

## PUBLIC SUPPORT AND JUDICIAL CRISES IN LATIN AMERICA

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*If preceding history shows anything, it is that when judicial decisions wander far from what the public will tolerate, bad things happen to the Court and the justices.<sup>1</sup>*

How do courts establish their power? What conditions undermine it? These are the core questions taken up in Barry Friedman's recent book, *The Will of the People*. As his title and the quote above suggest, the answer hinges on how aligned judges are with public opinion. Drawing on the history of the United States Supreme Court, Friedman argues that judicial power waxes when judges are able to discern and willing to match the larger trends in the public mood, and wanes otherwise. To the extent that courts are able to build a supportive constituency, they will be able to deflect potential challenges to their power.

Here, I begin to explore how well Friedman's thesis travels to a part of the world where courts are widely considered to be weak and unstable: contemporary Latin America. Although we lack readily available data on how specific judicial decisions map onto public opinion, the *Latinobarómetro* gives us some sense of how public support for courts in the region has varied over time and across countries.<sup>2</sup> Paired with a unique, cross-sectional, time series data set on political attacks against high courts in the region, which I constructed, I find that low public support for the judiciary is correlated with political attacks against judges. Indeed, low levels of legitimacy appear to have more explanatory power than several other intuitively plausible causes of judicial instability. I then address more general questions of

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1 BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 375 (2009).

2 *Latinobarómetro* is a public opinion survey conducted annually for several Latin American countries by the Latinobarómetro Corporation, based in Santiago, Chile. The data and analysis cited in this section can be found in Gretchen Helmke & Julio Rios-Figueroa, *Introduction to COURTS IN LATIN AMERICA* (Gretchen Helmke & Julio Rios-Figueroa eds.) (forthcoming 2010).

why support and attacks are linked and why, if public support is so central for judicial power, cultivating it often proves elusive.

### A LOOK AT SOME FACTS<sup>3</sup>

#### A. *Public Confidence in Courts*

One of the most widely touted facts about the rule of law gap in Latin America is how poorly the public regards the judiciary. *Latino-barómetro* surveys provide us with an overview of the evolution of public opinion about the judiciary over the last decade and across countries. On average, the percentage of Latin American citizens reporting that they had “a lot” or “some” confidence in the judiciary has hovered in the mid-30% range for most of the period, varying between a high of 38% in 1995, the first year for which we have data, and a low of 20% in 2003.<sup>4</sup> Such figures clearly contrast with the American public’s image of the United States Supreme Court today. Friedman, for instance, cites a recent Gallup poll with 69% of the public reporting trust in the judicial branch.<sup>5</sup> Moreover, whereas the judiciary has emerged as the most trusted branch of government in the United States,<sup>6</sup> in Latin America the judiciary routinely scores only slightly higher than the legislature and slightly lower than the executive branch.<sup>7</sup>

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<sup>3</sup> This section draws on Helmke & Ríos-Figueroa, *id.*

<sup>4</sup> Note that drawing temporal comparisons is complicated by the fact that the number of countries included in the *Latinobarómetro* survey increased over the time period analyzed. *See id.* at 3 (observing that the percentage of people reporting at least “some” confidence in the judiciary has spanned between a high of 38% to a low of 20%).

<sup>5</sup> *See* FRIEDMAN, *supra* note 1, at 581 n.37 (“[P]ublic trust of the judicial branch remains relatively high at 69 percent.”).

<sup>6</sup> *Id.*

<sup>7</sup> Between 1995 and 2000, the average percentage of Latin American citizens reporting trust in the legislature was 32%, 36% for the judiciary, and 38% for the executive. Between 2000 and 2007, the average amount of trust in the legislature declined to 25%, compared to 30% for the judiciary and 36% for the executive branch. Helmke & Ríos-Figueroa, *supra* note 2.

