nature of the policy, in the sense that the burdens of the second policy are simply felt after the first. What is important is that there is a sequence to the events so that litigants can learn from each other's experiences.

the backlash is a mere function of diffuse public support (or legitimacy) for the court. Although there is nothing wrong with imagining that diffuse support is positively correlated with the  $q_i$ , it need not dominate conceptually the model's implications.

No matter the outcome of the public reaction, the second litigant may go to court. At this stage, the legal process repeats itself (i.e. court makes a decision, government reacts and public responds). After both litigants have had the opportunity to seek relief, and after all subsequent choices of the other players, the game ends.

#### Preferences and Information Structure

The government derives value out of the implementation of its agenda, but pays separable costs for enacting it, for attempting to pack the court and for failing in this effort because of a public backlash. In particular, the government derives a value  $\alpha > 0$  out of the implementation of this agenda, which can only be eliminated by an unfavorable judicial decision that it ultimately accepts, whether voluntarily or following a public backlash. The government places a weight  $\phi$  on  $p_1$ , where  $0 < \phi < 1$ , so that the value of the first policy in the agenda (*i.e.*,  $p_1$ ) is  $\alpha\phi$  and the value of the second is  $\alpha(1 - \phi)$ . To enact its agenda, the government pays a cost  $\underline{\varepsilon}_g : \alpha > \underline{\varepsilon}_g > 0$ , which can reflect the opportunity costs of pursuing this item on the agenda or simply the transaction costs associated with governing. The cost of attempting to purge the court is  $\overline{\varepsilon}_g > 0$ , where  $\overline{\varepsilon}_g > \underline{\varepsilon}_g^{16}$  If it is costly to implement an agenda, it must be costly to purge a court. Finally, the cost of a public backlash against its attack is  $\beta > 0$ . The government knows the probability of a public backlash and the probability that the court's preferences are limited or expansive, as we define below. If the court is partisan, again as defined below, the government knows it for sure.

Litigant preferences depend on the burdens they ultimately bear and on the costs they pay to access the legal system. We assume that each litigant's utility is independent of the other. It may be that the first litigant is able to help the second learn about the court's preferences, but it will not be because

<sup>&</sup>lt;sup>16</sup> This ensures that the transaction costs of packing a court are larger than the costs of implementing the policy agenda. In an extension to this model, we consider the implications of allowing the government to simply defy the order.

the first litigant is trying to do so. Thus, a key element of an equilibrium in which litigants gain information about their courts must involve an incentive for early victims to seek relief. The burdens associated with each policy in the government's agenda impose a cost on litigants,

 $b_{ij} > 0$  for  $i \in \{H, L\}$ , j = 1, 2, where  $b_{Hj} > b_{Lj}$ , so that some burdens are worse than others for each litigant.<sup>17</sup> Litigants bear these costs if the policy continues to be implemented, whether because they do not seek judicial relief, their petition is denied, or because governments refuse to implement a judicial decision voiding the policy. Further, litigants must pay an access cost  $\varepsilon_l > 0$  to get into court. The litigants know the probability of a public backlash and they know the probability that a court is one of three types, again as defined below.

The court may be one of three types, which we can assume is drawn by nature from a set of courts, the distribution over which is known by the parties as defined above.<sup>18</sup> With probability  $\eta$  the court has expansive preferences, by which we mean that it loses value for even small burdens placed on litigants. We might imagine that this court is "liberal" in the modern sense, but this would restrict the substantive reach of the model needlessly. A more general interpretation is that the court's policy preferences simply diverge greatly from the government's. Such a court will pay  $b_{ij}$  if the policy is upheld or if its decision invalidating it is successfully defied. Simply, this court type shares the policy preferences of the litigants.<sup>19</sup> With probability  $\lambda$ , the court's preferences are limited, such that it will pay  $b_{Hj}$  only if a high burden is imposed and implemented; otherwise, it pays zero. Again, we might imagine that this court type diverges from the government, but not as much as the expansive court. Finally, it is

<sup>&</sup>lt;sup>17</sup> Importantly, though  $b_{Hj} > b_{Lj}$  we do not make any assumption about actual value of  $b_{Lj}$  to the litigants – low and high cost burdens are only "low" and "high" relative to each other. It may be that a low cost burden is quite high. The function of the ordering is to help us identify differences between court types, as we discuss below.

