1

Ruling against the Rulers

1.1 Introduction

Latin America's courts are in crisis. Inadequate material resources and infrastructure, outdated procedures, case backlog, corruption, politicization, and cronyism are among the many problems that judiciaries face. Although such difficulties are hardly new to the region, over the last decade the image of the judiciary has grown decidedly worse. According to a recent survey published in *The Economist*, the percentage of Latin American citizens that has confidence in the judiciary has fallen from approximately 35 percent in 1996 to around 20 percent in 2003. In individual countries, the judiciary's image is often far worse. Despite the ineptitude and abuse of power waged by political elites under dictatorship and democracy alike, judges today are less popular than presidents, the military, or the police (ibid.).

Judicial independence has proved particularly elusive. In 1990, Argentina's former President Carlos Menem packed the Supreme Court, proclaiming, "Why should I be the only Argentine President not to have my own Supreme Court?" A few years later, former Peruvian President Alberto Fujimori paralyzed his country's Constitutional Court by impeaching three sitting justices. In Venezuela, President Hugo Chávez dissolved the Supreme Court en masse in 1997, suspended approximately 300 lower level judges, and appointed 101 new judges to the bench. In Ecuador in the same year, the new government carried out a similar purge. In 2003, presidents in Paraguay and Argentina, respectively, launched impeachment proceedings against sitting justices, causing several to tender their resignations.

This was not supposed to have occurred. The wave of democratic transitions that swept the region in the 1980s was initially assumed to be a harbinger of judicial independence and the rule of law. Barring a reversion

to authoritarian rule, the early, optimistic view was that young democracies would consolidate and generate a host of auxiliary institutions, including independent judiciaries (O'Donnell and Schmitter 1986; Gunther, Diamandorous, and Puhle 1995). Under stable democratic governance, judges with the "right" kinds of values would be appointed and, once appointed, would serve as stalwart constitutional guardians (Alfonsín 1993). Over time, the growth of judicial power and independence would help to establish a rule of law, simultaneously protecting human and civil rights and encouraging economic investment and growth.

When such a virtuous cycle did not materialize, scholars and policy makers began to conclude that even if democracy was a necessary condition for judicial independence, it was far from sufficient. Hoping to increase judicial legitimacy and strengthen the rule of law, the World Bank launched a series of reform projects throughout the region during the 1990s. Most of these aimed at improving the functioning of the judiciary on the grounds that investors' confidence required an efficient and impartial judiciary (Dakolias 1996). For others, however, the flaws of Latin America's judiciaries defied such a solution. Persistent cultural attitudes, rooted in the civil law legal tradition, meant that, regardless of resources, Latin American judges lacked the values necessary for actively guarding the constitution against popularly elected leaders (Rosenn 1987). Among political scientists, the persistent weakness of the judiciary was viewed as an institutional artifact of hyper-presidentialism, or what Guillermo O'Donnell has termed "delegative democracy" (O'Donnell 1992; Larkins 1998; see also Nino 1992). An inherent feature of this peculiar type of democracy was the inability of other institutional actors to serve as an effective check on presidential power.

Yet even despite such persistent shortcomings, Latin America's courts have become vitally important political institutions. Throughout the region, judges often decide the most important and controversial issues of the day. In the area of human rights, for example, Argentine and Bolivian judges set new standards for transitional justice by trying and convicting top military leaders accused of committing vast human rights abuses (Kritz 1995; but also see Roniger and Sznajder 1999). In social issues, courts have played a key role in adjudicating the rights of indigenous groups, women, and homosexuals. In the economic realm, judges have ruled on policies ranging from privatization to state employment to the scope of emergency powers during economic crises. Judges have also played a

major role in deciding presidents' fates. In Peru and Argentina, judges were called on to rule on the sitting president's eligibility for running for office. In Brazil, Venezuela, Argentina, and Bolivia, judges have been asked to handle corruption cases involving sitting or former presidents. In Brazil and Venezuela, the court played a key role in the impeachment proceedings against incumbent presidents.

