

## 1 Introduction\*

Latin America has long been a source of frustration for students of political institutions. The region has a lengthy constitutional history. Most Latin American states adopted republican constitutions nearly two centuries ago. Yet these new institutions were superimposed on societies marked by weak states and vast socioeconomic, ethnic, and regional inequalities. The result was often a dramatic gap between the rules that were written on parchment and the way politics worked in practice, as postcolonial elites engaged in discrimination, manipulation, and evasion in applying laws. The tension between the promise of political equality and the realities of economic and social inequality was a constant source of regime instability. Constitutions were repeatedly scrapped and rewritten (Elkins et al. 2009), suspended for months or even years via “states of exception” (Loveman 1994), or flatly ignored. In many countries, this inaugurated a pattern of institutional weakness that endured into the twentieth century. The failure of parchment rules to generate desired or expected outcomes frustrated scholars and policymakers alike. Indeed, by the time Latin America succumbed to a wave of authoritarianism in the 1960s and 1970s, many scholars of the region had concluded that political institutions mattered little.

The Third Wave of democratization brought the study of institutions back to the fore. By the late 1990s, every country in Latin America except Cuba was at least nominally a presidential democracy with a range of new constitutional rights empowering its citizens. Once again, scholars and policymakers sought to design (or borrow) institutions that would enhance the stability and quality of democracy amid pervasive social inequalities. Yet these newly minted parchment rules often failed to generate the outcomes their designers expected or hoped for. Constitutional checks and balances did not always constrain presidents (O’Donnell 1994). Nominally independent judiciaries and central banks often lacked teeth in practice,<sup>1</sup> and electoral reforms had little effect on party systems (Remmer 2008). Newly enshrined social rights were often not

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<sup>1</sup> Cukierman et al. (1992); Bill Chavez (2004); Helmke (2004); Brinks and Blass (2017).

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respected in practice (Gauri and Brinks 2008). Presidential term limits were circumvented or overturned.<sup>2</sup> Civil service laws (Grindle 2012; Gingerich 2013), tax laws (Bergman 2009), labor and environmental regulations,<sup>3</sup> and laws prohibiting squatting and street vending (Holland and Hummell 2017) were enforced unevenly, if at all. Whether it was due to extreme instability, uneven enforcement, or both, the relationship between formal rules and expected outcomes remained weak in many Third Wave Latin American democracies. Yet there also existed considerable variation – across countries, across institutions within countries, and over time – in both the durability of parchment institutions and their capacity to shape actors’ behavior.

This variation is consequential. Institutional weakness narrows actors’ time horizons in ways that can undermine both economic performance (Spiller and Tommasi 2007) and the stability and quality of democracy (O’Donnell 1994). Democracy requires that laws be applied evenly, across territory and across diverse categories of citizens. That is, every citizen should be equal before the law, notwithstanding inequalities created by markets and societies. Institutional weakness undermines that equality – and it hinders efforts to use laws and public policies to combat the multifaceted inequalities that continue to plague much of Latin America. Institutions are not uniformly positive; laws create inequalities as often as they combat them. They may be exclusionary or discriminatory, reinforce inequality or other societal injustices, or – as Albertus and Menaldo (2018) show – protect authoritarian elites and their interests. In some cases, full democratization may require weakening and replacing such institutions. In general, however, no democracy can function well without strong institutions.

Although the problem of institutional weakness is now widely recognized in the field of comparative politics, it has not been adequately conceptualized or theorized. We do not yet have a clear conceptual framework that allows us to identify, measure, and compare different forms of institutional weakness. Such a framework is essential if we are to build theories about the sources and consequences of institutional weakness. In this Element, we take an initial step toward such a framework by presenting a typology of distinct forms of institutional weakness and exploring the potential sources of that weakness.

### 1.1 Why Institutional Strength Matters for Comparative Politics

Recent research on Latin American politics makes manifest the need to broaden the comparative scope of institutional analysis and theorize institutional

<sup>2</sup> Helmke (2017); Pérez-Liñán (2007); Corrales and Penfold (2014).