<sup>&</sup>lt;sup>18</sup> The government knows if the court is partisan but is uncertain over the other two types. It knows the probability with which each type is drawn. The litigants only know the probabilities associated with each court type.

<sup>&</sup>lt;sup>19</sup> This need not be the case. Courts might have policy preferences that are completely distinct. The key is that some court type needs to have preferences that converge with the government or not, so that there is some tension between judges and politicians.

possible that the court is simply an extension of the sitting government. This is a partisan court. The probability that a partisan court is drawn is partisan is  $1 - \eta - \lambda$ . A partisan court shares the policy preferences of the government precisely.

This describes the court's policy preferences, though above, we have suggested that the court has institutional preferences, as well. We model these as follows. First, following Vanberg, we assume that all court types pay a cost c>0 in the event that they are successfully purged. This parameter may be interpreted to represent the value judges lose from impeachment, both in terms of lost salary and other less quantifiable benefits associated with being a member of the court. Second, we assume that the expansive and limited court types derive some additional value, v > 0, from being accessed by litigants. There is a value to these courts from being used. This assumption reflects our effort to model a judicial interest in being relevant to the political landscape of its country – from being able to play a meaningful role in the control over the constitutional order.

#### **Clashing Equilibrium**

There are a number of substantively interesting cases in the model; however, we will focus on an equilibrium in which the profile of strategies matches the puzzling combination of behavior around which our discussion has been framed. We have elected to keep the model as flexible as possible in terms of the burdens the policies induce; however, in the present case, we assume each policy in the agenda imposes  $b_L$  on the litigants. This assumption influences the precise learning that transpires along the equilibrium path, but does not impact materially the empirical implications we discuss below.<sup>20</sup> Our solution concept is Perfect Bayesian equilibrium (PBE), which requires a profile of sequentially rational strategies and a profile of beliefs that are consistent with those strategies and determined via Bayes rule whenever

<sup>&</sup>lt;sup>20</sup> Assuming that both burdens are high places the limited court type in the same position as the expansive court is in the current case. This can influence the inferences litigants draw if a policy is struck down. They may still be uncertain about the precise court type after such a decision; however, there is no impact on the comparative statics we discuss below. An interesting alternative case involves a policy that induces a low burden, which is followed by policy that carries a high burden. In this case, governments might be willing to attack a limited court that has just upheld its policy, in expectation that it might strike down the more burdensome policy on the future docket. A limited court in this circumstance cannot gain by strategically challenging the policy, so it's behavior is unaffected.

possible (Osborne and Rubenstein 1994, 233).<sup>21</sup> In particular, we consider the following strategy profile.

We will discuss beliefs informally in the text, though they are characterized in the appendix.

#### Clashing Equilibrium Strategy Profile

Enact policy agenda; Attack court if ever challenged
Go to court
Go to court
Uphold both policies
Uphold both policies
Strike both policies

Three core conditions, defined on the probabilities of a public backlash and the probability that

the court has expansive preferences, support this equilibrium. They are as follows:

Condition 1:	$\max\{\frac{\varepsilon_l}{b_L}, \frac{c}{c+b_L}\} < q_2 < \frac{\alpha(1-\phi) - \overline{\varepsilon}_g}{\alpha+\beta+\phi}$
Condition 2:	$\frac{c - b_L}{q_2(c + b_L) + v} < q_1 < \min\{\frac{\alpha \phi - \overline{\varepsilon}_g}{\alpha \phi + \beta}, \frac{c}{c + v}\}$
Condition 3:	$\frac{\varepsilon_{l}}{q_{l}b_{L}} < \eta < \frac{\alpha - \varepsilon_{g}}{\overline{\varepsilon}_{g} + q_{1}(\overline{\varepsilon}_{g} + \alpha\phi + \beta) + q_{1}q_{2}(\alpha - \alpha\phi - \beta)}$

