

I

Introduction*A Choice of Paths behind Each Policy***I.1 A CHOICE OF LEGISLATIVE INSTRUMENT
BEHIND EVERY CHOICE OF POLICY**

Executives in new presidential democracies have concentrated great influence over the legislative process, often to the extent of excluding the legislative branch from the process. Many have been granted constitutional decree authority, and they use this prerogative accordingly. Often, however, unconstitutional decrees, i.e., decrees that violate the wording of the constitution, are enacted. The consequences of such violations are not uniformly tolerated. On occasion, supreme courts strike down decrees, other times legislatures react and overturn decrees by way of statutory legislation. Rarely, executives are threatened with impeachment. Most often, however, decrees simply stand.

This book is concerned with the role of checks and balances in the legislative process, especially in countries where the effects of institutions cannot be taken for granted. It approaches the problem from an unusual point of entry: the choice of legislative instruments; specifically, the choice of decrees versus statutes when enacting policies. The question I ask is: Under what conditions should we expect policies to be passed by congress instead of executive decree? What determines this choice? I argue that the choice is a function of (a) the allocation of legislative prerogatives across the branches of government, (b) politicians' valuation of those prerogatives, and (c) external agents' valuation of policy. This explanation captures the importance of institutions by taking into account the way institutions structure interactions. It also acknowledges that the mere existence of a rule is not sufficient to predict outcomes.

This caveat introduces the notion of institutional commitment, which I define as the politicians' willingness to defend their decision rights from encroachment. By bringing in external agents, I place the onus of putting policies on the table on external actors who are vested in specific policies and wish to see them prosper.

The main contribution of this book is to shed light on the complex process behind the enforcement of checks and balances. It puts forth the notion that the existence of rules imposing checks on executive behavior is worth nothing if the actors in charge of imposing constraints on the executive do not act to do so. It goes further to outline the mechanisms leading to politicians' willingness to enforce limits on the executive, by means of exercising and enforcing their own decision rights. Those mechanisms are associated with the value politicians assign to their decision rights, which, in turn, is associated to their expectations regarding how long they will remain in their posts and what benefits they derive from their tenure. In sum, the book highlights the utility to legislators, other politicians, and the polity as a whole, of enforcing their decision rights. In doing so, they strengthen the institutions they embody, and endow them with added value. By the same token, it reveals the conditions under which enforcement is more likely to occur and when one should not expect it to emerge.

This introduction proceeds as follows: In the remainder of this section, I present an example of a failed policy. I argue that the policy was enacted by decree due to a blunt miscalculation that ultimately led to its demise. The example illustrates many of the dynamics that I model in Chapter 2. Section 1.2 presents a review of the various literature on law making and decree authority that shape the questions and approaches in the present work. Section 1.3 engages with the debate surrounding explanations of decree authority, questions prevailing assumptions, and presents the shift in assumptions guiding this book. Section 1.4 presents a brief introduction of the theory put forth in Chapter 2. Section 1.5 provides a roadmap of the remainder of the book.

1.1.1 A Miscalculation

In March 2008, Argentine President Cristina Fernández de Kirchner enacted a decree raising taxes on agricultural exports. In an attempt by the administration to ride on the commodity boom of 2008, it increased the tax on agricultural exports by implementing a movable rate designed

to rise with international price increases.¹ The infamous tax, established through Resolución 125/2008, became known as *Retenciones Móviles*. Its enactment gave way to the country's worst wave of sustained strikes in many years, placing the economy on hold and putting on display the political muscle of organized agricultural interests.

Given the will to enact a tax on agricultural exports, the question becomes whether to do it by statute or decree. The first path acknowledges congressional decision rights over the process by which policies are decided, while the second does not. On this occasion, the president overlooked the forces at play and chose to enact the policy by decree.² The choice was made with no apparent consideration of the interests and influence of farmers, a traditionally powerful group in Argentina.

