

Enacting Constitutionalism

The Origins of Independent Judicial Institutions in Latin America

Abstract

When and why can we expect constitution-making processes to produce an institutional framework that formally serves constitutionalism? We present a simple and general typology of constituent processes that captures their legal/political character and their dynamic nature. We distinguish constitution-making processes controlled by one cohesive and organized political group (*unilateral*) from processes controlled by at least two different political groups (*multilateral*). Our central hypothesis is that multilateral constitution-making tend to establish institutional frameworks consistent with constitutionalism. Focusing on independent judicial institutions, we find support for our hypothesis in a sample of 18 Latin American countries from 1945 to 2005.

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Modern constitutionalism, inaugurated in the 18th century by the American (1787-1789) and French (1789-1791) constitution-making processes, assigned to codified constitutions a very specific function: to prescribe an institutional framework that would establish guarantees against the arbitrary use of power. However, already in 1800, Napoleon's constitution prescribed a personalistic rule that concentrated great power in his hands and formally made him emperor through its revision in 1804.¹ When and why can we expect constitution-making processes to produce an institutional framework that formally serves constitutionalism?

To answer this question, we present a simple and general typology that captures both the legal/political character of constitution-making processes and their dynamic nature. We differentiate constitution-making processes where a cohesive and organized political group controls the agencies required to amend or create the constitution (*unilateral*) from processes where those agencies are controlled by at least two different political groups (*multilateral*). These two types of constitution-making processes are fruitful independent variables that, as we argue in the first part of the paper, have some considerable advantages over other commonly used variables.

The hypothesis of this paper is that multilateral constitution-making processes tend to establish institutional frameworks consistent with constitutionalism. Taking these types of constitution-making processes as independent variables, and the Latin American region as our empirical arena, we test our hypotheses by focusing on some of the most important institutional mechanisms to prevent arbitrariness: independent judicial institutions. The Latin American region makes for a good laboratory for assessing different explanations for the creation of independent judicial institutions. The countries

examined share a common legal heritage, political culture, civil legal system, and presidential regime but at the same time retain important variations in judicial institutions as well as in other political and economic conditions. Using an original database covering 18 countries from 1945 to 2005, we show that autonomous judicial councils, strong constitutional adjudication organs, and autonomous prosecutorial institutions are more likely to be created by multilateral constitution-making processes.

The first part of the paper is dedicated to the theoretical framework and the second part to the empirical analysis. In the first part, we start by giving account of the dependent variables. Then, we discuss the “method of constitutionalism”² and the types of constitutional provisions that enact it as well as the specific judicial institutions we use to test our hypothesis. After that, we present our typology of constitution-making processes, our hypothesis, and discuss our contributions. In the second part of the paper, we first provide descriptive data on the enactment of judicial institutions in Latin America and then a statistical test of our hypothesis. In the conclusion, we briefly discuss the implications of our findings for future research on the relation between politics and law in Latin America and on constitution-making in general.

I. Enacting Constitutionalism

Constitutionalism can be broadly defined as “a method for organizing government that depends on, and adheres to, a set of fundamental guiding principles and laws”.³ Both ancient constitutionalism as systematized by Aristotle and Polybius and modern constitutionalism established institutional criteria that identify “constitutional governments” and contrast them with “extreme”⁴ or “despotic” ones.⁵

While ancient and modern constitutionalism have important differences,⁶ they share the aim of non-arbitrary government and the belief that the concentration of political power, either in a social class⁷ or in a governmental branch, leads to such a government. In particular, to preclude arbitrariness, institutions that block the accumulation of power, thus preventing that power from being used to multiply itself, are considered necessary.⁸ We identify the presence of this type of institutions as a *minimal* core shared by the codified constitutions that formally serve constitutionalism.

A bill of rights is arguably another fundamental element of constitutions that promote constitutionalism. Whether rights need to be included in constitutions, and *what* rights ought to be included, has been a source of debate since the emergence of modern constitutionalism.⁹ In any event, institutions that block increasing returns of power as a means to prevent arbitrariness links modern and ancient constitutionalism and has been considered since Montesquieu a necessary condition to securing the liberty of individuals and for effectively protecting some basic rights.¹⁰

Judicial Institutions and Constitutionalism

Among the constitutional provisions that formally block the increasing returns of power, those that establish independent judicial institutions are paradigmatic. An independent and empowered judiciary is an essential part of the system of checks and balances¹¹, which modern constitutionalism created to effectively prevent encroachments by any branch on the others. We take the enactment of provisions that establish an empowered and independent judiciary as dependent variables to test our theoretical argument. The judicial institutions in question are constitutional adjudication systems, judicial councils, and prosecutorial organs.

Constitutional Adjudication

As Ferejohn and Pasquino have argued, constitutional courts are instruments of a moderate or limited government, because they counteract the logic of “winner takes all” where elections are an “all or nothing game”.¹² In addition, constitutional courts provide a way out for “political parties who agreed on the benefits of constitutional ‘rules of the game’, but disagreed, sometimes fundamentally, on the precise content of those rules”.¹³ As Stone Sweet points out, knowing that constitutional interpretation will be needed, creating an independent court with constitutional adjudication power is a way to prevent the majority from using such interpretation to opportunistically increase its power.¹⁴

We consider constitutional adjudication systems in which judicial decisions in constitutional cases are valid for all (*erga omnes*) and not only for the participants in a particular case (*inter partes*). This is important because in most Latin American countries, some form of constitutional adjudication has existed since their independence, but it was not until recently that *erga omnes* provisions have been generally adopted.¹⁵ We also consider the extent of the access to the constitutional adjudication organ.

Judicial Councils

Judicial councils help counteracting increasing returns of power by preventing the partisan filling of judicial offices and systematic partisan biases in judicial decisions. Usually this is accomplished by transferring to the judicial council some power regarding the appointment of judges and usually most power regarding their career incentives. However, the judicial councils’ functions vary across countries and within countries over time. In Europe councils were adopted as a means to increase judicial independence by taking away from the Executive (usually the Ministry of Justice) the power to appoint

judges and supervise their career. In some Latin American countries, councils have also been delegated powers over the administration of the judiciary.¹⁶ Delegating such powers to a judicial council reduces the possibilities of them being used by a temporary majority to manipulate the judicial system for political gain.

The composition of judicial councils also varies across time and space. The mere existence of a judicial council does not necessarily imply judicial empowerment. It is necessary to compare both composition and functions of judicial councils in order to determine whether the judiciary is in control of a given institutional feature. In particular, we consider the ratio between judicial and lay members and the ways these groups are chosen, and we distinguish between countries that not only created councils but also granted the majority of the seats to members of the judiciary.¹⁷

Prosecutorial Organs

The public prosecutor's office is an important component of the justice system and plays a fundamental role in preventing the opportunistic use of the criminal system by public officials. There are important differences in origin, organization, and procedures of the office between adversarial (common law) and inquisitorial (civil law) systems. However, in both systems, the prosecutor plays a crucial role in the three stages of resolving a criminal matter: investigating, charging, and sentencing.¹⁸ Before the trial, the prosecutor typically directs the investigation of a case and participates in the decision of whether there are enough elements to go to trial. Moreover, there are countries where the prosecutor has the monopoly over the investigative part of any case where the state is involved; therefore, in these cases, prosecutors become highly critical as the gatekeepers for the judiciary.