It is useful, from the perspective of replication, to notice that the conditions mirror a central implication of the Vanberg argument. Namely, contentious inter-branch politics are most likely to emerge under relatively high degrees of uncertainty. Litigants must be confident enough that their courts' preferences are similar to their own in order to access the judiciary, but governments cannot be too sure that courts share litigant preferences in order to pursue the policy agenda in the first place. Thus, as Condition 3 suggests,  $\eta$  can be neither too big nor too small. Similarly, litigants and courts have to be confident enough in the success of an eventual public backlash in order to come to court and to challenge the

<sup>&</sup>lt;sup>21</sup> The solution concept places no restrictions on "off-path" beliefs. These are the beliefs players hold if they are called upon to choose at an information set that should not have been reached under the strategy profile. For example, we might wonder what Litigant<sub>2</sub> would believe if she observed Litigant<sub>1</sub> not go to court, which should not happen given his equilibrium strategy. We assume that players do not update at off-path information sets beyond where those beliefs lie prior to the unexpected behavior. In the case we consider, nearly all information sets are reached in equilibrium.

government, respectively; however, governments cannot be too confident about a public backlash, lest they will choose to accept unfavorable outcomes. Thus, Conditions 1 and 2 suggest that, like  $\eta$ , the  $q_i$ must be neither too large nor too small. With these general results in mind, we now describe the intuition behind the equilibrium by discussing choices and learning along the equilibrium path. We work backwards from the period of play following the second policy conflict.

### The Second Policy Conflict

The players learn a great deal from the first litigation. If they observed the court uphold the policy, they will conclude that it is not the expansive type. Since the government knows whether the court is the partisan type, it is now completely informed about the court's preferences. The litigant, however, remains unsure about the court's type, now assigning probability weight to the partisan and limited types. Precisely, the updated probability the litigant assigns to court having limited preferences is  $\frac{\lambda}{1-n}$ .

Whatever these updated beliefs turn out to be, since the litigant knows that the court does not have expansive preferences, and since the burden associated with the second policy is sufficiently small, she will not anticipate relief, and so she will not go to court, saving the costs of litigation. Likewise, if the second litigant observed the government successfully purge the judiciary, she will again choose to save the costs of litigation rather than engage in a costly, fruitless effort to obtain relief. On the other hand, if the parties observed the court strike down  $p_1$  and survive an attack, they will all conclude that the court is the expansive type.

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

sufficiently large. Since the game ends following this decision, the choice depends on relative size of the purge cost, c, and the policy loss associated with the government's agenda,  $b_L$ . The precise

condition,  $q_{2\min} = \frac{c}{c+b_L}$ , reflects one of two possible lower bounds on q listed in Condition 1. Finally, expecting a conflict, the litigant must also be convinced in the success of a public backlash in order to come to court in the first place. As long as  $q > q_{2\min'} = \frac{\varepsilon_l}{b_L}$ , the litigant will seek relief. This establishes the second possible lower bound on  $q_2$ , as defined in Condition 1. The probability of a backlash must be larger than both thresholds to sustain the clashing equilibrium.