What happened during the next four months provides a unique opportunity to observe the interplay between political actors and external agents regarding policy enactment. Immediately after the decree was issued, farmers went on strike. The agricultural sector brought its resources to bear on the conflict, and the strike, initially intended to last only a few days, was extended again and again, showcasing the weight of opposition to the policy. In a form of mobilization that has become common in Argentina, the strike took to the roads and interrupted transportation of goods (foods and others) almost entirely for weeks. By March 19, the media referred to the strike as the largest ever conducted by farmers (*La Nación*, 19 March 2008).

Apparently seeking to fight this battle in the public arena, on March 22 the president addressed the country, requesting farmers to cooperate and participate in negotiations. That same day, the *Union Industrial Argentina* (UIA, representing industrialists), also admonished farmers to reconsider their stance. Of course, this was more than a rhetoric battle; by March 25 there was widespread concern about the disruption in the supply of basic foods. In the next few days, the country broke out in *cacerolazos*.³

¹ The mobile index would move with the price of commodities, increasing as the price of commodities increased, and decreasing when prices went down.

² For the sake of clarity, note that this decree was an administrative decree, not a *Decreto de Necesidad y Urgencia*, the type of decree allowed by Constitutional Decree Authority in Argentina. The dynamics that it spearheaded, however, are well suited to illustrate the interaction of influential actors and politicians when deciding policies.

³ A form of public demonstration that became popular at the height of the 2001 crisis, in which predominantly urban-middle class demonstrators bang pots and pans to show discontent.

On April 2, farmers put the strike on hold to enter negotiations with the government. Unsatisfied by what the government offered and empowered by the success of their mobilization efforts, farmers went back on strike. Toward the end of April, the Minister of Economics, Martin Lousteau, resigned under the weight of the administration's failure to put an end to the seemingly endless tug of war. June was plagued by *cacerolazos* carried out by the urban middle class, which was infuriated by the lack of basic foods and the apparent paralysis in negotiations, and which blamed the government for their misfortune.

While the executive showed no signs of caving, on June 11 the Supreme Court declared that it would rule on the constitutionality of the decree. Almost immediately, only a week following that announcement, the executive sent a bill to Congress requesting an up or down vote on the tax. Farmers applauded the move, called off the strike, and moved into Congress, where they spent most of the next 30 days in consultation with legislators and their provincial allies. Exactly one month later, on July 17, Congress struck down the bill, putting an end to the long conflict. The status quo was re-established.

This narrative is intended to illustrate the confrontation between the branches over the enactment of policy in a case where the stakes were clearly high; had the stakes been low, the decree may have passed unnoticed. It shows external agents confronted over the policy (farmers opposing the tax, the UIA on the opposite sidewalk), and how powerful farmers invested their resources abundantly in support of their interests, ultimately getting their way, through congress. The narrative is largely at odds with the perception of Latin American presidents being able to legislate unchecked, empowered by the lack of horizontal accountability (O'Donnell 1994). Admittedly, the mayhem caused by the mobilization described above does suggest that conventional democratic instruments of representation are disrupted (Machado et al. 2011), as one would expect in delegative democracies. However, one cannot overlook the intervention of the supreme court and congress in settling the issue.

Clearly, as the growing literature on Latin American legislatures strives to demonstrate, the executive does not rule alone. In fact, this book finds motivation in the puzzle posed by the opposite scenario: even weak Latin America congresses enact laws, often, important ones. Once and again, the ever-powerful presidents portrayed in the literature are left to stand by while bills go through the congressional procedure for approval. Why not simply rule by decree? How can we explain the enactment of statutes where decrees are so readily available?

Furthermore, what explains the variation in the responses to these questions across cases? While Argentina, Brazil, Chile, and Peru have very similar institutional arrangements, careful analysis of the details of their legislative processes reveals stark differences in the way actors in each country come to policy decisions. Each of the four countries is endowed with constitutional decree authority, yet we observe that decrees are practically never chosen to legislate in Chile, whereas Argentina, Brazil, and Peru enact decrees routinely.