We focus on the institutional location of the public ministry: within the judiciary, the executive, or as an autonomous organ. If both judges and prosecutors belong to the judiciary, they would be, in principle, more powerful and clearly more independent of the political organs of government. However, in this case, there may be concerns regarding the lack of independence of the prosecutor relative to the judge. Also, traditionally, when the prosecutors are subordinated to the Executive, this branch exerts pressure on the whole judicial system through them.¹⁹ Finally, the public ministry may be an autonomous organ, an institution parallel to the judiciary and subordinated neither to judges nor to the executive. We consider that locating the prosecutorial organ outside the executive branch, not necessarily as an autonomous organ, helps counteract increasing returns of power, since the government will be less likely to influence the prosecutors with partisan considerations.²⁰

Let us now discuss the independent variables we use to give account of when and why we can expect constitution-making processes to produce constitutional provisions that formally block the use of power to increase itself—in particular, provisions that enact the judicial institutions we have discussed.

A Typology of Constitution-Making Processes

From a “designer’s perspective”²¹, there are arguments on the particular form institutions *should* take if a specific aim is pursued. However, such perspective may only exceptionally determine the particular design of institutions, which is often the product of collective bargaining in constitution-making processes embedded in specific political and legal contexts.

Several authors have explained the nature of constitutional provisions by focusing on the politics of constitution-making—in particular, on the political identity and the expectations of those who partake in such processes. Jon Elster has discussed the biases that result when some of the individuals who will operate the resulting institutional framework take part in the constitution-making processes.²² It has also been argued that the choice of electoral systems is influenced by partisan calculations of how electoral rules will affect their abilities to win legislative seats²³, and partisan self-interest has been shown to influence the choice of rules to elect presidents.²⁴ Tom Ginsburg has argued that the design of judicial review depends on the prospective power positions of constitution-makers in post-constitutional government.²⁵ On the same line, Jack Knight has argued that the constitution-makers' expectations of whether their present preferences will be those of the majority, both in the legislature and the judiciary, has an important influence on whether they choose opened-ended versus closed and detailed constitutional provisions.²⁶

The above accounts share a general *explanans*: that the outcomes of constitution-making processes are, to an important extent, determined by the constitution-makers' political interests. However, their independent variables and the way they operationalize them are varied and not always straightforward.²⁷ One of the aims of this paper is to present a simple yet general theoretical framework able to capture the political nature of constituent processes while acknowledging its legal face. We do so by distinguishing two types of constitution-making processes based on the conformation of the constituent body.

The typology is grounded on a distinction we propose between what we call *unilateral* and *multilateral* constitution-making processes that draws on the central assumption of modern constitutionalism that the constituent power and the government (i.e., the constituted power) are different.

For modern constitutionalism, the constituent power (i.e., the people) constitutes by an act a new political society imprinting its will on a codified constitution that cannot be altered by its constituted agents (i.e., the government). The codified constitution is thus both the expression of the popular sovereign's will and the guarantee that the government will not usurp it. This classical conception of the people as the unified actor, author of the constitution, founder of the political order, ultimate sovereign, and source of political legitimacy plays a very important normative role in modern constitutionalism. However, when conducting empirical research on constitution-making processes, it becomes apparent that this notion can hardly be used. The unitary identity of "the people" is both descriptively inaccurate and theoretically problematic.

The distinction between multilateral and unilateral constituent power aims to be useful for empirical research while being loyal to the normative ideals of constitutionalism. It does so by focusing not on the positive identification of the classical constituent power (i.e., the constituent power is the people) but by focusing on the negative one (i.e., the constituent power is *not* the government). In few words, a constitution-making process is unilateral when the constituent body is controlled by a single political group²⁸ that rules over a territory and multilateral when this is not the case. In a unilateral constitution-making process the fundamental distinction between the government and the constituent power is violated.

Unilateral constituent bodies are typical of polities where power is highly concentrated and a political group has the capacity of successfully undergoing a constitution-making process. Unilateral constituent bodies are neither monolithic nor completely unconstrained actors,²⁹ but this does not imply that its internal divisions amount to those found between participants of multilateral constitution-making processes. To understand the difference, note that despite internal divisions, the members of a unilateral constituent body are part of a cohesive ruling group that has coordinating mechanisms enabling it to make collective political decisions, in particular, vis-à-vis the opposing political forces.³⁰ Unilateral constitution-makers may face internal factions, limited resources and/or capacities, and external political actors that can limit the range of viable constitutional alternatives. But we are interested in a particular capacity that the unilateral constituent bodies have and the multilateral lack: the capacity to create institutions that concentrate power, often enabling the “legal” persecution of opponents or “rule by law.”

To ascertain whether a constitution-making process is unilateral or multilateral it is necessary to determine who are the members of the constituent body. When the constitution-making process amends a codified constitution the constitution itself plays an important role in such identification. In those cases we need to refer to the relevant amendment procedure since it establishes the legal identity of the constituent body³¹ that depending on the political circumstances may be occupied by one or several political groups (i.e. may be unilateral or multilateral). Clearly in the case of a constitution-making process that culminates with the enactment of a new constitution reference to the current constitutional text is not necessary nor most of the times even possible.³² In amendment

processes the identity of those who partake in the constituent body is legally and politically derived thus, following Sieyes, we call them derived constitution-making processes, while the processes that create a new constitution are referred to as original constitution-making processes.

This typology is theoretically fruitful not only for its simplicity and generality but it also has an important advantage over the political and legal variables commonly used in empirical research on codified constitutions because it combines legal and political elements. Unlike purely political variables that are constant across countries, such as the rules for establishing the effective number of parties in national legislatures, the basic criterion that establishes when an amendment process is unilateral or multilateral varies across countries and is partly determined by the amendment procedures established in each constitution. Hence, two countries may have the same effective number of parties but each can have a unilateral or multilateral constituent body depending on the rules for amending their respective constitution that can be more or less flexible. Notice also that these variables capture the political dynamic of constitutionalism, since they integrate the political profile of those constitutionally capable of amending the constitution and this can vary with the results of legislative elections. We will show how these advantages work with particular examples in the empirical section.

Explaining the Enactment of Constitutionalism

The basic explanatory variable of our account is the composition of the constituent body, in particular whether it is controlled by a single political group or not. We defined political groups as cohesive and coordinated networks of individuals with a public identity. We assume that each political group will prefer the constitutional order

that maximizes its relative power.³³ In addition, different political groups tend to have different political and moral values.³⁴ It follows that the preferred constitutional order of different political groups will tend to differ.