#### The First Policy Conflict

The logic of the second policy conflict mirrors the Vanberg analysis. Although it adds a litigant to the interaction, the underlying story is the same. The value-added of the current model turns on the behavior it can speak to in the first period, where the effects of current choices on future utility streams play a significant role. We begin with the government. Assuming that the court has struck down  $p_1$ , the government's choice depends again on how it balances the costs of attempting to purge the court and a successful backlash against it versus the benefits of the entire policy agenda, an implication of packing

the court with partisans.<sup>22</sup> As long a 
$$q_1 < q_{1 \max} = \frac{\alpha \phi - \overline{\varepsilon}_g}{\alpha \phi + \beta}$$
, the government will attack, as defined in

#### Condition 2.

The temporal dimension of the interaction influences the choices of the expansive and limited courts in important ways. If the expansive court strikes the policy, it is able to successfully signal its type to future litigants, and future litigants will come to court, granting the court a direct benefit associated

<sup>&</sup>lt;sup>22</sup> In most respects, the decision is similar to that made in the context of the second conflict. What differs is the way that the value of the first policy in the agenda influences the calculus. As the value of the first policy in the agenda, relative to the second, increases, the government is increasingly likely to attack the court in the first period yet decreasingly likely to attack in the second. The reason is that if the second policy is not particularly important, the government simply allows the court to strike it down. What this implies is that for attacks to emerge in both periods, the value of the policies in the agenda must be roughly equal.

with use and the indirect benefit associated with the opportunity to strike down another offensive policy. However, to increase litigant demand, the court embarks on an extremely risky strategy. In fact, it invites two attacks – one from the government over the first policy and another over the second. In such a context, we might expect deference to be highly attractive. Yet, if the court avoids conflict, if it behaves as if it were the limited or partisan types, it will induce inaccurate beliefs in society about its preferences. Consequently, it will have to accept two unfavorable political implications: 1) it will be unable to resolve the constitutional problem associated with the second policy since the second litigant will not seek relief, and 2) it will have to give up the institutional benefits of being accessed. In order to take the risk implied

by the strategy profile, it must be that  $q_1 > q_{1\min} = \frac{c - b_L}{q_2(c + b_L) + \upsilon}$ .

The limited court faces a similar, though not identical tradeoff. The strategy we are considering implies that it will lose the institutional benefits of future litigant access. Might the limited court attempt to attract the litigant to court by strategically challenging the government, thus appearing to be the expansive court? Under this alternative strategy, the limited court would risk a purge in the first round merely to increase demand for its services. This strikes us as a dubious strategy, though it is possible. In following this alternative strategy, the limited court would clearly uphold the second policy, which it does not believe to be unconstitutional. In light of this alternative, in order for the limited court to implement its equilibrium strategy, a successful public backlash in the first period must be insufficiently likely:

$$q_1 < q_{1\min'} \equiv \frac{c}{c+\upsilon}.$$

Unlike the scenario for the second litigant, the first litigant is unsure of the court's type when it makes its choice to go to court. In order for her to expend resources on a legal strategy, she must be sufficiently sure that the court is the expansive type. In particular,  $\eta > \eta^* = \frac{\varepsilon_l}{q_l b_L}$ . As is clear from the

expression, the litigant's choice also depends on a sufficiently high  $q_1$  – if it is too low, there is no probability of an expansive court high enough to induce a legal effort. The final choice concerns whether the government will enact the policy in the first place. It must balance the value of the policy agenda against the costs of implementing it, the costs of attempting to purge the court twice, and the costs of possible public backlashes. As Condition 3 suggests, the precise condition is defined on the probability of

an expansive court: 
$$\eta < \eta^{**} = \frac{\alpha - \underline{\varepsilon}_g}{\overline{\varepsilon}_g + q_1(\overline{\varepsilon}_g + \alpha\phi + \beta) + q_1q_2(\alpha - \alpha\phi - \beta)}$$

## **Empirical Implications**

We organize our discussion of the empirical implications of the model around Figure 4, which depicts the Clashing Equilibrium graphically. The backlash probability shown here is for the first policy. For ease of presentation, we assume that Condition 1 is met.<sup>23</sup>

## [Figure 4]

*Observation 1: The value of the policy to the government and the cost of the burden to the litigant strictly increase the chances of conflict*<sup>24</sup>

