Introduction

Courts in Latin America

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Courts are central players in Latin American politics. Throughout the region, judges now shape policies that were once solely determined by presidents and legislators. Over the last two decades, courts have been asked to decide a litany of hot-button social, political, and economic questions. Whether reelection should be permitted, executive powers expanded, emergency economic measures upheld, presidents impeached, human rights abuses prosecuted, divorce and abortion permitted, foreign wars supported, and AIDS medication made available, these are the sorts of major policy issues now being decided by Latin American judges. As the list of areas in which courts intervene has grown, the judiciary has emerged as one of the most important – if still deeply contested – institutions in posttransition Latin American politics.

Such developments are sharply at odds with the long-standing image of Latin American courts. Weak, ineffective, dependent, incompetent, unimportant, powerless, decaying, parochial, conservative, and irrelevant – these were the adjectives used by scholars to describe the region's judicial systems for most of the twentieth century. Under dictatorship, courts were a frequent casualty of regime change, and judiciaries were largely dismissed by scholars as pawns of de facto governments.[1] But even as democracy took root, many of the same problems identified with courts under authoritarianism – executive dominance, conservative legal philosophy, lack of adequate infrastructure, lack of public trust and support, and ongoing political instability (cf. Verner 1984) – seemed to persist. Carlos Menem's notorious packing of the Argentine Supreme Court in 1990 and the string of highly questionable judicial decisions that followed led observers to conclude that checks and balances in Latin America were frustratingly elusive (Larkins 1998). Conversely, scholars warned that even if judges enjoyed independence, the conservative legal philosophy and bureaucratic mind-set rooted in the civil law legal tradition (cf. Merryman 1985) prevented

[1] But see Ginsburg and Moustafa (2008) and Barros (2002).

Latin American judges from protecting individual and human rights. This was the main lesson provided by the Chilean Supreme Court (Couso 2002; Hilbink 2007).

Yet, as scholars began to look more closely at the region's courts, they also began to realize that not all the news was bad. First, the increasing social demand for greater accountability (Peruzzotti and Smulovitz 2006, 10) began to spill over into a demand for courts to insert themselves into the very sorts of political controversies listed earlier. This suggested that judges could and should play an important role in shaping society, allocating resources, and keeping governments in check, even if reality often falls short of expectations. Second and related, although conceptions of the role of judges in a democracy have been slow to change, an ideological shift has clearly been underway.[2] The global doctrine affirming that human rights constitute the central category of constitutionalism has gradually been incorporated into the legal curriculum (Pérez-Perdomo 2006, 102–113; Couso, forthcoming; see also Chapter 4).[3] Third, as Ríos-Figueroa carefully elaborates in Chapter 1, Latin American judges now enjoy greater formal institutional protections than ever before. At the same time, they also have been granted an expanded portfolio of legal instruments of constitutional control. This blend of more insulation from political pressure and a growing capacity to influence policy is considerably greater than what existed in the recent past.[4]

Nevertheless, in many Latin American countries, the historical legacy of weak judicial institutions has been hard, if not impossible, to overcome. As several of the chapters in this volume attest, throughout the region, judges continue to face threats ranging from impeachment and forced resignation to court packing and en masse purges. Drawing on a new data set on interbranch crises compiled by Helmke (2009), Helmke and Staton (Chapter 11) identify more than fifty instances of threats or attacks on the survival of high-court judges in the region between 1985 and 2008. Such assaults range from Menem's court packing and Fujimori's dissolution of the supreme court to the impeachment of judges in Ecuador under President Gutiérrez,

[2] The creation of the Interamerican Court of Human Rights in 1979 signals the beginning of this process that then developed in international conference meetings such as those regularly organized since 1981 by the International Association of Constitutional Law, which bring together prominent constitutional scholars, or those organized since 1995 by the Conferencia Iberoamericana de Justicia Constitucional, which summon constitutional judges.

[3] The relative number of lawyers in Latin American countries has also been steadily increasing. Data are scarce, especially for earlier periods, but Pérez-Perdomo (2006, 86–114) provides some calculations. By around 1940, the average number of lawyers per one hundred thousand inhabitants was thirty-eight. A boom has taken place since the 1950s, pushing the average by the year 2000 to 189. However, the average masks important differences across countries because the number of lawyers per one hundred thousand inhabitants varies from 85 in Ecuador (1991 data) to 345 in Argentina (2001 data, a figure close to that of the United States, with 379 lawyers that same year, according to the American Bar Association).