Not surprisingly, judges who ruled in favor of the government only fueled further the impression that Latin America's courts lack independence. In Argentina, for example, pundits and scholars alike chronicled a series of almost comically partial decisions handed down by the Supreme Court during former President Menem's first term (Baglini and D'Ambrosio 1993; Verbitsky 1993; Larkins 1998). In the early 1990s, the Argentine Supreme Court allowed the president to freeze private savings accounts, privatize state-owned companies by decree, and trample the independence of other governmental institutions. In one particularly egregious example, known as the Banco Patagónico case (1993), justices appointed by Menem "lost" a decision that was unfavorable to the government. Shortly thereafter, a new opinion emerged that was more in line with what the government wanted (see Baglini and D'Ambrosio 1993; Larkins 1998: 430). Likewise, in Venezuela during the first years of Chávez's presidency, the new Supreme Court regularly caved to the president. In the case of *Elias Santana* (2001), involving a journalist's demand for equal time in Chávez's weekly national radio address, the Court backed the president and denied the claim. Commenting on the Court's rejection of the right of reply, a former justice argued that the Court's decision was "aberrant and erases the word democracy in this country."[1]

Yet even casual observation suggests that judicial behavior within Latin America has been far more varied. From Peru to Guatemala, where judges refused to allow sitting presidents to run for a third term in office, to Venezuela, where Chávez's own judges refused to back his attempts to punish military officers charged with attempting a coup against his government, to Argentina, where judges struck down key provisions of interim president Eduardo Duhalde's economic emergency plans, the fact is that judges do decide cases against the government, and sometimes they decide against the very government by which they were appointed. While it is tempting

[1] *Miami Herald*, July 14, 2002.

to dismiss such cases as mere anomalies, the importance and boldness of these decisions demand closer examination.

More generally, the phenomenon of "ruling against the rulers" calls into question several core assumptions about judicial behavior and institutions. First, the fact that Latin American judges are often willing to decide controversial cases casts doubt on the longstanding supposition that judges who lack independence and legitimacy automatically avoid the political fray. Although Latin America's judges have invoked variants of the political questions doctrine, particularly during periods of dictatorship, other evidence suggests that they sometimes go to great lengths to hear politically contentious cases. In Argentina, for example, the use of the writ of *recurso extraordinario*, by which most cases reach the Supreme Court on appeal, has expanded substantially over the last few decades. In 1990 the Court further paved the way for hearing highly political cases by establishing the doctrine of per saltum to hear cases involving the privatization of the state-owned airline. This doctrine, based on U.S. jurisprudence, allows the Supreme Court to seize important cases from the first instance courts, thus "jumping over" second-instance courts all together. Although the Court has used the doctrine only occasionally, even these bursts of boldness rest uneasily with standard notions about how judges under constraints should act.

Second, that even the most compromised judges are willing to rule against the government raises the question of whether political insulation is indeed a necessary condition for checks and balances to emerge. Since Alexander Hamilton's famous defense of judicial independence in *Federalist 78*, scholars have assumed that only politically insulated judges would be willing to "hazard the displeasure of those in power." (1961 [1787]: 471). Variation in judicial behavior in deeply insecure institutional environments, however, invites a reassessment of this fundamental connection.

A brief comparison with one of the world's most independent and powerful courts, the U.S. Supreme Court, helps to underscore further the puzzles raised by Latin American courts. Notwithstanding such well-known disasters as *Dred Scott*, the U.S. Supreme Court has avoided deciding a litany of important issues throughout its history (e.g., see McCloskey [1960] 1994). Even in the area of school desegregation, the Court's famous ruling in the case of *Brown v. Board of Education* (1953) came only after the presidential election had taken place. To paraphrase one of the justices, the Court worried that deciding the matter sooner would have turned the issue into

campaign fodder, thereby creating an impossible position for the Court, whose decision would be seen as favoring one political party over the other.[2]

In terms of the U.S. Supreme Court's track record on decisions, a solid body of empirical research shows that the federal government routinely comes out ahead, winning approximately two-thirds of its cases (Epstein et al. 1994). The executive branch, represented by the Solicitor General, does especially well before the highest court. In addition to winning the bulk of its cases (Yates 2002), the Solicitor General exercises an enormous amount of influence on justices' opinions via amicus curiae briefs. Even after controlling for the facts of the case, changes in court membership, and the court's tendency to reverse, scholars have found that the position adopted by the Solicitor General has significant effects on the direction of the Court's opinion (Segal and Spaeth 2002). While such patterns raise red flags about the judiciary's ability to act as a counter-majoritarian institution (e.g., Dahl 1957; Rosenberg 1992), the point of interest here is that if even ostensibly independent judges have a hard time ruling against the current government, why would Latin America's judges ever be willing to do so?