As  $\alpha$  increases,  $\eta^{**}$  rises and the contentious equilibrium window expands upward. As this happens, the government becomes willing to enact potentially unconstitutional policies for higher and higher probabilities that the court has expansive policy preferences. Likewise, as the burden of the policy increases,  $q_{min}$  shifts to the left in Figure 4, similarly expanding the contentious equilibrium window. The court is increasingly willing to strike down the policy as the burden increases. Despite the fact that the court knows that the government will attack it for challenging its authority, as the burden grows, the court becomes increasingly aggressive. This result emerges in Vanberg (2005), as well, but the intuition behind it is not exactly the same. For sure, the value of the burden associated with either policy is important to the result, for the same reason that it is in Vanberg's model. In short, the court is increasingly willing to risk a purge in order to veto the first policy. But there is another rationale for the result, which derives

<sup>&</sup>lt;sup>23</sup> Precisely, the equilibrium resides in a kind of rhombohedron-shaped region in the center of the three-dimensional parameter space. We do not trace out the exact shape of this object. Our view is that in a simple model such as this, the key is communicating the basic tensions involved in judicial choice, rather than treating the parameter space as if it perfectly reflected the real world. For this reason, we believe the two-dimensional figure does an adequate job of communicating visually the results.

<sup>&</sup>lt;sup>24</sup> [Insert comparative statics here].

from the temporal dynamic of the model and it's affect on learning. In particular, in the context of the first policy conflict, as  $b_L$  grows, the court's incentive to accurately communicate its preferences rises, as well. The reason is that by doing so, the court gains an opportunity to strike the *second* policy on the agenda. By strategically deferring to the government, the court not only loses out of the first policy, it gives up the opportunity to have an impact on the second, because it has convinced litigants not to waste their resources on a lost cause. The examples of inter-branch warfare described in Part 2 clearly involved public policies of significant importance to political officials. Whether they were similarly important to judges is an empirical matter, which we do not take up here. And to test the claim, we need to know the importance of all of the other cases that did not result in political conflict. For this reason, we do not necessarily view our descriptions of attacks on Latin American judiciaries as a test of the model, but they are certainly not inconsistent with the story.

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

As we move from left to right across Figure 4, we become increasingly likely to enter the clashing equilibrium window. This implies that we should be increasingly likely to observe conflict as public preferences diverge from their representatives, emboldening courts with expansive preferences. Likewise, in so far as judicial legitimacy increases  $q_i$ , it should be that courts are increasingly likely to invite conflict as they grow in public esteem. Yet, both of these relationships are subject to important non-linear effects. As the probability of a backlash continues to increase through the window in Figure 4, conflict is not longer in equilibrium, because the probability of a backlash is too high. This follows either because governments do not initiate questionable agendas in the first place or because, if they do, they will accept unfavorable judicial decisions. Thus, we should observe an inverted-U relationship between measures that capture the probability of a public backlash and conflict.

This proposition is clearly testable with data on public support for courts in Latin America. We all know that judicial legitimacy in the region is not significant, but it is also inaccurate to suggest that it is literally zero everywhere or really close to zero. Indeed, it may be that we see so much conflict in the

region precisely because public support is not high enough to warrant governmental self-censoring yet not low enough to always induce judicial deference. Further, it is important to note that the model is not limited conceptually to a notion of judicial legitimacy. Instead, we might expect to find these crises over conflicts in which governments manage to misgauge public preferences over particular policies, situations in which courts are able to exploit differences to obtain favorable policy outcomes.