The causal mechanism that links multilateral constitution-making with the production of institutions that formally serve constitutionalism is the following. When the constitution-making process is multilateral, the different groups of the constituent body face a constraint over the type of institutional framework they can attempt to enact: other group's veto, which we call "the veto constraint." Thus, we should expect power-concentrating institutions to be vetoed during the constitution making-process, independently of whether the groups are uncertain about the future distribution of power or whether they know that one of them is more likely to be in a majoritarian position. In the latter case, such institutions will be vetoed by the likely minority, while in the former case, all groups will veto them. This veto follows from the assumption that political groups will try to maximize their relative power, since power-concentrating institutions in hands of another group are likely to severely undercut such power. The veto constraint blocks the enactment of certain types of constitutional provisions that contravene the central concern of constitutionalism, and thus we should observe important differences between multilaterally- and unilaterally-created constitutional provisions. In particular, multilateral constitution-making processes will tend to produce institutions that counteract increasing returns to power such as the judicial institutions with which we will test this claim.

Let us contrast the above account with one given by the insurance model defended by authors such as Ginsburg, Finkel, and implicitly by Przeworski.³⁵ *Prima facie*, our

account seems to be equivalent to the one given by this model. Ginsburg's main empirical implication is that "explicit constitutional power of and access to judicial review will be greater where political forces are diffused than where a single dominant party exists at the time of constitutional design".³⁶ However, the causal mechanisms behind the two accounts differ in ways that can lead to different observable implications. The key factor on our account is the veto constraint constitution-makers have in multilateral constitution-making processes and lack in unilateral ones. The insurance model departs from the idea that "the key factor from the drafter's perspective is the *uncertainty* of the future political configuration at the time of constitutional drafting".³⁷

The first thing to note is that the drafter's uncertainty of future political configuration is a cognitive state and thus it is not directly observable. Therefore, for this model to be empirically tested we would need to infer from certain observable states the drafter's relevant beliefs. To derive observable implications from the insurance model one could, as Ginsburg does, identify different scenarios, one where "a single party believes that it is likely to hold on to political power... [and another where] many political forces are vying for power, no power can have confidence that it is likely to win future elections".³⁸ However, it is important to note that there is not a necessary relation between the type of constitution-makers and their levels of uncertainty. A ruling party can either be certain or be highly uncertain of its future relative power.³⁹ For this reason the composition of the constituent body is not always a good proxy of uncertainty about the distribution of political power in the future.⁴⁰ A systematic test of the insurance model would require a measure of uncertainty that allows for different degrees of certainty for similarly composed constituent bodies.

The insurance model raises an important question: When does uncertainty with regard to future political success matter to constitutional design? An implication of our account is that the effect of uncertainty depends on whether the constituent power is multilateral or unilateral.⁴¹ As we have argued, when the constituent power is multilateral the veto constraint works independently of the levels of uncertainty of constitution-makers. Now, given that establishing institutional constraints on the increasing returns of power has important costs for the ruling group, we will expect *unilateral* constitution-makers to avoid those institutions unless they believe there is an important probability that they will lose power, i.e. unless they believe those institutions will bind *others*.⁴² Thus, beliefs about future political success are relevant in unilateral scenarios where there is the perception of a high probability of future power loss. For this subset of unilateral constitution-making processes the logic of the insurance model and our account complement each other.

Finally, several authors have accounted for the *maintenance* and *efficacy* of judicial institutions as functions of the parties' prospective share of power. For instance, Landes and Posner⁴³ and Ramseyer and Rasmusen⁴⁴ account for why judicial review has been maintained in the United States and Japan, respectively, arguing that when a ruling party expects to win elections repeatedly, the likelihood of maintaining judicial independence is low; however, when it has a low expectation of remaining in power, it may be better off by "tying the hands" of the potential winner. It is noteworthy that the dependent variables of these accounts and ours are different. More importantly, those accounts assume an already *constituted* institutional framework.⁴⁵

The distinction between the *constituent* and the *constituted* levels of analysis is very important. As we said, “political fragmentation” at the *constituent* level does not necessarily imply political fragmentation at the *constituted* one. Moreover, at the constituted level, given the logic of electoral competition and the presence of an established general framework within which political rivals interact, political fragmentation often leads to deadlock.⁴⁶ In contrast, constitution-makers often cannot rely on a viable institutional framework to regulate their future interactions, so for them, the cost of deadlock tends to be higher. Furthermore, as we have argued, if the institutions to be enacted formally block the concentration of power, “fragmentation” in the constituent level will not lead to deadlock.

Let us now test our theoretical argument.

II. Determinants of the Latin American Judicial Mosaic

Latin American countries share a common legal heritage, political culture, civil legal system, and presidential regime but at the same time retain important variations in judicial institutions. For instance, Mexico, Peru, and El Salvador have all created judicial councils, but only Peru also created a constitutional tribunal, while both Mexico and El Salvador transformed the Supreme Court and a chamber of it, respectively, into constitutional adjudication organs. At the same time, El Salvador allows all citizens to file suits before the constitutional organ, while Mexico and Peru provide access only to public authorities, such as a fraction of legislators or political parties.

Similar interesting differences exist in virtually every other judicial institution, from the prosecutorial organ to the appointment and tenure of supreme, lower, administrative, and constitutional judges. These differences are the product of the rather

high number of constitutional changes in adjudicatory institutions in Latin America over the second half of the last century (see Figure 1, upper left cell). Figure 1 also shows an interesting upward trend, and gap, in the proportion of countries with constitutional adjudication (solid line) and those that also have referral open to all citizens (dashed line) (Figure 1, upper right cell). Interestingly, a similar trend and gap exists between the proportion of countries that create judicial councils (solid line) and the proportion of countries in which judicial councils are in addition controlled by judges (dashed line) (Figure 1, lower left cell).⁴⁷ There is also an interesting downward trend to locate the prosecutorial organ inside the executive branch (Figure 1, lower right cell).

[Figure 1 here]

Dependent Variables

From 1945 to 2005, eighteen Latin American countries produced forty three constitutions and twenty nine amendments to adjudicatory institutions, in particular to constitutional adjudication provisions, judicial councils, and prosecutorial organs. Our database includes these seventy two constitution-making processes when opportunities existed to create or change those adjudicatory institutions.⁴⁸ In order to assess whether multilateral constitution-making processes tend to produce independent and powerful adjudicatory institutions, we created the ordinal dependent variable CONSTITUTIONAL ADJUDICATION that takes the value of 0 if the constitution of a country does not include provisions of constitutional adjudication with *erga omnes* effects, 1 if it does, and 2 if access to the constitutional court is open to all and not only to public authorities. We also created the ordinal dependent variable JUDICIAL COUNCIL that takes a value of 0 if a country does not have one, 1 if it does, and 2 if the council is composed by a majority

of judges. Finally, we also created a binary dependent variable that takes a value of 1 for PROSECUTORIAL ORGAN OUTSIDE THE EXECUTIVE and 0 if otherwise.