Ruling against the rulers also raises concerns about the proper role of judges in a democratic system. On the one hand, the complaint of scholars in the region has long been that courts too often fail to act as an effective check when leaders violate the rights of minorities. Particularly in light of judges' purported failure to protect human rights under military rule, any willingness to challenge the government, even if only very rarely, should be welcome news. This view would seem to be further shored up by the evidence that, even under democracy, vertical accountability in Latin America is notoriously weak (O'Donnell 1998; Crisp, Moreno, and Shugart 2003; but also see Stokes 2001). In such environments, it would seem that the costs of judges not exercising judicial review are especially high.

Of course, not all proponents of democracy are as enthusiastic about embracing judicial activism. Starting with Thomas Jefferson, skeptics of judicial review have long argued that it is improper in a democracy to allow unelected judges to strike down laws passed by elected legislators. A secondary but related argument is that an activist judiciary poses the potential to generate legal instability. Although such an argument may strike

[2] "*The Supreme Court and 'Brown v. Board of Ed': The Deliberations behind the Landmark 1954 Ruling.*" National Public Radio, December 2003.

scholars of Latin America as somewhat ironic, North American critics have long charged that because judges are likely to have different ideological views, allowing them to review ordinary legislation on the basis of their own preferences creates problems of inconsistency and instability.[3] Moreover, judicial activism may serve to preclude democratic deliberation by foreclosing important debate between citizens and their representatives (Sunstein 1996b). By these arguments, anti-government decisions handed down by Latin America's courts not only flout our understanding of how dependent judges react, but may also be harmful to new democracies.

In the Latin American context such concerns have been echoed by justices seeking to explain their reluctance to strike down the government.[4] Likewise, regional experts have warned that too much insulation endangers accountability (Fiss 1993; Domingo 1999; Dakolias 1996). Lisa Hilbink (1999) invokes Judith Shklar's critique of legalism to argue against maximizing the independence of Chile's ultraconservative judges. While this book does not aim to settle this controversy, its findings raise new questions about the links between judicial dependence and juridical instability, on the one hand, and the connection between judges' values and their decisions, on the other. Specifically, this study explores the idea that the very absence of institutional security may, under certain circumstances, inadvertently lead judges to shore up respect for basic rights and procedures normally associated with the rule of law. As a result, this analysis highlights an important, if heretofore neglected, tension between rule of law arguments that emphasize stability versus those that emphasize equality and due process.

Taken together, the main point of departure for the book lies in the observation that many of the features normally associated with fragile, dependent courts – insecure tenure, political pressure, and support of the government – may not necessarily co-vary. In established democracies, the incongruence between institutional protections and judicial behavior has generated a long line of research focused around the question of why ostensibly independent judges rarely rule against the government. Turning the focus to Latin America, however, raises a fresh set of puzzles about why, when, and in which types of cases otherwise dependent judges rule against the government. As the following section describes, standard models of judicial behavior derived from the behavioral and institutional literature do not provide sufficient answers. Selection-based theories, which highlight

[3] For a formal theoretical approach to this question, see Rogers and Vanberg 2003.
[4] Interview with Justice Moliné O'Connor, Buenos Aires, May 1998.

the government's ability to appoint like-minded judges, lead us to expect unwavering congruence in such settings. Likewise, standard sanctioning-based models, which focus on the ability of the government to punish errant judges, tell us very little about willingness of otherwise dependent judges to rule against the government. Explaining judicial behavior in institutionally insecure contexts thus demands a new analytic framework that can account not only for why judges who lack institutional security support the government, but also why they rule against it.