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

The logic of the clashing equilibrium turns on a fundamental tension that constitutional judges confront. As we note above, when attacks are expected, judges have incentives to strategically defer to powerful political authorities; however, when they do so, they risk producing inaccurate beliefs about their preferences, which can lead litigants to discount the future value of using the judiciary. In the limit, judges may come to be perceived as mere extensions of the government. Whether judges value opportunities to impact policy outcomes or simply value being accessed, incentives for sincere adjudication can offset incentives for strategic deference. In the clashing equilibrium, the expansive court resolves this tension in favor of risk. This choice has important implications for how litigants learn about their courts. In this case, governmental attacks are made only against courts with expansive policy preferences. Thus, courts that survive attacks manage to signal successfully their preferences to future litigants; and for this reason, we should observe litigants increasingly likely to seek relief following unsuccessful attacks, precisely because they have learned that about a potential ally. Clearly, there are other equilibria in this model, which we do not elaborate upon here, but the logic of this observation stands generally – any unsuccessful attack on a court will increase beliefs in the possibility that the court's preferences are expansive. This, in turn, increases the chances that litigants will seek relief, judicializing conflict.

## Observation 4. Institutional preferences create competing pressures for conflict

A standard institutional approach to enhancing external judicial independence involves increasing judicial tenure (Ríos-Figueroa 2006). The logic of the design is transparent. By ensuring that judges enjoy

their seats for longer periods, we insulate them from the need to curry favor with either parties who have control over their tenure or parties who might hire them once off the bench. But consider what increased tenure might imply in our model. On the one hand, longer tenure can increase the value of *c*, the cost of removal, by increasing the salary stream that will be lost and the years of prestige associated with the position. Yet, increased tenure might also increase v. In so far as being accessed influences the prestige of the court, access should be valued more by judges that will sit on the court longer. Importantly, these parameters have distinct effects on judicial behavior. As *c* increases,  $q_{min}$  shifts to the right in Figure 4, so that court must be increasingly certain that the public will successfully push back against the government in order to strike the first policy. In other words, as the future value of tenure increases, courts should become increasingly deferential, and by so doing, reduce the possibility of conflict. On the other hand, as v increases, and the value of inducing greater litigant demand for relief rises, we observe the opposite effect –  $q_{min}$  shifts to the left. Consequently, the court is willing to strike the first policy for lower and lower probabilities of public backlash. This change increases the possibility of conflict.

It is worth considering carefully the implications of this result. We believe that they are significant, both for our interests in institutional design and for our ability to test institutional theories. The institutional design implication is that by increasing tenure, we induce two competing effects, neither of which are unambiguously positive. By increasing c, we increase incentives for strategic judicial deference. By increasing v, we increase the possibility of sincere judicial decision-making, but at the expense of risking inter-branch conflict. For this reason, it is not clear that extended tenure rules will necessarily advance the rule of law.

The research design implication is that, for particular courts, even more so for particular judges, we cannot be sure which of the two competing pressures will outweigh the other. For this reason, if all we are armed with are data on tenure rules, the model suggests that we might observe positive, negative or null effects on both strategic judicial deference and on inter-branch conflict. Fortunately, we are also guided by a rough sense of how to evaluate what we do observe. Take the crisis data described above. Although a conclusion certainly must await a well-controlled model of conflict, it does appear that crises

have clustered in the Latin American cases with relatively low external, *de jure* judicial independence. What might the model suggest about this observed negative tenure effect? If we are right, and there are competing, yet unobserved influences on judicial behavior induced by increasing tenure, then we likely have under-estimated the effects of both institutional preferences. We would have estimated a larger negative effect of tenure if we could be sure that courts care nothing about attracting future litigants, and we may have estimated a positive effect if we could be sure that judges care nothing for their future streams of income and other sorts of professional prestige unrelated to increasing demand for their services. Even if we are wrong about whether judges care about increasing litigant demand, the negative effects of tenure on conflict do not necessarily bode well for the rule of law. The reason is that we may be observing this effect precisely because judges with long tenure rules are more careful than those without.