[4] Judicial reforms have also considerably increased judicial budgets all over the region (see Vargas Vivancos 2009).

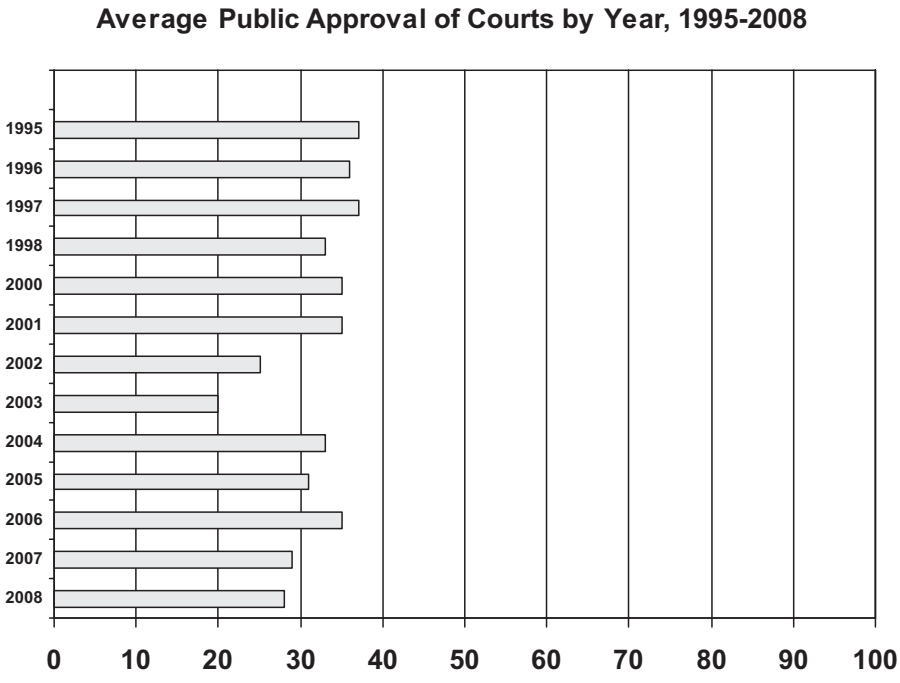

FIGURE I.1. Average Public Approval of Courts by Year, 1995–2008.

Hugo Chávez's efforts to remake the Venezuelan Supreme Court, and Evo Morales's assault on Bolivia's Supreme and Constitutional courts (cf. Chapter 10).

Another disturbing fact is how poorly the public regards the judiciary. *Latinobarómetro* surveys allow us to gauge the evolution of public opinion over time and across countries. Overall, the evidence is damning. Figure I.1 shows that on average, the percentage of people reporting that they had "a lot" or "some" confidence in the judiciary has varied between a high of just 38 percent to a low of 20 percent. Moreover, average levels of confidence seem actually to have declined over time. During the late 1990s, around 60 percent of those surveyed had "little" or "no" confidence in the judiciary, but in the new millennium, that percentage has risen to over 70 percent.

Closer examination of these data, however, reveals considerable cross-national variation (see Figure I.2). In Ecuador and Peru, only one in five citizens surveyed has any confidence in the judiciary. Argentines, Bolivians, and Paraguayans have only a slightly better impression of their courts. But in Brazil, Costa Rica, Dominican Republic, and Uruguay, between 40 percent and 50 percent of people on average have a positive view of the judiciary. Yet even in those countries, judges are not immune from criticism. In Brazil, judges have come under increasing public