1.2 Actors, Institutions, and Mechanisms

The vast bulk of the literature on Latin American courts characterizes courts by "adding up" different measures of independence and then evaluating where they fall short (Rosenn 1987; Verner 1989; Dakolias 1996; Larkins 1996; Domingo 1999). This study takes a different tack. Rather than assess Latin America's courts according to an ideal vision of judicial independence, I argue that a more theoretically fruitful approach is to examine the interaction among the various attributes conventionally associated with dependent courts. Such an approach also requires careful description of actors and institutions, but seeks a deeper analytical understanding of the mechanisms by which they are linked. Along these lines, this section considers several models of court-executive relations prominent in the American politics literature. While none of these "off the shelf" theories adequately explains the empirical puzzles at hand, they provide a useful repertoire of ideas and approaches that can be reconfigured to construct a more complete understanding of courts under constraints.

Selection-Based Approaches

When governments control judicial appointments it should hardly come as a surprise that judges rarely rule against them. In established democracies, the selection process has served as a key part of the explanation for the relative harmony among the branches of government. Consider the most well-known example: the United States Supreme Court. Despite a host of institutional guarantees protecting judges against undue pressure, only very rarely is the Court out of line with the government of the day. Starting with Dahl's seminal critique of the counter-majoritarian thesis (1957), such harmony results from the fact that presidents routinely appoint judges to the bench and presidents tend to appoint judges who share their views. The fact

that more than 90 percent of all U.S. Supreme Court nominees have come from the president's party provides considerable empirical support for the view that, even among the world's most independent courts, the nomination process is highly partisan (Baum 2001; Carp and Stidham 2001).

Contra Hamilton, the broader implication of Dahl's thesis is that simply granting judges secure life tenure may give them the capacity to rule against the government, but does not ensure that judges will have the inclination to use it. Judges make decisions according to their sincere preferences. But because the elected branches have control over selecting judges, the Court ultimately functions to legitimate, rather than challenge, the power of the government. As long as judges are generally seen as independent, such a situation approximates what Ramseyer and Rasmusen (1996) have argued is the ideal judiciary from the incumbent party's point of view. That is, judges who are viewed as independent will help to make the government's promises credible (Landes and Posner 1975) and help to police the bureaucracy (McCubbins and Schwartz 1984), but will also rule in line with what the politicians in power want.

For governments that respect the basic rule of law principles, there is nothing inherently problematic with this arrangement. Indeed, even the staunchest defender of judicial review would agree with the notion that judges should exercise their power only when governments overstep their limits. Moreover, republican constitutions, such as the U.S. and many Latin American constitutions, are not based on the pure separation of powers, but rather are designed to prevent the concentration and hence abuse of power by a single branch by giving each branch of government a way of exercising influence over the other two (see Manin 1994: 30–31). Giving the other branches a role in selecting judges who share their views may even help to enhance the protections for the judiciary such that politicians do not need or want to violate the independence of individual judges. Along these lines, John Ferejohn (1999) has argued that the structural interdependence among the branches of the U.S. government, which includes the president's and senate's ability to select the justices, contributes to the self-enforcing nature of the constitutional protections afforded to U.S. justices.

Selection, however, is not always foolproof. As Dahl pointed out, sometimes presidents get "unlucky" and fail to have the opportunity to appoint judges to the bench. Such was the fate that befell Franklin Delano Roosevelt, which led to the infamous clash between the Lochner-era Court and the executive branch over Roosevelt's New Deal policies (e.g., see Caldeira 1987). Indeed, although most U.S. presidents get to appoint between two and

three justices per term, they do not get to appoint the majority of judges on the bench. Even Ronald Reagan, who had four vacancies on the Supreme Court during his time in office, did not succeed in substantially altering the Court's ideological direction. In Segal and Spaeth's judgment, "the Supreme Court was no more conservative than the one he inherited . . . the twentieth century still ended with organized school prayer unconstitutional and *Roe v. Wade* the law of the land (2002: 217). The larger lesson they draw is that *which* justices' seats become available may be as important as how many.