Of course, it is entirely possible that once we set-up a well-controlled test, we might ultimately be unable to reject the null hypothesis suggesting that formal institutions are irrelevant to judicial behavior. Certainly, there are scholars that have argued as much. Still, this would not necessarily mean that formal institutions are irrelevant to judicial behavior or to crises more generally. They can matter greatly. It is just that we may not pick up the right effects in field data, because of the competing incentives problem. For this reason, we believe that the larger point is that our field needs to consider the applicability of lab experiments for the purpose of testing theoretical propositions. In the laboratory, we can get control over the competing incentives our institutions induce. And we may even begin to learn about how judges might evaluate these competing pressures on balance.

#### Conclusion

Over the past fifty years, scholars of judicial politics have developed an impressive array of theoretical arguments to account for why governments might ever create courts empowered to constrain the state and for why such courts might ever exercise their power in practice. There can be no question that we know a great deal more about how judicial power works than we did at the beginning of this process. There are good reasons to suspect that politicians empower courts to solve credible commitment problems and to insure themselves against future electoral losses. There is considerable evidence that

fractionalized politics provides the political cover necessary for judges to constrain arbitrary state action, and there is evidence that public support empowers courts, that judges believe it, and that they care about influencing it. This work all suggests that democratization may have a powerful influence on judicial independence and the rule of law. Yet, it also seems that that courts can be quite constrained, even in a democracy. Indeed, the Latin American experience not only suggests that courts under democracy can be constrained, it reminds us that courts are openly attacked. Despite these attacks, litigants bring cases, and courts sometimes challenge powerful, potentially dangerous political officials.

As we discuss in Part 2, existing theoretical models struggle to explain this behavior, but not because they are inherently misguided. Far from it. Our existing models have a number of admirable qualities. It is just that no model is able to put these behaviors together in a coherent way, and we believe that our field should have such an account, precisely because the issues of judicial independence, the rule of law and the judicialization of politics are so central to our concerns - both in the region and around the world. We have presented a model of inter-branch conflict, which takes a stab at putting these behaviors together. We do so by pulling together features of existing models, and adding to them assumptions about institutional preferences, litigant choices, and time. The model suggests that judges confront a core tradeoff in difficult cases, especially when people are watching: a strategy of deference can avoid direct political conflict, but it risks creating inaccurate beliefs about judicial preferences, whereas a strategy of aggressive constitutional control may communicate accurate beliefs about preferences, but it risks a purge. The way in which judges evaluate this tradeoff can have important implications for inter-branch attacks, the construction of judicial institutions, and ultimately for beliefs about courts. Our theory also suggests implications for institutional design and for institutional research. Increasing judicial tenure, really any institution that increases judicial time horizons, induces competing incentives for strategic judicial deference, which imply competing effects on conflict. We need to consider carefully our design recommendations, and we must consider alternative research designs, ones that take seriously the problem of identifying the causal effect of the institutions we care about.

Although we believe the model raises some novel insights, we certainly do not believe this represents an end point in our collective research agenda. There are clearly alternative explanations for increasing caseloads (e.g. Epp 1998). Jurisdictional changes, whether they emerge out of the legislature or doctrine, should obviously increase access, as do rules governing standing. And groups may push legal agendas simply for the political platforms high courts provide. We have not attempted to model those features of the world. And surely, there is room for a logic of ideas or institutional ideology (Hillbink 2007), another source of judicial behavior that we exclude from the analysis. Further analysis also might consider how simple non-compliance might be accounted for in such a model. In other words, why purge a court when you can simply ignore a decision? Also, the current model does not explain how judges might build their institutions though the logic of strategic deference, that is, by maximizing compliance. Here, such a strategy is deeply problematic. An extension might consider the conditions under which deference might be preferred to risk as a means of institution building. Finally, we have not modeled the institutional design stage, and it is surely worth investigating whether we can tie a logically consistent account of judicial reform to a model of inter-branch conflict. We would welcome such additions to the framework we have constructed, and we would even welcome an entirely novel approach, one that turns our results on their head. Yet, we believe that whatever changes are adopted, it is critical that we wrestle with how to reconcile our existing theoretical models with the empirical facts in Latin America.