Independent Variables

To assess the main hypothesis of this paper, we created the independent variable MULTILATERAL that takes a value of 1 if the constitution making process was of this type and 0 if such process was UNILATERAL. Remember that a constitution-making process is multilateral when at least two political groups partake in it. The 1991 Colombian constitutional assembly is paradigmatic in this respect since it grew out of a complex historical context as a consensual attempt to broaden democracy in order to confront violence and political corruption. The Constituent Assembly even included some political and social forces that were traditionally excluded from formal politics such as demobilized guerrilla groups, indigenous communities and religious minorities. The Assembly's composition was pluralistic, with the Democratic Alliance-April 19 Movement, a political party created by former guerilla group M19 after the peace process, being the second largest political group with 25% of the seats and the traditional Liberal and Conservative Parties gaining no more than 60% of the seats together. No single political group, thus, dominated this exemplar multilateral constitution making-process.⁴⁹

The peculiar circumstances of the 1991 Constitution actually made the broadening of mechanisms for political participation, of rights, and of judicial mechanisms for their protection and explicit goal.⁵⁰ In our account, however, the explicit motivation for creating an institutional framework consistent with the principles of constitutionalism is not necessary. As we have argued, the veto constraint works in multilateral settings out of

the self-interest of political groups that try to maximize their power. In 1989 Costa Rica created the powerful Constitutional Chamber *Sala Cuarta* through a constitutional amendment. In the debates there was not much discussion about the type of court the legislators were creating or to the impact of such a court. But it was a multilateral constitution-making process where two main political groups bargaining in the legislature had incentives to create a power-diffusing institution.⁵¹

To operationalize these variables, when new constitutions were created we looked at the partisan composition of the constituent assembly. If the share of seats of the largest party in the assembly was two thirds or more, we coded this as unilateral constituent power, and if its share was less than half, we coded it as multilateral.⁵² If the largest party in the assembly had between half and two thirds of the seats, we looked at the voting rules established for the assembly to assess whether this party could make decisions by itself.⁵³ When there was no information on the share of seats in the assembly, we looked at secondary literature to determine whether a single political group was in control of the constitution-making process.⁵⁴ This was mostly the case of constitutions made under dictatorships, although some dictatorial regimes had constituent assemblies with the official party usually getting much more than two thirds of the vote.⁵⁵ For instance, in the Nicaraguan constitution of 1950 created under the dictatorship of Somoza, the official party got 70% of the seats in the constituent assembly.

For amendments, we looked at the amending rules established in the correspondent constitution and then checked whether a single political party controlled the agencies required by those provisions at the moment of the relevant amendment.⁵⁶ Our variables capture the dynamic nature of constitutionalism, and this can be shown in

the coding of the derived constituent power. For instance, the typology captures that in 1988 Mexico underwent an important change when, for the first time since 1929, the PRI lost the two-thirds majority in the Chamber of Deputies needed to amend the constitution. This change “multilateralized” the derived constituent power in Mexico. Before this election, the PRI was able to unilaterally amend the Mexican constitution (actually, it did so more than 400 times). The converse process, a “unilateralization”, occurred in Argentina under Juan Domingo Perón. In 1946 Perón captured the presidency with 54 percent of the vote, and his party (*Partido Peronista*, named after him in 1947) held two-thirds of the House and all but two seats in the Senate. This, in effect, created a unilateral constituent power, “in the absence of an opposition party whose agreement were necessary to pass the reform, Peron imposed in 1949 a new constitution that allowed the indefinite reelection of the president and strengthened presidential power in several areas”.⁵⁷

The resulting classification of constitution-making processes in Latin America is in Table 1.

[Table 1 here]

Control Variables

Other variables, such as social fragmentation, the liberalization of the economy, and the international promotion of judicial reforms, have also been pointed out as conditions under which politicians tend to create autonomous judicial institutions. Social fragmentation along ethnic, religious, linguistic, or class lines may also create incentives for constitution-makers to empower neutral arbiters to solve disputes among different groups. Some Latin American countries, for instance, have reformed their constitutions in

order to recognize the rights of ethnic and other minorities and have created justice institutions in order to legally channel demands by these groups and conflicts between them.⁵⁸ In addition, a balanced dispersal of economic power across societal groups or a reform coalition of non-state actors that employs societal force to fracture institutional power may constitute two mechanisms that produce fragmentation in the political organs and thus incentives to empower adjudicatory institutions.⁵⁹ We thus include the variable SOCIAL FRAGMENTATION, proxied by the index of ethnic fractionalization, to account for this explanation.⁶⁰

Regarding economic conditions, it has been argued that commitments to protect property rights attract investment and promote economic growth and that creating independent and powerful adjudicatory institutions are good signals for enhancing the credibility of such commitments.⁶¹ Investment can come from national or international sources, and thus politicians may increase judicial independence to enhance their credibility either with the domestic or the international business community. In processes of economic liberalization that open formerly state-controlled sectors and industries to foreign markets, the conditions of the international trade may also constitute incentives to empower judicial institutions. Determining the direction of causality regarding economic conditions is complex, but we should observe higher levels of judicial empowerment associated with higher levels of economic activity and openness to international trade. We thus include two variables: OPEN ECONOMY to capture a country's degree of openness to trade measured as the ratio of exports plus imports to the Gross Domestic Product (GDP), and GDP PER CAPITA.⁶²

International organizations such as the World Bank (WB) and the Interamerican Development Bank (IDB), as well as the United States Agency for International Development (USAID), have invested millions of dollars in promoting judicial reforms worldwide.⁶³ As stated by the World Bank's Legal and Judicial Reform program, "The overall objective of the legal and judicial reform program is to contribute to the improvement of a more impartial, independent, accountable, and effective judiciary that is able to control corruption and improve governance."⁶⁴ There are many different reasons that determine the amount and particular aim of international aid, such as regime type, level of development, and commitment to improve judicial institutions.⁶⁵ However, other things being equal, we should be able to see higher levels of judicial empowerment correlated with higher levels of international funds devoted to this end if the explicit aim of the legal and judicial reforms is met. In order to capture the amount of funds provided by international organizations for legal and judicial reforms, we built the variable EXTERNAL FUNDS that is the sum in millions of dollars that USAID, the WB, and the IDB have invested with that particular aim in the region.⁶⁶

Finally, in the analyses that follow, we also include the variable DIFFUSION, measured as the proportion of countries having the correspondent adjudicatory institution(s) in a given year, to control for the explanation according to which countries adopt institutions based on the number of other countries that are doing the same thing. In order to avoid losing the first observations in the dataset, we do not include a variable measuring the institution(s) that existed in the year previous to the analysis. However, all the analyses are estimated with country-clustered standard errors taking into account that observations are not necessarily independent within countries.

Empirical Analysis

In order to assess whether independent and powerful adjudicatory institutions are created under multilateral constitution-making processes, we ran ordered probit regressions with CONSTITUTIONAL ADJUDICATION and JUDICIAL COUNCIL as dependent variables and a probit regression with PROSECUTORIAL ORGAN OUTSIDE THE EXECUTIVE as the dependent variable. This hypothesis finds empirical support in our sample: MULTILATERAL is statistically significant and positively related to the creation of judicial councils (Table 3, second column) and prosecutorial organs outside the executive (Table 3, third column), and it is positively related and very close to a 90% level of significance to constitutional adjudication (Table 3, first column).⁶⁷ The rest of the variables are not statistically significant, except DIFFUSION for the creation of judicial councils and the institutional location of the prosecutorial organ, which seem to be institutions created also as a part of an international wave, and OPEN ECONOMY for the creation of judicial councils.