<sup>3</sup> See Bensusán (2000); Piore and Schrank (2008); Ronconi (2010); Murillo, Ronconi, and Schrank (2011); Coslovsky (2011); and Amengual (2014).

weakness. Take, for example, Gretchen Helmke's (2004) study of executive–judicial relations in Argentina. Established theories of judicial politics – which draw heavily on the case of the United States – tell us that lifetime tenure security for Supreme Court justices should enable justices to act with political independence. But when rules of tenure security are routinely violated in such a way that justices know that voting against the executive could trigger their removal, judicial behavior changes markedly. Helmke finds that when institutions of tenure security are weak, as in Argentina during much of the twentieth century, justices are more likely to vote with presidents during the early part of their term. As the president's term in office concludes, however, justices tend to engage in “strategic defection,” ruling in line with the party or politician they expect to succeed the outgoing president (Helmke 2004). Thus, Helmke identifies – and theorizes – a pattern of judicial behavior that is based on the expectation of institutional weakness and diverges markedly from what would be expected in a strong institutional context.

Alisha Holland's (2017) work on forbearance and redistribution similarly highlights the importance of taking variation in enforcement seriously. Most analyses of redistributive politics in Latin America focus on formal social policies such as public pension and health care spending. By such measures, redistributive efforts in the region are strikingly low: social expenditure as a percentage of gross domestic product (GDP) is barely half the Organisation for Economic Co-operation and Development (OECD) average, and unlike most OECD countries, taxes and transfers only marginally reduce income inequality (Holland 2017: 69–70). In unequal democracies such as those in much of Latin America, the persistence of such small welfare states may seem puzzling. By adding the dimension of forbearance, or deliberate non-enforcement of the law, Holland provides a powerful insight into why such outcomes persist. The state's toleration of illegal activities such as squatting and street vending distributes considerable resources to the poor (Holland estimates that in Lima, it amounts to around \$750 million a year [2017: 9]). Thus, whereas most Latin American states do little, in formal terms, to support housing and employment for the poor, nonenforcement of laws against squatting and street vending creates an “informal welfare state,” in which “downward redistribution happens by the state's leave, rather than through the state's hand” (Holland 2017: 11).

Forbearance toward the poor has thus powerfully shaped long-run welfare state development in Latin America. Because forbearance entails less taxation than formal redistribution, the nonpoor (and governments) may come to prefer it; and when the poor organize around preserving forbearance, popular demands for formal redistribution are often dampened. This “forbearance trap” can lock

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in informal welfare states for decades (Holland 2017: 237–276). A central lesson from Holland’s work, then, is that understanding the politics of redistribution in unequal democracies requires a focus not only on policy design but also on enforcement.<sup>4</sup>

Alison Post’s (2014) research on foreign and domestic investment in infrastructure in Argentina offers another example of how variation in institutional strength shapes policy outcomes. Foreign multinationals – with their deep pockets and long time horizons – are widely expected to hold an advantage over domestic corporations in winning and sustaining favorable infrastructure contracts where institutional veto points constrain governments from modifying the rules (Levy and Spiller 1996; Henisz 2002; Cox and McCubbins 2002) or international third-party enforcement is included in contracts (Elkins et al. 2006; Buthe and Milner 2008). However, Post shows that in weak institutional environments, this is often not the case. In a context of high economic and political volatility, where governments are able to alter the terms of contracts regardless of formal rules, domestic investors with extensive linkages to local economies and politicians are better positioned to sustain and, when necessary, renegotiate contacts.<sup>5</sup> Such “informal contractual supports” may be of little consequence in an institutional environment with strong property rights. However, in a context of institutional instability, such as Argentina in the 2000s, they help explain why domestic investments often prevail over foreign ones (Post 2014). Post thus shows how the behavior of both governments and investors changes in a weak institutional environment, producing investment outcomes that differ markedly from those predicted by the existing literature.

Attention to institutional instability has also reshaped our understanding of electoral design. Most comparative scholarship in this area assumes that those who design the electoral rules do so with a self-interested goal: to maximize their electoral advantage. The most influential work in this area assumed that politicians engage in *far-sighted* institutional design. In other words, they design electoral rules in pursuit of relatively long-term goals (Rokkan 1970; Rogowski 1987; Boix 1999). Boix (1999), for example, argues that conservative elites in much of early twentieth-century Europe replaced plurality electoral systems with proportional representation (PR) systems in an effort to minimize

<sup>4</sup> Variation in enforcement should also influence individual preferences over social policy, in line with Mares’ (2005) finding that prior individual experience with state institutions affects policy preferences. The social policy literature would benefit from adding variation in enforcement to the range of strategies available to politicians, just as it benefited from focusing on the effects of hidden change despite formal institutional continuity (Hacker 2005; Palier 2005).