Senate voting on judicial nominees also can alter the selection process. Research has shown that the success of presidential judicial nominees is highly influenced by the partisan composition of the Senate, the president's popularity, and the timing of the nomination with respect to the president's term (Cameron, Cover, and Segal 1990). Moreover, although most nominees get approved, this may have more to do with presidential strategy, not presidential power. For example, Moraski and Shipan (1992) use a series of simple spatial models to illustrate how the president's ability to select the best new judge depends on the locations of the president's ideal point relative to the current median justice and the median senator. If the president and Senate are located on the same side of the median justice, the president is unconstrained to appoint a new median justice. If the Senate and president are located on opposite sides of the median justice, however, any attempt made by the president to select a new median judge will be rejected by the Senate. By this logic, selection as a mechanism for creating a judiciary that is supportive of the ruling majority requires the additional condition that the preferences of ruling majority are relatively aligned.

Yet even if presidents manage to appoint the judges they want, principle-agent problems may still arise. Presidents may find judges who share their views on some but not all issues. Judges may turn out to behave very differently from what the nominating president anticipates. Or over the passage of time, justices might alter their views. For any combination of these reasons, scholars of the United States have concluded that even judges appointed by the current government are unlikely to support the incumbent president all of the time (Segal and Spaeth 2002).

In Latin America, by contrast, few of the factors mitigating the impact of presidential selection on judicial subservience are in evidence. For example, unlike the United States, Latin American presidents often are able to appoint not merely two or three judges per term but the entire court. Historically, judges have been particularly vulnerable to replacement during

periods of regime instability. Incoming authoritarian leaders were able to appoint the majority of justices to the bench in Guatemala (1953), Cuba (1959), Brazil (1964), Nicaragua (1979), and Argentina (1947, 1955, 1956, 1976; Verner 1984). Under democracy, the situation has hardly improved.

The exaggerated capacity of Latin American presidents to select their own judges goes a long way toward explaining the degree of cronyism and corruption that distinguishes Latin American judiciaries from their counterparts in more developed democracies. To see why this is the case, consider the arguments made by Hamilton in *Federalist* 76 regarding the importance of the relative balance of power between the executive and legislative branches. According to Hamilton, the dangers of venality that would otherwise come from the executive's ability to nominate judges will be effectively thwarted by the requirement that the president obtain the Senate's confirmation in judicial appointments. In Hamilton's words, "the necessity of the [Senate's] concurrence would have a powerful, though, in general, silent operation. It would be an excellent check upon a spirit of favoritism in the President and would tend greatly to prevent the appointment of unfit characters" (1961 [1787]: 457).

This legislative check, however, is precisely what is often missing in many Latin American countries. Under military dictatorship in which the legislature is disbanded, the selection of judges takes place through a process of negotiations within the military junta. Surprisingly, under democracy the situation may be even worse. As scholars of the region have pointed out, presidents in Latin America are far more powerful than legislatures (e.g., see Morgenstern and Nacif 2002). Under democracy, however, presidents do not even have fellow junta members who must be consulted for their own judges to be appointed.[5] In Argentina, for example, there have been some battles between the Senate and the president over appointing judges

[5] In Argentina the most egregious examples of judicial cronyism occurred not under the last dictatorship, but under the democratic government of Carlos Menem (1989–9). For example, Menem's Supreme Court appointees included Justice Eduardo Moliné O'Connor (Menem's tennis partner), Chief Justice Julio Nazareno (a former partner in Menem's family's law firm in Menem's home province of La Rioja), and Justice Vázquez (who on his appointment to the bench publicly proclaimed his personal friendship with Menem on the television show *Hora Clave*; Verbitsky 1993: 52–60; Larkins 1998: 430). In all these cases, the Senate confirmation process functioned only as a mere formality. As under previous democratic governments in Argentine history, the president's nominees were quickly confirmed by the Comision de Acuerdos del Senado (Appointments Committee of the Senate) with virtually no discussion about the nominees' policy preferences, ideology, or even credentials (e.g., see Poder Cuidadano 1997: 21–4).