FIGURE 1

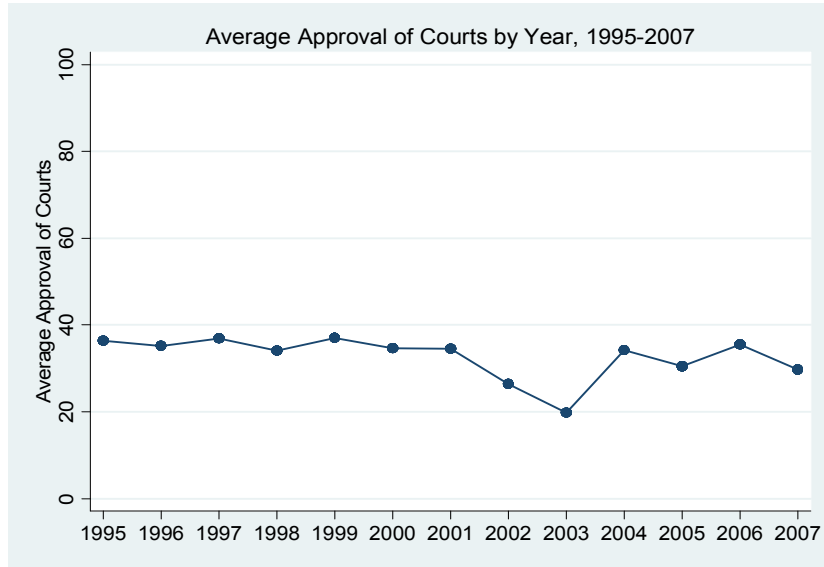
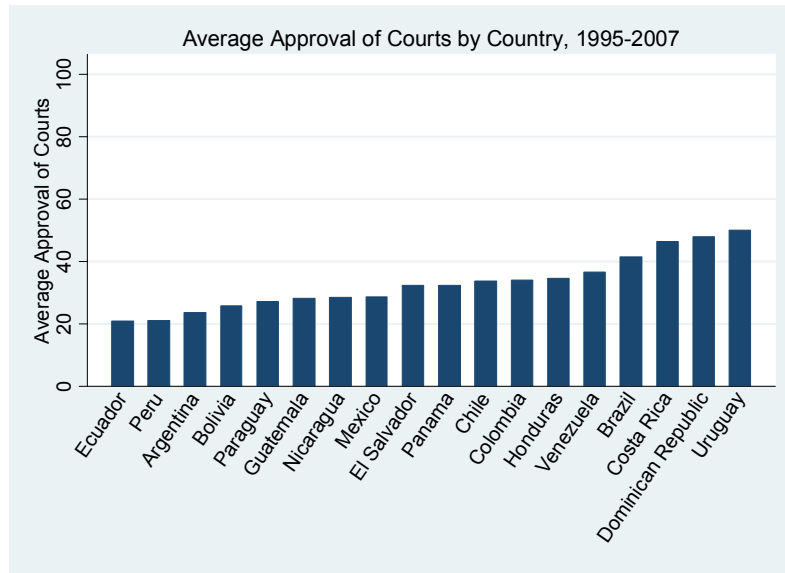


FIGURE 2



Behind the regional averages, however, there is a great deal of cross-national variation.<sup>8</sup> For example, in Ecuador and Peru, only one in five citizens surveyed has any confidence in the judiciary.<sup>9</sup> Argentines, Bolivians, Paraguayans, Guatemalans, Nicaraguans, and Mexicans have scarcely better impressions of their courts.<sup>10</sup> But in Brazil, Costa Rica, Dominican Republic, and Uruguay, where between 40% and 50% of people on average have a positive view of the judiciary, the courts appear to be on much more solid ground with the public.<sup>11</sup>

### B. Political Attacks Against Courts

Throughout the twentieth century, Latin American judiciaries have all too frequently been the casualty of regime change, with judges resigning en masse whenever dictators displaced democrats and vice versa.<sup>12</sup> In Argentina, for example, judges were the victims of regime instability in 1946, 1955, 1966, 1973, 1976, and 1983.<sup>13</sup> In Bolivia, political instability under the specter of military rule led to the reshuffling of the Supreme Court some seventeen times over four and half decades (1936, 1940, 1941, 1944, 1946, 1948, 1952, 1957, 1961, 1964, 1967, 1972, 1974, 1978, 1979, 1980, and 1982).<sup>14</sup> Even under Mexico's relatively stable single-party rule, the Court was subject to constant manipulation by incoming governments. Mexico's Supreme Court was completely dissolved and re-constituted in 1934,

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<sup>8</sup> See *infra* Figure 2.

<sup>9</sup> See Helmke & Ríos-Figueroa, *supra* note 2, at 4 fig.1.2 (showing that only about 20% of Ecuadorians and Peruvians approved of courts in their respective countries).

<sup>10</sup> See *id.* (estimating that, in the majority of Latin American countries, the courts suffer from only 20% to 30% public approval).

<sup>11</sup> See *id.* (measuring public approval of the judiciary in Brazil, Costa Rica, Dominican Republic, and Uruguay to be over 40%).

<sup>12</sup> See Joel G. Verner, *The Independence of Supreme Courts in Latin America: A Review of the Literature*, 16 J. LATIN AM. STUD. 463, 469–70 (1984) (explaining that political upheavals have led to changes in the court by the dismissal or resignation of judges).

<sup>13</sup> See Rebecca Bill Chávez et al., *A Theory of the Politically Independent Judiciary: A Comparative Study of the United States and Argentina*, in COURTS IN LATIN AMERICA, *supra* note 2, at 219, 236 (stating the years in which the Argentine Supreme Court “experienced purges” in response to changes in political power); see also GRETCHEN HELMKE, COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA 62 (2005) (“During the cycle of regime instability that plagued Argentina from the 1940s through the 1980s, the members of the Supreme Court were replaced with every change in regime.”).

<sup>14</sup> See Andrea Castagnola & Aníbal Pérez-Liñán, *Bolivia: The Rise (and Fall) of Judicial Review*, in COURTS IN LATIN AMERICA, *supra* note 3, at 278, 284–85.