<sup>5</sup> Such renegotiation often entails cross-sectoral bargains that violate rules governing market concentration and conflict of interest (Post 2014; Post and Murillo 2016).

their losses in the face of the growing electoral strength of socialist parties. Such theories of far-sighted design hinge on some critical assumptions: for example, actors must believe that the rules they design will endure over the medium to long run; and they must have some certainty that they themselves will remain viable and thus be able to play by those rules. In other words, far-sighted designers of electoral rules must be able to “predict with some certainty the future structure of electoral competition” (Boix 1999: 622). Neither of these assumptions holds in weak institutional environments. Where electoral volatility is high, and where institutions are easily and frequently replaced, far-sighted institutional design is more difficult. In such a context, rule designers remain self-interested, but they are less likely to be far-sighted. Rather, as scholars such as Karen Remmer (2008) and Calvo and Negretto (forthcoming) argue, politicians are more likely to design rules aimed at locking in short-term electoral advantages. Such short-sighted design may well have the effect of reinforcing institutional instability. Allowing for variation in rule designers’ time horizons should, therefore, enhance the external validity of theories of institutional design, facilitating their application across different national contexts.

Finally, attention to variation in institutional strength has yielded new insights into the dynamics of institutional change. Recent work in the historical institutionalist tradition has focused attention on forms of gradual institutional change emerging from the reinterpretation or slow redeployment of existing written rules (Streeck and Thelen 2005; Mahoney and Thelen 2010). This scholarship was a useful response to an earlier literature that emphasized discontinuous change – moments of dramatic and far-reaching change, followed by long periods of path-dependent stasis (Krasner 1988). Yet the patterns of layering, drift, conversion, and exhaustion identified by Kathleen Thelen and her collaborators operate in a context of strong formal institutions. As we have argued elsewhere (Levitsky and Murillo 2009, 2014), the dynamics of institutional change can be quite different in a weak institutional environment. Rather than being characterized by “stickiness,”<sup>6</sup> institutional change tends to be rapid and thoroughgoing, often following a pattern of serial replacement, in which rules and procedures are replaced wholesale – without ever settling into a stable equilibrium (Levitsky and Murillo 2014).

Second, actors in a weak institutional environment may achieve real substantive change by modifying enforcement or compliance levels rather than changing the rules. Mahoney and Thelen (2010) have shown how gaps in compliance can serve as a mechanism of hidden change via the subtle

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<sup>6</sup> For example, Streeck and Thelen (2005) explicitly assume the “stickiness of institutional structures” (p. 18) in their discussion of economic liberalization in advanced democracies.

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reinterpretation of institutional goals, even as formal institutional structures remain intact. Building on this insight, recent scholarship shows how the “activation” of previously dormant institutions can be an important source of change (see Levitsky and Murillo 2014). For instance, Saffon and González Bertomeu’s (forthcoming) analysis of property rights in Porfirian Mexico shows how changing patterns of enforcement may have far-reaching consequences without altering the letter of the law.<sup>7</sup> At the same time, noncompliance may also be a source of formal institutional *stability*, especially when it tempers an institution’s distributive consequences (Levitsky and Murillo 2014).<sup>8</sup> During the 1990s, for example, Latin American governments seeking more flexible labor markets weakened enforcement of existing labor laws while keeping them on the books (Bensusán 2000; Cook 2010).

Recent research thus suggests the need for a more conscious focus on institutional weakness as an object of study rather than as a sort of “random error” that obstructs proper institutional analysis. That is what this Element seeks to do.

## 1.2 Why Latin America?

Institutional weakness is widespread in the developing and postcommunist worlds. Why, then, examine a single region? We focus on Latin America because it contains both an important set of shared characteristics and useful variation. With few exceptions, Latin American countries possess at least minimally effective states and competitive electoral (if not always fully democratic) regimes. Thus, these are not cases in which political institutions can be dismissed as predictably and uniformly meaningless. Moreover, the region contains within it substantial variation on the dimension of institutional strength – across countries, across institutions, and over time. A focus on Latin America allows us to exploit this variation, while simultaneously benefiting from the scholarship of a relatively close-knit community of scholars with a shared knowledge of the region’s history and individual cases. At the same time, the implications drawn from the study of Latin America have clear applicability to other regions of the world, and we expect our framework and the lessons to contribute to a broader debate on political institutions in comparative politics.

<sup>7</sup> Latin America exhibits more far-reaching instances of deactivation and activation than what is suggested by Mahoney and Thelen (2010), as political actors are not necessarily restricted to the discretion given by the letter of the law. Processes of activation and deactivation may also be reversed. Holland (2017, forthcoming) shows how electoral incentives drive the shifting activation and deactivation of street vending regulations in Bogota, Lima, and Santiago de Chile.