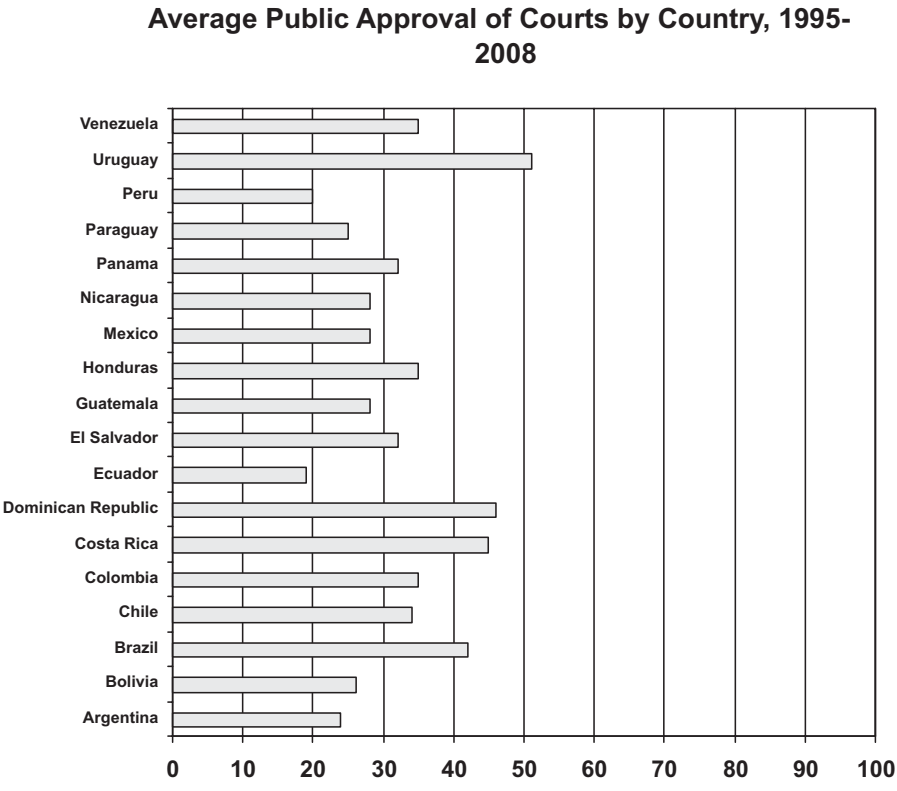

FIGURE 1.2. Average Public Approval of Courts by Country, 1995–2008.

scrutiny for political bias in the *mensalão* corruption plot as a result of their refusal to prosecute Lula.[5]

Public opinion of courts also varies dramatically over time within individual countries. For example, in Argentina, average approval ratings of courts fell throughout the 1990s during the second Menem administration, rose briefly under the short-lived de la Rúa administration, crashed in 2002 during the height of the economic and political crisis, and have recovered following the impeachment of several Menem appointees to the court in 2003–2004. Interestingly, in Bolivia, average approval of courts was highest in 2006, just as current president Evo Morales began to dismantle both the constitutional tribunal and the Bolivian Supreme Court (cf. Chapter 10). Although relatively high, public confidence in the judiciary has waxed and waned in Chile, Colombia, Mexico, Venezuela, and even Costa Rica. Of the countries in this volume, only Brazil has had positive approval ratings consistently above 30 percent.

[5] *Latin American Weekly Report*, November 12, 2009.

Taken together, these advances and setbacks have captured the imagination of a new generation of Latin Americanists, convincing them that judicial institutions warrant sustained scholarly attention. Rooted in the deep conviction that the rule of law is essential to sustained democracy and economic growth, research on judicial politics in the region now blossoms. Kapiszewski and Taylor (2008) recently chronicled the rapid evolution and diversity of literature on Latin American courts, identifying themes ranging from transitional justice and judicial reform to interbranch relations and judicial decision making. By their count, approximately 90 pieces of research primarily focused on the judiciary in Latin America have been published since 1980, with many of the most influential and innovative work done by contributors to this volume. Never before has there been so much scholarly interest in how Latin America's courts function or why they fail to function.[6]

This book builds on that momentum in several ways. Empirically, the book takes seriously the potential role for constitutional review in a democracy by focusing on two fundamental questions:

- To what extent are courts in Latin America willing and able to protect individual rights?
- To what extent are they willing and able to arbitrate interbranch disputes that affect the separation of powers?

Taken together, the answers provided by chapters of the book reveal considerable variation both across countries and over time within countries. Courts in Costa Rica and, to a somewhat lesser extent, Colombia have tended to succeed in both respects; the picture has been far more mixed in Argentina and decidedly worse in Bolivia. At the same time, other chapters also highlight the fact that these two standard judicial roles – upholding rights and ensuring checks and balances – need not always go together. For instance, whereas the Brazilian, Chilean, and Mexican courts have been actively involved in arbitrating interbranch disputes, they have been far more reluctant to uphold individual rights. Such patterns raise broader questions about the conditions under which spillover versus substitution effects occur across legal issue areas.