1.1.2 Decree Authority and Levels of Reliance on Decrees

In recent times, democracies around the globe have increasingly resorted to policymaking by executive decree. The third wave of democratization has been haunted by questions regarding the quality of the new democracies, often casting doubt on the very meaning of democracy in specific settings. Among the problems leading to the debate is the fact that these democracies have increasingly chosen to endow their executives with constitutional decree authority (Negretto 2009). Although Latin American democracies provide well-known cases of this approach to decision making, countries in other regions have also made indiscriminate use of decrees; Russia and Nigeria are two notorious cases that exemplify the extensiveness of the phenomenon.

Consequently, executive decree authority, usually identified with authoritarian regimes and dictatorial modes of decision making, has become an integral component of many developing democracies. Amid public reactions that range from utter outrage to indifference, the phenomenon has captured the attention of pundits and laymen alike, and much has been written on the topic since the onset of the third wave of democratization in the 1970s. Scholars analyzing third-wave democracies were quick to note the problem and to dismiss it as an authoritarian legacy, which the “consolidation” of these regimes would overcome.

Yet given the continued centrality of decree authority in democracies around the globe and its impact on policy, understanding the determinants of the choices leading to the use of decrees over statutes constitutes a long-postponed priority in our discipline. It remains that, despite frequent use of decree authority, policies are enacted through congressional statutes constantly. And although many countries have established constitutional decree authority (CDA, following Carey and Shugart’s (1998) terminology), even where presidents are perceived to be very powerful, there is huge variation in the extent to which they use the prerogative.

The incidence of congressional statutes is just as puzzling in certain institutional environments as we might find the frequency of decrees to be in others. If policies may be easily enacted by executive decree, why would some go through congress at all? In response, I have already referred to legislators' interest in the process, but why should we expect *variation* in the outcome?

The rules governing the approval of decrees and statutes are certainly a determinant, yet many decrees that blatantly breach constitutional rules are enacted and sustained for years. The fundamental reason, I argue, is that politicians' valuation of their decision rights varies. It varies across countries, and it varies across policy areas. I refer to this as varying levels of *institutional commitment* among legislators and Supreme Court justices. I expand on the notion of institutional commitment in the next two chapters.

1.2 POLICY, LAWMAKING, AND NEW DEMOCRACIES

1.2.1 Lawmaking and Checks and Balances in US Politics

The legislative process in separation of powers' systems has been analyzed most frequently and intensely within the scenario of the United States. Given the difficulties inherent to comparative endeavors, theorizing on the determinants of the legislative process in separation of powers' systems in general is, to a large extent, influenced by our knowledge of the US case and by US congressional politics (Mayhew 1991; Krehbiel 1998; Shepsle and Weingast 1987, among many others). The role of the executive in lawmaking, as analyzed by the US politics literature, is restricted to that of a veto player who intervenes in the process and can affect outcome policies given its formal prerogatives (Krehbiel 1998; Cameron 2000; McCarty 2000; McCarty and Groseclose 2001). Some of the most influential comparative work shares this basic framework when studying the executive and other key institutional players in the policymaking process (Tsebelis 2002). An insightful approach is that taken in Sin's (2015) book, where she proposes that given the effects of rules on outcomes, actors look across the branches not only when deciding policy but most importantly, when deciding the rules that will later affect policy choice.

While students of comparative politics have learned a large amount from the approaches and insights of US politics, important caveats are needed regarding the assumptions made by this literature and the

extent to which they may be transported to different settings. Scholars have been aware of these difficulties. For example, a fairly uncontroversial adjustment has affected the basic reelection motivation, a guiding assumption in rational-choice US politics. This motivating assumption has been translated as progressive ambition, that is, a motivation to advance one's career through either reelection or any alternative career path (Schlesinger 1966; Rohde 1979; Samuels 2002).⁴