<sup>8</sup> For example, during a 2018 debate on reforming the rules banning abortion in Argentina, supporters of the existing abortion ban argued that reform was not necessary because no women were actually penalized for terminating their pregnancies ([www.lanacion.com.ar/2157341-aborto-no-faltar-a-la-verdad](http://www.lanacion.com.ar/2157341-aborto-no-faltar-a-la-verdad)).

Issues of institutional strength are of great consequence in Latin America. Given the region's vast inequalities and state deficiencies, the potential impact of institutional reform *on paper* is often strikingly high. If laws aimed at eliminating corruption, clientelism, racial discrimination, or violence against women, or rules designed to redistribute income to the poor, enforce property rights against squatters, or protect the environment, were *actually complied with over time*, the social and distributional consequences would be enormous. So the stakes of institutional compliance and durability are high. Struggles over whether and how the rules are enforced, and whether they remain on the books or are discarded, have prominent winners and losers. Scholars must better understand what drives these struggles – and what determines their outcomes.

Although this Element focuses on Latin America, its lessons travel beyond the region. The creation of institutions that seem designed to produce low compliance or which fail to generate a coalition that can sustain compliance are hardly unique to Latin America. Incentives to create weak institutions and shared expectations of institutional weakness are endemic across the Global South. Indeed, they may be found in industrialized democracies as well. Thus, the power struggles underlying the design, implementation, and persistence of weak institutions is relevant not only for Latin America but for comparative politics more broadly.

## 2 Defining Institutions

Before we conceptualize weak institutions, we must define institutions. Most institutionalists begin with North's (1990: 3, 4) definition of institutions as "the humanly devised constraints that shape human interaction . . . [in ways that are] perfectly analogous to the rules of the game in a competitive team sport" (see, e.g., Peters 1999: 146). In previous work (Brinks 2003; Helmke and Levitsky 2006), some of us have argued that institutions are made up of rules, and, in the context of defining informal institutions, we have sought to differentiate rules from purely descriptive statements or expectations about behavior. For this project, we adopt the same starting point – the notion that (formal) institutions are made up of (formal) rules. This allows us to focus on formal constraints that are "humanly devised" and recognized as compulsory within a polity. As we will see, these formal constraints interact in complex ways with social norms and other informal institutions, which affects both the work that institutions do and their potential strength or weakness. At the definitional stage, however, we can limit our purview to formal rules.



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Many definitions stop there, but for our purposes we must push the definition beyond the implicit equation of institutions with single stand-alone rules or laws. In all cases, we are concerned with the effectiveness of sets of rules rather than with that of single rules in isolation, and with the actors whose conduct is affected by these rules, even though a single rule may sometimes stand in as shorthand for the institution as a whole.

We therefore define a formal institution as a set of officially sanctioned rules that structures human behavior and expectations around a particular activity or goal. Elinor Ostrom (1986: 5) initially defined institutions as “the result of implicit or explicit efforts by a set of individuals to achieve order and predictability within defined situations by: (1) creating positions; (2) stating how participants enter or leave positions; (3) stating which actions participants in these positions are required, permitted, or forbidden to take; and (4) stating which outcome participants are required, permitted, or forbidden to affect.” She later added rules that specify (5) the consequences of rule violation, which in most cases we expect to be associated to a specific sanction (Crawford and Ostrom 1995).<sup>9</sup> We simplify Crawford and Ostrom’s “grammar” somewhat, defining a formal institution as a set of formal rules structuring human behavior and expectations around a statutory goal by (1) specifying actors and their roles; (2) requiring, permitting, or prohibiting certain behaviors; and (3) defining the consequences of complying or not complying with the remaining rules.

Our conceptual scheme relies on identifying the statutory goal of formal institutions – the second element in our definition above. As we will see in the next section, a strong institution is one that sets a nontrivial goal and achieves it, while a weak institution achieves little or nothing either because it fails to achieve an ambitious goal or because it never set out to accomplish anything. We set statutory goals rather than the (stated or implicit) policy objectives of institutional creators as the benchmark because we recognize that the ultimate policy aim of institutions – often a product of compromise among distinct and even competing interests – may well be ambiguous or contested (Moe 1990; Schickler 2001; Streeck and Thelen 2005; Mahoney and Thelen 2010). By taking the statutory goal itself as a starting point, we can more easily identify how the preferences and strategies of actors work to weaken or strengthen institutions. Whether the institution succeeds in achieving its policy objective or produces extensive unintended consequences can be analyzed separately under more conventional policy effectiveness rubrics. It is entirely possible,

<sup>9</sup> Other definitions identify rules specifying roles, thus constituting decision makers; rules that permit, prohibit, or require certain behavior; and rules that define consequences (Hart 1961; Ellickson 1991).



in this conceptual scheme, that a strong institution nevertheless fails to achieve the policy objectives that prompted its creation or does more harm than good in the overall scheme of things.