[Table 2 here]

For a better interpretation of this last set of results, Table 3 shows the predicted probabilities of adopting independent and powerful adjudicatory institutions as the constitution-making process changes from unilateral to multilateral. For instance, a change from unilateral to multilateral decreases the predicted probability of not creating a judicial council in .15 (-.29, -.02) (confidence intervals in parenthesis) and that of having the prosecutorial organ within the executive branch in .23 (-.47, .01). Table 3 also shows that the predicted probability of opening access to an existing system of constitutional

adjudication increases 23 percentage points (-.03, .48) when the constituent power becomes multilateral.

[Table 3 here]

The distinction unilateral/multilateral constituent power is not coextensive with the distinction dictatorship/democracy, which is often used as an independent variable in studies on constitution-making processes.⁶⁸ The correlation between democracy⁶⁹ and multilateral in our sample is 0.51. For instance, as we have noted, since 1988 the Mexican derived constituent power has been multilateral; however, Mexico was not considered a democracy until the year 2000, when the PRI lost the executive. We find the opposite case in democratic Venezuela where in 1998 Hugo Chávez won the presidency but not a majority in congress. That fact convinced him to call a legally dubious but politically effective referendum where the proposal for a constituent assembly was accepted. Elections were held to elect the members of the assembly and the candidates of government parties, grouped under the so-called *Polo Patriótico*, obtained almost all the seats effectively creating a unilateral constitution-making scenario. With the domination of the constituent assembly, the government assumed absolute power, intervening both in the legislative and judicial powers.⁷⁰ We have then a unilateral constitution-making process in a democracy. Notice that while not all unilateral constitution-making processes take place in dictatorships, all constitution-making processes done by a dictatorship are unilateral.

Finally, a systematic analysis of whether international funds lead to the empowerment of adjudicatory institutions is not possible, because data on EXTERNAL FUNDS is available only after 1990. A glance at what we have shows that Colombia and

El Salvador are the countries that have received more money, on average, since 1990, while Costa Rica and Mexico are in the other extreme. At the same time, the country that has made more empowerment changes since 1990 is Mexico, and El Salvador has only made two since then. Correlations between the average external funds and the sum of changes corroborate the lack of a relationship. Legal and judicial reforms pursue changes in access to justice and efficiency in its administration, as well as judicial independence, so perhaps their influence is less notorious in constitutional than in statutory or regulatory changes⁷¹, but a systematic analysis on this issue may uncover a different pattern.

III.- Conclusion

We explored when and why can we expect constitution-making and amending processes to produce an institutional framework that formally serves constitutionalism. We presented a simple yet general typology of constitution-making processes based on the composition of the constituent body. We argued that multilateral constitution-making processes tend to establish institutional frameworks consistent with constitutionalism and we tested this hypothesis by focusing on the enactment of judicial institutions. Using an original database that covers 18 Latin American countries from 1945 to 2005 we showed that independent and powerful judicial institutions are more likely to be created under multilateral than under unilateral constitution-making processes. For instance, in our sample a change from unilateral to multilateral constitution-making process makes it eleven percentage points (-.29, -.02) more likely that a country will create a judicial council, and four percentage points (.00, .10) more likely that a judicial council be governed by a majority of judges.

Our results challenge a consensus that in Latin America constitutions are *de jure* in accordance with the principles of constitutionalism while *de facto* these principles are systematically violated. The widely held opinion that in Latin America the level of judicial independence *de jure* is a lot higher than it is *de facto* is based on an oversimplified look at legal texts; it is actually the case that Latin American constitutions have often failed to enact independent judicial institutions. True, almost all Latin American constitutions have a provision declaring the independence of the judiciary, but our results point to the necessity of studying more systematically specific *de jure* judicial institutions and to reconsider their relation to political reality. We hope that our systematic empirical analysis on the political origins of judicial institutions in Latin America will call the attention to these understudied but increasingly important institutions within the comparative politics agenda.

We argued that our typology presents several advantages over other commonly independent variables and we showed that it has explanatory power. The framework seriously considers the distinction between ordinary and constitutional laws, it captures the interrelation between law and politics, and the dynamism inherent in constitution-making processes. We argued that the effect of uncertainty in constitution-making processes depends on whether the constituent power is multilateral or unilateral, and showed that in unilateral scenarios where there is certainty or near certainty of power loss the logic of the insurance model and ours are complementary. We believe that the typology can be fruitfully used in further research on the causes and consequences of constitutional design.

One policy implication for international donors and national actors that seek to strengthen judicial institutions and the rule of law is that investments in judicial reform will tend to have higher returns when the constituent power is multilateral, since independent and powerful institutions are more likely to be created constitutionally when this is the case. Adjudicatory institutions may be also created or reformed via regular statutes, but these institutions would tend to be more unstable, since they are susceptible of being changed by simple majorities.