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Theory	Explains Attacks on	Explains Anti-	Explains Demand for
	Judiciary	Governmental Decisions	Luigation
Reform/ Delegation		$X^*$	
Reform/ Insurance	Х		
SOP/Fragmentation		$X^*$	
SOP/Strategic Defection		X**	
SOP/Public Opinion I <sup>A</sup>		$X^*$	
SOP/Public Opinion II <sup>B</sup>	Х	Х	

# Table 1. Theoretical Models of Inter-branch Politics

\*Anti-governmental decisions occur only when judges are unconstrained \*\*Anti-governmental decisions occur only once incumbent government weakens <sup>A</sup> Stephenson (2004); Carrubba (2009) <sup>B</sup> Vanberg (2005); Staton (2009)



Figure 1. Judicial Crises by State, 1985-2008



Figure 2. Number of Judicial Attacks in Latin America by Year, 1985-2008



# Figure 3. Sequence of Actions





## Appendix

The following analysis proves the results described in the text. In particular, it identifies the conditions that must hold for the strategy profile listed above to be a PBE, and it defines the corresponding beliefs that are consistent with the profile. Given the model's finite horizon, we proceed via backward induction, beginning with the government's choice over the second policy on the equilibrium path. We assume that if players are asked to move at an information set that should not be reached in equilibrium, they do not update beyond their beliefs on path, prior to the deviation. We clearly need to make a few knife-edged restrictions on behavior, to break ties. For now, we assume that there are no ties to break.<sup>1</sup>

## **Second Policy**

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

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

## **First Policy**

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

Given the partisan court's preferences, it obviously rejects the appeal. The limited court will obtain 0 if it upholds, because the second litigant will not bring a case. If instead, it strikes the policy it expects  $q_1v + (1-q_1)(-c)$ . Thus, to ensure that the limited court upholds,  $q_1$  must be smaller than the threshold defined in Condition 2. Finally, if the expansive court upholds the policy, it loses  $-2b_L$  since it will give up the burden in both periods. If instead it strikes, it will gain the value of the second period interaction, discounted by the probability of surviving, plus the value of being purged, or  $q_1(v + ((1-q_2)(-c-b_L)) + (1-q_1)(-c-b_L))$ . Solving for  $q_1$  yields the lower bound on  $q_1$  in Condition 2.

<sup>&</sup>lt;sup>1</sup> Clearly, further analysis is needed to demonstrate that all conditions can hold simultaneously. This will be included in a future draft.

When the first litigant moves, his beliefs are identical to his priors. If he does not go to court, he pays  $-b_L$ . If he goes to court, he can expect  $\eta(-q_1\varepsilon_l + (1-q_1)(-\varepsilon_l - b_L)) + (1-\eta)(-\varepsilon_l - b_L)$ , and solving for  $\eta$  yields the lower bound in Condition 3. Finally, like the litigant, when the government moves first, its beliefs are defined in the text – they are the government's priors. If the government fails to enact the policy, it gains 0. If it enacts, it will expect the following:  $(1-\eta)(\alpha - \varepsilon_g) + (\eta - \eta q_1)(\alpha - \varepsilon_g - \varepsilon_g) + (\eta q_1 - \eta q_1 q_2)(\alpha - \alpha \phi - \varepsilon_g - 2\varepsilon_g - \beta) + \eta q_1 q_2(-\varepsilon_g - 2(\varepsilon_g + \beta)))$ Solving for  $\eta$  yields the final threshold in Condition 3.

## **Off-path behavior**

## The limited court, partisan court or new court strikes p<sub>2</sub>

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

## The first litigant does not go to court

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

## The government does not attempt to purge after $p_1$ is struck

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

## The government attempts to purge after $p_1$ is upheld

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

All other information sets are reached in equilibrium.