For instance, Amengual and Dargent (forthcoming) examine the regulatory framework around mining, construction, and agroindustry in Argentina, Bolivia, and Peru. The mining regulations they study have the policy goal of reducing environmental hazards for the local population and the express statutory goal of requiring or forbidding certain practices. The motivation for the mining companies that help enforce these rules might be to access international markets or inhibit competition from informal miners who do not have the technology to fulfill those standards, rather than to protect the environment. Indeed, these motivations are often crucial for understanding firms' incentives to coproduce enforcement. But to measure the strength of the institution, we should examine whether the required or forbidden practices are taking place, not whether the policy goals are being achieved, or whether the mining companies are realizing their objectives. When evaluating institutional strength, then, the focus should be on the ostensible goal of the institution, not on the (public or private) motives of the politicians and other social actors behind it.

Institutional goals may be *transformative*, in that they seek to move outcomes away from the status quo, or *conservative*, in that they seek to preserve the status quo in the face of potential change. This Element focuses primarily on transformative institutions, both because they are more often the subject of political and policy debates in Latin America and because they are more often identified as being weak. Nevertheless, conservative or status quo-preserving institutions can be of great importance. Property laws and civil or criminal codes that enshrine traditional gender roles and family structures are examples. Albertus and Menaldo's (2018) work on the persistence of authoritarian constitutions that protect wealthy elites from redistribution by constraining democratic governments demonstrates that conservative institutions are endemic. The conceptual scheme we propose works in either case. Whether conservative or transformative, institutions are meant to make it more likely that social, economic, or political outcomes will be closer to a defined statutory goal than to some less preferred alternative outcome.

Weak formal institutions should not be confused with informal rules, or those that are "created and enforced outside officially sanctioned channels" (Helmke and Levitsky 2006: 5). Informal institutions may coexist with either strong or weak formal institutions. When they coexist with weak formal institutions, they may either reinforce them by providing a second mechanism that promotes the expected behavior ("substitutive") or undermine them by promoting an alternative behavior ("competing") (Helmke and Levitsky 2006: 14).

Although we recognize (and discuss below) the importance of informal rules in generating institutional strength or weakness, our focus here is on formal institutions.

Finally, it is important to distinguish formal institutions, or rules, from the organizations that are either the targets of those rules (political parties, interest groups, economic actors) or dedicated to enforcing or implementing the rules (bureaucracies). By keeping rules and organizations conceptually distinct, we can evaluate whether strengthening state agencies – hiring more inspectors, spending more on training bureaucratic personnel, buying more vehicles, or establishing meritocratic criteria – actually enhances compliance with the institution, as do Ronconi (2010), Amengual (2016), and Schrank (2011) in their work on labor regulations and civil service.

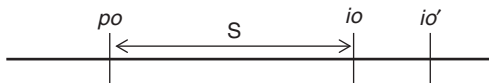
### 3 Institutional Weakness

#### 3.1 The Core Concept

After defining formal institutions, we turn to conceptualizing their weakness. We expect strong institutions to redistribute and refract power, authority, or expectations in order to produce an institutional outcome ( $io$ , in Figure 1) that diverges from what the preinstitutional outcome ( $po$ ) would have been.<sup>10</sup> An institution may be designed to produce an outcome (shown in Figure 1 as  $io'$ ) that is more ambitious than that which it actually produces. A strong institution, however, makes a difference because the distance between  $io$  and  $po$  – a parameter we call  $S$  (for strength) – is greater than zero.  $S$  is a cost to those who prefer  $po$  and is exactly the benefit sought by those who prefer  $io$  or  $io'$ .

We can use the following graph to illustrate this point and set up a vocabulary to use as shorthand:

It is important to note that the move from  $po$  to  $io$  is not a move from the state of nature to an institutionalized context. Indeed,  $po$  could be (in the case of a conservative institution) a feared future outcome the institution is designed to prevent, and  $io$  may be the status quo it seeks to preserve. The idea is that the



**Figure 1:** Strong institution –  $io-po \gg 0$

<sup>10</sup> We use “preinstitutional” here in the same sense in which people commonly use “prepolitical.” It is not meant to imply temporality, but rather simply what might happen in the absence of the institution.