Tables and Figures

Figure 1. Adjudicatory Institutions in Latin America

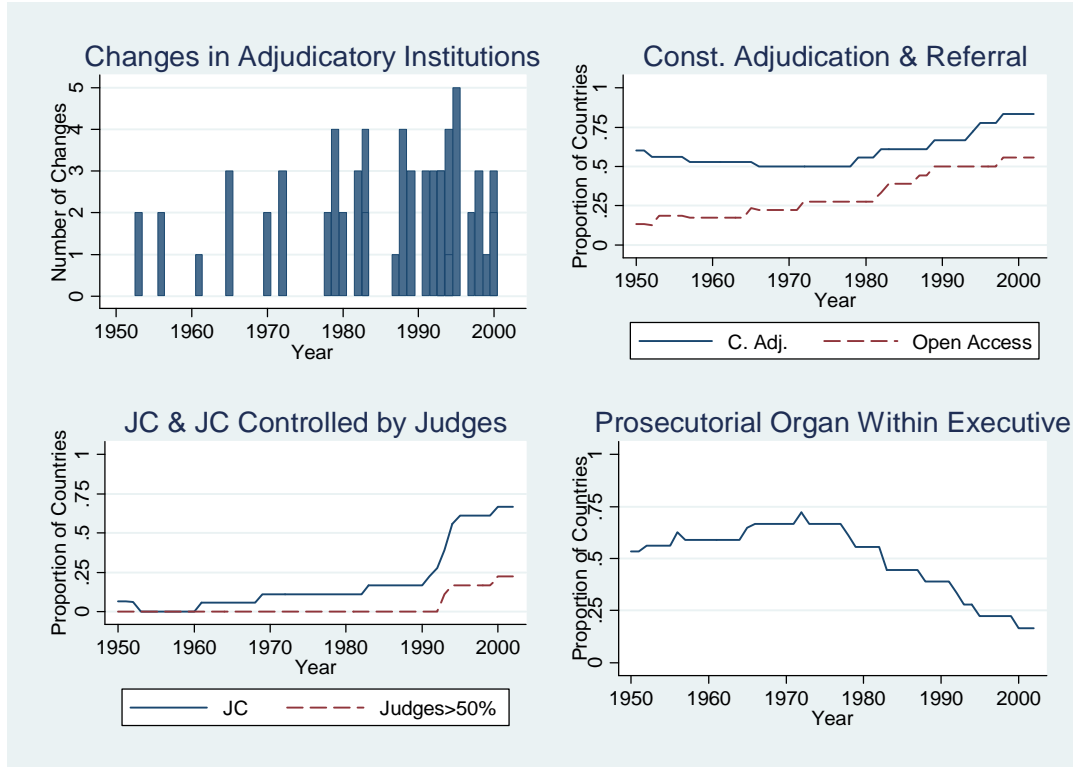


Table 1. Constitution-Making Processes in Latin America, 1945-2002

Unilateral	Multilateral
Argentina 1949	Argentina 1957*, 1994
Bolivia 1947, 1967	Bolivia 1995*, 2002*
Brazil 1967	Brazil 1947, 1988, 1993*, 1998*, 2004*
Chile 1980	Chile 1970*, 1997*, 2005*
Costa Rica 1949	Colombia 1957*, 1968*, 1979*, 1991,
Dominican Republic 1966	1997*, 2001*
Ecuador 1946, 1967	Costa Rica 1989*, 1993*, 2003*
El Salvador 1950, 1963	Dominican Republic 1994*
Guatemala 1956	Ecuador 1945, 1978, 1984*, 1993*, 1996*
Honduras 1957, 1965	1998
Nicaragua 1948, 1950, 1974, 1987	El Salvador 1983, 1991*
Panama 1946, 1972, 1983*	Guatemala 1945, 1965, 1985
Paraguay 1967, 1992	Honduras 1982, 2000*, 2003*
Peru 1993, 1995*	Mexico 1994*, 1999*
Venezuela 1947, 1953, 1999	Nicaragua 1995*, 2000*
	Peru 1979
	Uruguay 1952, 1967
	Venezuela 1961

* Demotes amendments to constitutions. These derived constitution-making processes include only amendments to adjudicatory institutions

Table 2. Ordered Probit Estimates of Determinants of Constitutional Adjudication and Judicial Councils, and Probit Estimates of Prosecutorial Organ Outside the Executive

	<u>Dep. Variable</u>	<u>Dep. Variable</u>	<u>Dep. Variable</u>
	CONSTITUTIONAL ADJUDICATION	JUDICIAL COUNCIL	P.O. OUTSIDE THE EXECUTIVE
MULTILATERAL	0.664 (0.449)	0.450** (0.235)	0.694* (0.425)
SOCIAL FRAGMENTATION	-0.575 (1.316)	-0.007 (1.087)	-1.124 (1.127)
OPEN ECONOMY	0.0062 (0.005)	0.004 (0.005)	0.008* (0.004)
GDP PER CAPITA	0.00007 (0.0001)	0.00007 (0.0001)	0.0002 0.0001
DIFUSSION	0.266 (1.299)	3.817*** (0.742)	2.426* (1.323)
Number of observations	72	72	72
Loglikelihood	-71.65	-42.94	-34.51
χ^2	0.104	0.000	0.052
Pseudo R ²	0.075	0.333	0.257
McKelvey and Zavoina's R ²	0.180	0.558	0.487

Numbers in parenthesis are clustered standard errors (cluster=country). Levels of significance are denoted as *p≤.10, **p≤.05, ***p≤.01

Table 3. Predicted Probabilities and First Differences for Adjudicatory Institutions under Unilateral and Multilateral Constitution-Making Processes*

	UNILATERAL	MULTILATERAL	DIFFERENCE
Constitutional Adjudication			
No	.35 (.17, .56)	.16 (.04, .36)	-.19 (-.40, .03)
Yes	.40 (.23, .56)	.36 (.20, .51)	-.04 (-.18, .03)
Yes and Open	.25 (.11, .42)	.48 (.26, .69)	.23 (-.03, .48)
Judicial Council			
No	.78 (.64, .89)	.63 (.45, .80)	-.15 (-.29, -.02)
Yes	.19 (.07, .33)	.30 (.12, .48)	.11 (.01, .22)
Yes and Judges in the Majority	.03 (.01, .06)	.07 (.02, .14)	.04 (.00, .10)
Prosecutorial Organ			
Within Executive	.45 (.25, .68)	.22 (.09, .42)	-.23 (-.47, .01)
Outside Executive	.54 (.31, .75)	.77 (.58, .91)	.23 (-.01, .47)

Probabilities calculated with CLARIFY: Software for interpreting and presenting statistical results, by Michael Tomz, Jason Wittenberg, and Gary King, version 2.1.

Available at: <http://gking.harvard.edu>

* All other variables set at their mean value. 90% confidence intervals in parenthesis.

¹ R. C. Van Caenegem, *An historical introduction to western constitutional law* (New York: Cambridge University Press, 1995), pp. 190-3.

² Stephen Holmes, "Constitutionalism," in Seymour M. Lipset, ed., *The encyclopedia of democracy* (Washington, DC: Congressional Quarterly Press, 1995).

³ *Ibid.*, p. 299

⁴ Aristotle, *Politics* (Cambridge, MA: Loeb Classical Library), 1293a 33-34.

⁵ Alexander Hamilton, James Madison, and John J. Jay, J., *The federalist papers* (New York: New American Library, 1961).

⁶ For instance, arguably, the central concern of ancient constitutionalism was political stability and strength, while modern constitutionalism places a larger emphasis on the protection of the individual vis-à-vis the government. M. J. C. Vile, *Constitutionalism and the separation of powers* (Oxford: Clarendon Press, 1967).

⁷ As is in oligarchies where the main political offices are in the hands of the few rich, or in democracies where they belong to the many poor. Aristotle, 1301a 31-37.

⁸ Hamilton et. al. p. 331. Ancient constitutionalism attained this aim by "mixing" institutions of different constitutions. "For example, in regard to the administration of justice, in oligarchies they institute a fine for the rich if they do not serve on juries but no pay for the poor for serving, while in democracies they assign pay for the poor but no fine for the rich, but a common and intermediate principle is to have both payment and fine, and therefore this is *a mark of a constitutional government, since it is a mixture of elements from both oligarchy and democracy*". Aristotle, 1294a 37-1294b 3

⁹ For the debate surrounding this issue on the American constitution-making process, see Jack N. Rakove, *Original meanings. Politics and ideas in the making of the constitution* (New York: Vintage Books, 1997).

¹⁰ Montesquieu, *The spirit of the laws* (London: University of California Press, 1977)

¹¹ Hamilton et. al., Federalist 78

¹² John Ferejohn and Pasquale Pasquino, "Constitutional adjudication: Lessons from Europe," *Texas Law Review*, 82 (2004), 15.

¹³ Mark Thatcher and Alec Stone Sweet, "Theory and practice of delegation to non-majoritarian institutions," *West European Politics*, 25 (January 2002), 9

¹⁴ Alec Stone Sweet, "Constitutional courts and parliamentary democracy," *West European Politics*, 25 (January 2002), 77-100.

¹⁵ Patricio Navia and Julio Ríos-Figueroa, "The constitutional adjudication mosaic of Latin America," *Comparative Political Studies*, 38 (February 2005)

¹⁶ Lynn Hammergren, "Do judicial councils further judicial reform? Lessons from Latin America," *Carnegie Endowment for International Peace*, Working Paper 28, Rule of Law Series, (2002), p. 2

¹⁷ Carlo Guarnieri, "Judicial independence in Latin Countries of Western Europe," in Peter H. Russell and David M. O'Brien, eds., *Judicial independence in the age of democracy. Critical perspectives from around the world* (Charlottesville: University Press of Virginia, 2001), p. 118.