In addition to documenting the rich empirical variation that exists across the region's courts, the book also seeks to push forward long-standing theoretical debates about judicial behavior. In so doing, the broader questions the book seeks to answer include the following: What explains the choices Latin American judges make?

[6] A series of edited volumes also testify to the growing importance of the judiciary in the region. An early volume by Stotzky (1993) brought together legal scholars and politicians focusing on the role of the judiciary in the transition to democracy. More recent volumes have broadened the research agenda by discussing the rule of law in the region (Méndez et al. 1999; Domingo and Sieder 2001), judicial reform (Pásara 2004), the judicialization of politics (Sieder et al. 2005, 2010), the judicial protection of social and economic rights (Gargarella et al. 2006; Gauri and Brinks 2008), and the accountability function of courts in Latin America (Gloppen et al. 2010).

To what extent do concerns about sanctions drive judicial behavior? How does the institutional and partisan context shape decision making on the bench? How important is the judicial selection process? What role, if any, do judges' attitudes or the law play? Do judges care about their legitimacy, and if so, how might they seek to build it? How does public opinion affect judicial behavior? And what sorts of trade-offs might judges in Latin America face as they navigate among different institutional actors and the public? Like Latin American legislatures and executives (cf. Mainwaring and Shugart 1997; Morgenstern and Nacif 2002), Latin American courts provide a series of fresh opportunities for evaluating and reformulating existing institutional models, most of which have been confined to American politics.

Along these lines, we note that much of the recent literature on judicial decision making in Latin America has revolved around the fragmentation hypothesis derived from the separation of powers approach (e.g. Chávez 2004; Scribner 2004; Ríos-Figueroa 2007; cf. Chapter 8). In a nutshell, this approach contends that judges will be more capable of handing down decisions that go against the government when political power is divided across the branches of government. The basic reasoning is that if power is fragmented, sanctioning judges is that much harder. Having judicial decisions overturned is less likely because new legislation is harder to pass; impeachment, jurisdiction stripping, and court packing are less likely because putting together a legislative coalition to carry them out is more difficult. Simply put, fragmentation guarantees judicial independence. It makes it possible for the basic Hamiltonian design, on which Latin America's constitutions also rest, to work.

Each of the chapters in the volume grapples, to some extent, with this basic fragmentation story. But, as we discuss more fully later, not all contributors arrive at the same conclusions. If the separation of powers approach provides the theoretical linchpin of the book, for many of the authors, it merely serves as a starting point. Thus, while the book provides ample new evidence that judges are indeed constrained utility maximizers, it also broadens considerably our understanding about what goes into judges' utility functions and what factors – institutional, cultural, or sociological – constrain or enable them.

The remainder of this introduction has three main objectives. First, we develop a basic typology of the roles that constitutional courts play and use it to structure our discussion of the enormous empirical diversity that characterizes Latin American judiciaries over time and across countries. Second, we synthesize the theoretical contributions made by each of the authors. Specifically, we describe the various ways in which the volume pushes forward scholarly debates about the nature of interbranch relations, judicial motivations and goals, and the effects of various institutions on judicial decision making. We conclude with an overview of the volume's overarching lessons and its organization.

THE EMPIRICAL FOCUS

The central empirical focus of this volume is on the choices that Latin American judges make. Our starting point lies in the observation that, like their North American and European counterparts, Latin American justices potentially exercise two basic modes of constitutional control. The first, which we call *horizontal control*, involves judges arbitrating interbranch or intergovernmental disputes. The second we refer to as *vertical control* and involves judges interpreting the scope of individual or human rights. In this section, we provide a brief overview of these two fundamental roles and then draw on some of the evidence contained in the volume's individual chapters to illustrate the wide variety of judicial decision making that takes place across the landscape of contemporary Latin America. First, however, we offer a brief word about the scope of the analysis and our decision to limit the inquiry primarily to constitutional courts.