Additionally, although with valuable exceptions in recent times, mainstream work in US politics does not consider most legislative prerogatives held by the president as part of the law-making process *per se*, but rather as part of the intrinsic role of the executive during the implementation of policies. Within American politics, the participation of the executive in the implementation of policy emerging from the legislative process has been analyzed from the perspective of legislative delegation, with emphasis on the role of congressional decisions in that respect. This gave way to the initiation, over two decades ago, of a line of research that was guided by questions regarding legislators' capacity to ensure that their policy decisions do not deviate from their intended goals during the implementation process. Landmark contributions to this literature include McCubbins, Noll, and Weingast (1989); McCubbins and Schwartz (1984); Epstein and O'Halloran (1999); and Huber and Shipan (2002), among others. However, given the inadequacy of some assumptions when transported outside of the United States (and of other developed democracies), substantive conclusions of the literature are of limited direct applicability in different political scenarios.

Yet, for all its contributions, US politics has paid comparatively less attention to the executive's prerogative to enact decrees. Valuable work breaks ground in this terrain as it shifts focus from congress to the executive and places emphasis on executive orders and how these interact with congressional decision rights (Mayer 2001; Howell 2003; Lewis 2003; Canes Wrone, Howell, and Lewis 2008). This shift of focus is more in tune with mainstream approaches to non-US presidential systems.

⁴ Likewise, the US literature most usually assumes that the executive and Congress direct policy preferences, which are entrenched preferences that do not change with political moods or external preferences. Direct preferences are perhaps associated to ideology, beliefs, or political identification. This is another assumption worth re-thinking in the Latin American context, where policy preferences seem to be quite unstable. This book assumes politicians' policy preferences are indirect, derived from those of other actors. I develop this notion later in the book.

1.2.2 The Legislative Process from Various Perspectives

The analysis of the more conventional aspect of lawmaking, via congressional statutes, has been less extended outside of the United States. One of the most ambitious works on lawmaking and policy change in comparative perspective, contributed by George Tsebelis in 2002, seeks to establish bases for the comparison of political systems independent of the type of regime (in the author's words: non-democratic, presidential, or parliamentary) or party system, some of the most commonly used standards for comparison. He suggests that a fundamental characteristic of the policy process is policy stability, which is, in turn, determined by the preferences of veto players. Tsebelis' analysis of veto players in comparative perspective is a landmark contribution to the field, and some of the insights there have influenced the analysis I present in this book. Tsebelis argues, "It is the constellation of veto players that best captures policy stability, and it is policy stability that affects a series of other policy and institutional characteristics" (2002, 5). I agree with Tsebelis on the count that the institutional structure is fundamental. We must focus on those institutions that are of relevance to the legislative process if we are to gain leverage over the determinants of policy change and policy stability. However, Tsebelis' work does not provide guidance to determine under what conditions players are effectively veto players, that is, which institutions are of relevance and why. In other words, what explains variation in outcomes when we are confronted with polities that show identical structures in terms of veto players? Or, more bluntly, what makes a player a veto player? The framework presented here, which builds on the work of Diermeier and Myerson (1999), seeks to provide an improved tool to uncover the determinants of policy stability and its opposite: change.

Furthermore, Tsebelis makes a strong assumption when stating that people participate in a political system to promote their policy preferences. This is sometimes the case. But this book argues that other motivations may guide participation. What if politicians lack direct policy preferences, and simultaneously have only indirect links to their constituents?⁵ The consequences of presuming that these politicians will make policy decisions constrained by the same factors that shape those with direct policy preferences or close monitoring by constituents can greatly mislead our conclusions. This implicit assumption in Tsebelis' (2002)

⁵ By indirect links to constituents, I refer to the link promoted by electoral rules. Majoritarian systems favor a more direct link between constituents and voters than does proportional representation, for instance.

work leaves some political systems out of the parameters of his analysis. By contrast, this book provides guidelines to establish which actors are veto players (or, more specifically, under what conditions we can expect actors to be effective veto players), and it also establishes that actors' preferences are not primordial but are indirectly derived from other actors' preferences.