¹⁸ Geraldine Szott Moohr, "Prosecutorial power in an adversarial system: Lessons from current white collar cases and the inquisitorial model," *Buffalo Criminal Law Review*, 8 (2004), 165-220.

¹⁹ Carlo Guarnieri and Patricia Pederzoli, *Los jueces y la política. Poder judicial y democracia* (Madrid: Taurus, 1999), p. 95.

²⁰ As the scandals on the firing of the U.S. Attorneys during April 2007 show, no country is immune to this potential flaw of institutional design.

²¹ John Ferejohn, “The Politics of Imperfection: the Amendment of Constitutions”, *Law & Social Inquiry*, 22 (2006), 501-530

²² Jon Elster, *Ulysses Unbound* (New York: Cambridge University Press, 2000)

²³ Barbara Geddes, “Initiation of new democratic institutions in Eastern Europe and Latin America,” in Arend Lijphart and Carlos Waisman, eds., *Institutional design in new democracies* (Boulder, CO: Westview Press, 1996),

²⁴ Gabriel L. Negretto, “Choosing how to choose presidents: Parties, military rulers, and presidential elections in Latin America,” *Journal of Politics*, 68, (Spring 2006), 421-433.

²⁵ Tom Ginsburg, *Judicial Review in New Democracies. Constitutional Courts in Asian Cases* (New York: Cambridge University Press, 2003)

²⁶ Jack Knight, “Institutionalizing constitutions interpretation,” in John Ferejohn, Jack Rakove and Jonathan Riley, eds., *Constitutional culture and democratic rule*, (New York: Cambridge University Press, 2001)

²⁷ We discuss the operationalization of these accounts later in this section.

²⁸ A political group is a cohesive and coordinated network of individuals with public political identity, such as a party or a military junta.

²⁹ Robert Barros, *Constitutionalism and dictatorship. Pinochet, the junta, and the 1980 constitution* (New York: Cambridge University Press, 2002)

³⁰ In contrast, the members of a multilateral constituent power lack those coordinating mechanisms. If the constitution-making process is successful, the constitution becomes a coordination device, see Russell Hardin, *Liberalism, constitutionalism, and democracy* (New York: Oxford University Press, 1998)

³¹ For instance, three quarters of Congress plus the majority of state legislatures

³² There are few constitutions that contain the procedure for making a new constitution, but even in these cases the procedures are mostly irrelevant. Making a new constitution generally implies that the content of the previous one was in an important way flawed.

³³ For instance, if the constituent power is formed by the representatives of several states, those from more populated states will prefer proportional representation in the legislative.

³⁴ For instance, socio-economic equality and the defense of private ownership are two values that may be prioritized differently by different groups. Note also that different groups can disagree on which institutional setting will realize a common desired aim.

³⁵ Ginsburg, op. cit. Jodi Finkel, “Judicial reform as insurance policy: Mexico in the 1990s” *Latin American Politics and Society*, 46 (Winter 2004), 87-113. Adam Przeworski, *Democracy and the Market* (New York: Cambridge University Press, 1991) 36-38

³⁶ Ginsburg, p. 25

³⁷ Ibid., p. 24 emphasis added

³⁸ Ibid., p. 24

³⁹ See Finkel, op. cit. Also Ran Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press 2004)

⁴⁰ Empirical accounts based on the insurance model need to be especially careful of not attributing in an *ad hoc* manner uncertainty to politicians after a successful judicial reform. For instance, Jodi Finkel has argued that the Mexican 1994 constitutional reform that empowered the judiciary was an insurance policy for the PRI that foreseeing losing power wanted to tie the hands of the future winners, Finkel, p. 87-113. However, there are reasons to be skeptical of such accounts of long-term strategic behavior, “according to some privileged witnesses of the reform process, in 1994, no one could have foreseen the PRI electoral defeat that occurred in 1997 or 2000”, Silvia Inclán, *Judicial Reform and Democratization: Mexico in the 1990s*. Ph.D. Dissertation in Political Science, Boston University (2004), p. 84.

⁴¹ We thank an anonymous reviewer for pointing us the importance of this question and the relation between uncertainty and the type of constitution-makers.

⁴² Elster, *Ulysses Unbound*

⁴³ William Landes and Robert Posner, “The independent judiciary in an interest-group perspective,” *Journal of Law and Economics*, 18 (1975), 875-899.

⁴⁴ Mark J. Ramseyer and Eric B. Rasmusen, *Measuring judicial independence. The political economy of judging in Japan* (Chicago: Chicago University Press, 2003)

⁴⁵ This is also the case of the accounts based on principal-agent models.

⁴⁶ See Gary Cox and Matthew McCubbins, “Institutional determinants of economic policy outcomes,” In Stephen Haggard and Matthew McCubbins, eds., *Presidents, parliaments, and policy* (New York: Cambridge University Press, 2001)

⁴⁷ Control over the Judicial Council has been a sensitive political issue in Latin America. In countries where the Supreme Court has the administrative control of the judiciary, it

has either blocked the creation of the council that would take away this control (i.e., Chile, Argentina), or it has fought to control a majority of seats in the council (i.e., Mexico). In countries, where control over the judiciary's structure has been in the hands of the elected branches of government, the creation of a council has been a mere formality since it is controlled by politicians (i.e., Bolivia). Still, in other countries such as Peru in 1969, the Judicial Council was created by the military government in order to manage the appointments of judges. See Hammergen, "Do judicial councils further judicial reform?" pp. 3-4.

⁴⁸ The list of observations is in Table 1 below. We are aware of three other constitutions adopted during the timeframe of this paper that, unfortunately, we have not yet been able to find in their original version. These constitutions are: Dominican Republic 1961, 1963; and Brazil 1969. Of course, the number of amendments to other constitutional provisions than those considered in this paper is much larger.

⁴⁹ Rodrigo Uprimny, "The Enforcement of Social Rights by the Colombian Constitutional Court: Cases and Debates," in Roberto Gargarella, Pilar Domingo, and Theunis Roux, eds., *Courts and Social Transformation in New Democracies. An Institutional Voice for the Poor?* (London, GB: Ashgate, 2006)

⁵⁰ Ibid., p. 128.

⁵¹ We thank an anonymous reviewer for asking us to clarify this point.

⁵² No constitutional assembly included in this analysis required a threshold higher than two thirds to make decisions. There were two cases in which the largest party in the legislature had less than 50% of seats, but a coalition (as defined in Jose A. Cheibub, Adam Przeworski, and Sebastian Saiegh, "Government coalitions under presidentialism

and parliamentarism,” *British Journal of Political Science*, 34 (2004), p.565-587) had more than that (Brazil 1947 and 1988). We coded these cases as multilateral. Data from share of seats in constituent assemblies comes from Dieter Nohlen, ed., *Elections in the Americas. A data handbook*, vols. 1-2, (New York: Oxford University Press, 2005). The *Political Database of the Americas* (PDBA). (n.d.). Last accessed January 28th, 2008, from, <http://pdba.georgetown.edu/>, and *Constitutiones Hispanoamericanas*. (n.d.). Last accessed January 28th, 2008, from <http://www.cervantesvirtual.com/portal/>.