Constitutional review, after all, is just one of the many functions that Latin American judges serve. As elsewhere, judicial systems in Latin America also include judges of various ranks (first instance and appellate), specializing in different types of disputes (e.g., criminal and civil, electoral, administrative, labor, military) as well as a host of additional institutions beyond courts (e.g., ministries of justice, prosecutorial organs, and judicial councils). Although these other types of judicial institutions surely matter, this volume concentrates the vast bulk of attention on constitutional courts. Our reasoning is straightforward. As political scientists, we are interested first and foremost in how judges interact with other political actors and how these interactions shape policy outcomes. Whereas lower-level courts can sometimes play this role, courts imbued with constitutional review jurisdiction – whether they are supreme courts, constitutional chambers, or separate constitutional courts – hold the proverbial last word over whether to enforce the political rules of the game, at least within the judicial hierarchy. Moreover, given that the field of Latin American judicial politics is still quite young, the fact is that most of the available systematic data on judicial decision making exist only for Latin America's high courts. That said, as the field continues to mature, we expect – and hope – that efforts will be made to incorporate lower-level courts. This is especially important in contexts, such as present-day Latin America, where important efforts are being made to establish firmly stare decisis and convert the lower courts, which handle the quotidian business of most litigants, into effective protectors of constitutional principles.

To provide a common starting point for the volume, we begin with a simple conceptualization of the role of constitutional courts based on the organization of modern constitutions. Structurally, constitutions are divided into an "organic" part that establishes the different branches of government, their powers, and their reciprocal relationships and a "normative" part that deals with individual rights. These two

elements were prefigured by Montesquieu (1997, Book XII, 216), who distinguished between the "political liberty as relative to the constitution," that is, "formed by a certain distribution of the three powers," and the "political liberty of the subject" that defines the relationship between the state and its citizens. Classic twentieth-century constitutional theorists Hans Kelsen and Carl Schmitt also refer to the two parts of modern constitutions: the former in his discussion of the "material" and "formal" understanding of the constitution,[7] the latter distinguishing between the "principle of distribution" (basic rights) and the "organizational principle" (separation of powers) of modern constitutions.[8]

These two parts are clearly present in all Latin American constitutions. For instance, the first twenty-nine articles of the Mexican Constitution enumerate all the fundamental rights that the charter guarantees to the citizens, whereas the second part of the constitution is dedicated to the prerogatives and responsibilities of the different institutions of the state and the interactions between them.[9] Of course, the extent of rights included in Latin American constitutions and the particular ways of organizing interbranch relations vary across countries and over time within countries, as shown in data reports from the Comparative Constitutions Project, compiled by Tom Ginsburg and Zachary Elkins.[10]

The central question that we asked each of the contributors to tackle was how judges in Latin America deal with these two fundamental elements of the constitution. More specifically, we invited each of the authors to address whether Latin American courts are willing and able to arbitrate interbranch disputes and, if so, whether any discernible patterns emerge. Likewise, we asked them to speak to Latin American judges' willingness and ability to respond to demands regarding a variety of constitutional rights and then to assess whose rights precisely judges are protecting.

Here we classify these basic elements of constitutional control using a simple two-by-two schema (see Table I.1). On the right-left dimension, we distinguish between courts that engage in horizontal control over intergovernmental disputes and those

[7] In a material sense, "the constitution is the norm that regulates the elaboration of laws, the activity of the organs of the state and administrative authorities." In a formal sense, the constitution also considers the content of those laws through a catalog of fundamental rights that "delineate the principles, direction, and limits for the content of present and future laws" (Kelsen 2001, 21–22).

[8] According to Schmitt, "the principle of distribution [relates to] the individual's sphere of freedom [while the] organizational principle facilitates the implementation of the distributional principle. Basic rights and separation of powers denote the essential content of the *Rechsstaat* component of the modern constitution" (Schmitt 2008, 170).

[9] As is well known, the list of rights guaranteed by the U.S. Constitution was added via amendments. There was an interesting debate during the constitutional convention in Philadelphia on whether it was necessary to include a list of rights in the Constitution. Skeptics, such as James Madison, thought such a list was superfluous, assuming that the institutional machinery set up by the Constitution was going to work well. Others thought the list of rights had to be included in the Constitution for them to be secured (see Rakove 1997).

[10] See http://www.comparativeconstitutionsproject.org/.