Guided by a related concern for policy stability, Spiller and Tommasi (2007) seek to unveil the determinants of policy in Argentina. Their work ignited the study of the determinants of policymaking in a series of countries in Latin America, providing a framework for analysis that emphasizes the details of institutional arrangements and the importance of the effects generated by these institutions when they interact. The study of policymaking in a series of Latin American countries following the general framework put forth by Spiller and Tommasi (2000, 2007) was compiled into a volume published by the Inter-American Development Bank (IADB) (Stein et al. 2008), and traces the characteristics of policy and policymaking in a number of countries to specific traits of the institutional setting in each.

Moving away from the question of policy stability and toward studies of legislative politics *per se*, considerable analysis and theorizing have been advanced regarding the role of different congressional institutional arrangements. However, the record is uneven with respect to testing those claims. Work along the lines of Mayhew's (1991) contribution to our understanding of the law-making process in the United States, which provides broad-ranging characterizations of law enactment and inter-branch relations in the context of this country, largely does not exist for other countries. Furthermore, the next step, which requires advancing from the single case to carrying out such projects in comparative perspective, is a daunting task that has barely been undertaken.⁶

Studies of country cases are most common for good reasons, as they provide a well-grounded point of entry to our understanding. In this line, valuable contributions are made by Alemán and Calvo's (2010) analysis of executive influence in the legislative process in Argentina, Calvo's (2014) book on the characteristics of law making when presidents lack majority support in Argentina's fragmented legislature, Londregan's (2000) volume on Chilean legislative institutions, Londregan and Aninat's (2006) analysis of the law-making process in Chile, Hiroi's (2005) analysis of the dynamics of law making in Brazil, or Zucco's (2009) analysis of the

⁶ Saiegh (2011) is a noteworthy exception.

effects of ideology on legislative behavior in Brazil. Tsebelis and Alemán's (2016) recently edited book stands out in this line of work, with different authors undertaking aspects of the law-making process and focusing on specific countries.

Contributions have been made that analyze the process of approval of specific laws or particular policy areas (Llanos 1998; Etchemendy and Palermo 1998; Stein et al. 2006). Palanza and Sin (1997) analyze law-making in Argentina from the perspective of executive bargaining with provincial parties. Pereira and Mueller (2002) focus on bargaining between the branches for the budgetary process. These analyses are highly informative of the specific dynamics and transactions in place for those specific cases, and provide valuable insights to broader processes, but they are not intended to reach generalizations regarding the legislative process in comparative perspective, with the exception, among the works cited here, of Stein et al. (2006).

On the other hand, more specific aspects of the process have been analyzed comparatively. For instance, while theorizing on veto bargaining in comparative perspective, Magar (2001) advances a broader analysis of law-making in Latin America, with focus on legislative vetoes. Our theoretical understanding of the executive veto prerogative in Latin America is advanced in Tsebelis and Alemán (2005). On the topic of decree authority, Negretto (2004) compares Argentina and Brazil, and Alemán and Pachón (2008) analyze conference committees in Chile and Colombia. A large literature of this kind exists, and the references provided here are but a small sample.

Sebastián Saiegh's book *Ruling by Statutes* (2011) stands out in its broad comparative approach to law making. Saiegh's work is interested in explaining policy creation and change, and it approaches the topic from an understanding of legislators as strategic actors, highlighting that while partisan and constituency-related considerations are important, so is the notion of vote buying. While Saiegh's interest and approach are close to those of this book, he focuses entirely on statutory law making and excludes policy enactment by decree altogether. As a measurement of the executive's legislative success, to dismiss that some presidents enact huge amounts of legislation by decree seems to miss an important part of law making by presidents.

Finally, links between the judiciary and the legislative branch have received relatively little attention in the academic literature until quite recently. Despite valuable contributions, such as the work of Murphy (1964), Epstein and Knight (1998), Gely and Spiller (1990), Spiller and