⁵³ Voting in constitutional assemblies is usually by majority, but there are exceptions as is the case in Uruguay where the required vote is two thirds.

⁵⁴ Dominican Republic: Howard J. Wiarda, “Contemporary constitutions and constitutionalism in the Dominican Republic: The basic law within the political process,” *Law & Society Review*, 2 (1968); Leiv Marsteintredet, “Political institutions and their effect on democracy in the Dominican Republic,” PhD Dissertation, (University of Bergen, 2004). Guatemala: Piero Gleijeses, *Shattered Hope. The Guatemalan Revolution and the U.S., 1944-1954*, (Princeton, N.J: Princeton University Press, 1992). Honduras: Victor Bulmer-Thomas, “Honduras since 1930,” in Leslie Bethell, ed., *The Cambridge history of Latin America*, (New York: Cambridge University Press, 1990), vol. VII. Nicaragua: Victor Bulmer-Thomas, “Nicaragua since 1930,” in Bethell, *ibid*. Panama: Michael Conniff, “Panama since 1930,” in Bethell *ibid*. Argentina: Gabriel Negretto, *Constitution-making and institutional design. Distributing power between government and opposition in three Argentine constitutions (1853-60, 1949, 1994)*. PhD Dissertation Columbia University (2000). Brazil: Gary M. Reich, “The 1988 constitution a decade later: Ugly compromises reconsidered,” *Journal of Interamerican Studies and World*

Affairs, 40 (Winter 1998), 5-24.; José Afonso Da Silva, *Constituciones iberoamericanas. Brasil* (México: UNAM-Instituto de Investigaciones Jurídicas, 2006). Chile: Claudia Heiss and Patricio Navia, "Protected democracy and military autonomy. Trade-offs in Chile's transition to democracy," ICSO-Universidad Diego Portales. Working Paper, no. 9, vol. 2., (2006). Colombia: Luis Córdoba Mariño, *Apuntes de historia constitucional y política de Colombia* (Bogotá: Fundación Universidad de Bogotá, 1998); Nestos Osuna Patiño, *Constituciones Iberoamericanas. Colombia*, (México: UNAM-Instituto de Investigaciones Jurídicas, 2006). Ecuador: Enrique Ayala Mora, "Ecuador since 1930," in Leslie Bethell, ed., *The Cambridge history of Latin America* (New York: Cambridge University Press, 1990), v. VIII. Paraguay: Instituto Internacional de Gobernabilidad (IIG). "Diagnostico institucional de la Republica de Paraguay," (2002). Peru: María McFarland Sanchez-Moreno, "When a "constitution" is a constitution. Focus on Peru," *Journal of International Law and Politics*, NYU, 33 (2001). Uruguay: Héctor Gross Espiel, & Eduardo Esteva, *Constituciones Iberoamericanas. Uruguay*, (Mexico: UNAM-Instituto de Investigaciones Juridicas, 2005). Venezuela: Miriam Kornblith, "The politics of constitution-making: Constitutions and democracy in Venezuela," *Journal of Latin American Studies*, 23 (1991). 61-89.

⁵⁵ If no constituent assembly was created, we corroborated that the regime was classified as a dictatorship by Adam Przeworski, Michael Alvarez, Jose Cheibub, and Fernando Limongi, *Democracy and development* (New York: Cambridge University Press, 2000)., Scott Mainwaring, Daniel Brinks, and Aníbal Pérez-Liñán, "Classifying political regimes in Latin America, 1945-1999," *Studies in Comparative International Development*, 36

(2001), 37-65., and Peter Smith, *Democracy in Latin America. Political change in comparative perspective* (New York: Oxford University Press, 2005).

⁵⁶ All the Latin American constitutions considered here are “rigid” in the sense that their amendment procedures require at least legislative supermajorities.

⁵⁷ Negretto, *Constitution-making and institutional design*, pp. 165-6.

⁵⁸ See Rachel Sieder, “The judiciary and indigenous rights in Guatemala,” *International Journal of Constitutional Law, ICON*, 5 (2007), 211-217.

⁵⁹ Rebecca Bill Chavez, *The rule of law in nascent democracies: Judicial politics in Argentina* (Stanford, CA: Stanford University Press, 2004) pp. 17-23

⁶⁰ The variable measures the probability that two randomly selected persons from a given country will *not* belong to the same ethnic group, so values close to 0 indicate homogeneity, and values closer to 1 indicate heterogeneity. Alberto Alesina, Arnaud Devleeschauwer, William Easterly Sergio Kurlat and Romain Wacziarg, “Fractionalization”, *Journal of Economic Growth*, 8 (2003), pp. 155-194.

⁶¹ Douglas North and Barry Weingast, North, “Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth Century England” *Journal of Economic History*, 49 (1989), 803–832.

⁶² OPEN ECONOMY is taken from Allan Heston, Robert Summers and Betina Aten, *Penn World Table version 6.2*, Center for International Comparisons of Production, Income and Prices at the University of Pennsylvania, (2006). Values for this variable are available for 1950 to 2004. Based on these series and the level of GDP per capita we imputed values for years between 1945 and 1950. GDP per capita is taken from Angus Maddison, *The world economy. Historical statistics*, (Paris: OECD, Development Center

Studies, 2003) pp. 145-49. For both variables we take the values lagged one year for the analysis.

⁶³ See Pilar Domingo and Rachel Sieder, eds., *Rule of law in Latin America: The international promotion of judicial reform*, (London: University of London, 2001).

⁶⁴ World Bank, *Initiatives in legal and judicial reform*, (Washington, DC: The World Bank, 2004).

⁶⁵ Gretchen Helmke and Elena Mclean, “Inducing independence: A strategic model of lending and legal reform,” (2006) argue that under some conditions local NGOs provide good information to international lenders about the credibility of the national government’s commitment to improve judicial institutions.

⁶⁶ Data from USAID comes from Steven E. Finkel, Aníbal Pérez-Liñán and Mitchell Selligson, *Final report: Effects of U.S. foreign assistance on democracy building. Results of a cross-national quantitative study*. (USAID, Vanderbilt U., U. of Pittsburgh, 2006).

Data from the World Bank was constructed based on the Database of Projects and Operations in the Public Administration, Law, and Justice Sector (available at <http://www.worldbank.org/> under Projects and Operations). Data from the IDB is based on Christina Biebesheimer, “Justice Reform in Latin America and the Caribbean: The IDB perspective,” in Domingo and R. Sieder, eds. Data for EXTERNAL FUNDS is available only after 1990. For this reason, we are unable to systematically explore this hypothesis.

⁶⁷ When DIFFUSION is not included in the regression of Table 3, Column 1, MULTILATERAL becomes significant at the $p \leq .10$ level.

⁶⁸ This is consistent with the fact that not all constitutional governments are democracies nor all democracies have been constitutional.

⁶⁹ Przeworski, et al, *Democracy and development*,

⁷⁰ Nohlen, v. 2, 543-4

⁷¹ See Domingo & Sieder, eds.