TABLE I.1. *Judicial power: horizontal and vertical control*

Enforcing Rights	Arbitrating Interbranch Conflicts: No	Arbitrating Interbranch Conflicts: Yes
No	Cell I: Argentina (1989-1997) Bolivia (pre-1999; post-2008) Brazil (pre-1988) Chile (pre-2005) Costa Rica (pre-1989) Mexico (pre-1994)	Cell II: Mexico (post-1994) Brazil (post-1988) Chile (post- 2005)
Yes	Cell III: Colombia (1992-2006)	Cell IV: Argentina (1983-1989) Bolivia (1999-2006) Costa Rica (post-1989)

that do not. More specifically, we argue that judges exercise horizontal control when (1) they are able and willing to get involved in intergovernmental dispute cases and (2) they are able and willing to decide cases against the more powerful party. The first criterion effectively sets the lower bar for establishing whether judges engage in horizontal constitutional control: judges must have the appropriate jurisdiction, the relevant actors must turn to the court for adjudication, and the justices must be willing to get involved in such disputes. Obviously, if any of these things are lacking, then judges are not able to exercise horizontal control. For instance, in Mexico in 1994, the court finally earned the right to effectively adjudicate disputes among different levels and branches of government, though the thresholds for standing remain quite high (Chapter 7). Prior to that time, the court could not have exercised horizontal control, even if it had wanted to.

The second criterion focuses on who wins and who loses and thus sets a qualitatively higher, though perhaps more controversial, bar for determining whether horizontal control exists. Here we follow the literature in roughly ordering the different branches in terms of the relative powers they enjoy. Thus we assume that Latin American presidents are more powerful than legislatures, albeit to varying degrees (e.g., Mainwaring and Shugart 1997), and that federal governments are more powerful than state and local governments (e.g., Gibson 2004). This enables us to address certain kinds of questions (e.g., Does the court check the power of the president? Does the court limit the power of the federal government?) that we believe are fundamentally important. Thus, in classifying the role of the court in a country like Brazil or Mexico, it matters not only that constitutional courts have the ability to

adjudicate intergovernmental disputes but also that they sometimes use this capacity to rule against the national government and/or the president.

The upper-lower dimension of our schema focuses on vertical control, which entails the adjudication of various constitutional rights. As with horizontal control, the baseline conditions for courts to exercise vertical control are that litigants and judges have the requisite institutional instruments to entertain such cases. For example, the Costa Rican Constitutional Court's particularly expansive rules for standing allow citizens virtually unfettered access to demand their rights be upheld. As Wilson writes in Chapter 2, "anyone in Costa Rica (without regard for age, gender, or nationality) can file a case with the Sala IV at any time of day and any day of the year, without formalities, lawyers, fees, or an understanding of the point of law on which the claimant is appealing. Claims can be handwritten or typed on anything and in any language, including Braille." By contrast, until 2005, the Chilean Constitutional Tribunal was purely limited to abstract review, which only a limited set of political actors could pursue, thus dramatically reducing the number and types of claims the judges received (Chapter 4). Different degrees of access to instruments of constitutional control, between the extremes of the Costa Rican and Chilean cases, can be found across the region (Chapter 1).

Beyond the institutional rules for standing, of course, it matters what courts say about such rights. Perhaps even more than horizontal control, using our "less powerful wins the case" rule to assess the degree of vertical constitutional control is sometimes challenging. The most straightforward sorts of cases involve judges deciding whether to protect an individual right against government encroachment. For instance, in 1996, the Colombian Constitutional Court was called to decide whether a recently passed statute regulating television networks violated the constitutional freedom of expression of thoughts and information. Here, because the court made a clear decision to strike down the law, it seems relatively unproblematic to classify this as an example of vertical control.

More complicated are cases that require judges to balance two or more types of rights, as in an abortion case decided by the Argentine Supreme Court in 2001, where the rights of the fetus were weighed against those of the mother. In such cases, of course, it is tempting to use the label of vertical constitutional control whenever one agrees with the decision and to reject it otherwise. Our decision rule helps address this problem, but again, only if we are clear about which of the two parties is most powerful. In this example, the mother is certainly more powerful than the fetus, but if the fetus is protected by state law or if the social consensus goes against women's privacy rights, then the balance shifts. Still, our decision rule provides us with some leverage over this problem, and we use it with these caveats in mind.[11]

[11] Likewise, though we acknowledge that upholding rights can sometimes mean protecting the powerful or elites, as in the case of the jurisprudence of the U.S. Supreme Court during the so-called Lochner era, when property rights clashed with labor rights and the Court decided to uphold the former (see Friedman 2001), here we want to focus on the Court's willingness to protect the rights of the relatively disadvantaged.