1940, and again in 1994 with the latest wave of reforms.<sup>15</sup> Despite life tenure provisions, the majority of presidents during that time appointed more than 50% of the justices to the bench.<sup>16</sup>

Interestingly, however, in many Latin American countries, the pattern of juridical instability has continued or even increased following the advent of democracy.<sup>17</sup> In Argentina, Bolivia, and Ecuador, for instance, courts have continued to be targeted for removal or packing by nearly every recent democratic government. From Carlos Menem's infamous court-packing scheme in 1990, to Lucio Gutierrez's ill-fated attempt to remove all thirty-one judges on the Ecuadorian Supreme Court in 2005, to Evo Morales's nearly constant harassment of the Bolivian judiciary since his election in 2006, executives routinely concentrate their energies on attacking sitting judges. In other well-known instances, including Alberto Fujimori's self-coup in Peru in 1992, Jorge Serrano's unsuccessful effort to stage a self-coup the next year in Guatemala, and Hugo Chavez's attempts to consolidate his power through constitutional change in 1999, courts are often pulled into larger institutional battles.

The *Institutional Crises in Latin America (ICLA) Dataset*<sup>18</sup> offers the first systematic picture of these types of attacks and threats against high courts in contemporary Latin America. The dataset covers eighteen Latin American countries (Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, Venezuela) from 1985 (or from the year of the country's most recent transition to democracy) through 2008. Using information from the *Latin American Weekly Report*, I employ the following three operational rules for identifying attacks against courts: 1) the executive or legislative branch takes actions that threaten the survival of justices on the supreme and/or constitutional court; 2) these threats affect the majority composition of the court (e.g., court pack-

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15 See Beatriz Magaloni, *Authoritarianism, Democracy and the Supreme Court: Horizontal Exchange and the Rule of Law in Mexico*, in DEMOCRATIC ACCOUNTABILITY IN LATIN AMERICA 266, 288 (Scott Mainwaring & Christopher Welna eds., 2003).

16 See *id.* at 287–88 (recognizing that since 1934, “[t]he overwhelming majority of presidents appointed more than 50 percent of justices during their terms.”).

17 See Aníbal Pérez-Liñán & Andrea Castagnola, *Presidential Control of High Courts in Latin America: A Long-Term View (1904–2006)*, 2 J. POL. LATIN AM. 87, 106 (2009) (“[T]he advent of democracy may have accelerated the race to control courts, rather than reducing it.”).

18 GRETCHEN HELMKE, INSTITUTIONS ON THE EDGE: INTER-BRANCH CRISES IN LATIN AMERICA (forthcoming 2011) (unpublished manuscript) (on file with author and the University of Pennsylvania Journal of Constitutional Law).

ing, multiple impeachments, forced resignations); and 3) the attacks are politically motivated (i.e., they are tied to a specific decision affecting public policy handed down by the court, or they are part of broader political battle for judicial control fought between the two branches). Note that setting a relatively high threshold for identifying political attacks against the judiciary helps avoid statistical, Type I errors in which, say, the other branches of government legitimately seek to punish an errant judge, but thereby potentially excludes some important cases as well.<sup>19</sup>

FIGURE 3

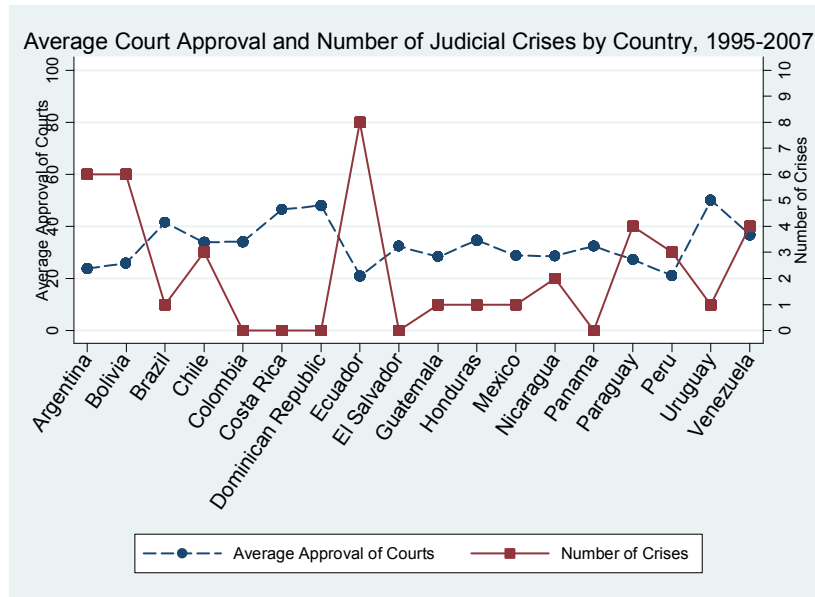


Figure 3 shows the distribution of attacks against Latin American high courts by country, combined with the previous data on public support. Roughly consistent with Friedman's thesis, note that countries with the highest frequency of crises are also those that tend to suffer from the lowest public approval ratings: Ecuador, Argentina,

<sup>19</sup> For instance, by these coding rules, President Franklin Delano Roosevelt's court-packing scheme would be coded as a politically motivated attack, but the attempt to impeach Justice Samuel Chase, which was also politically motivated, would not make the cut by Rule 2. Cf. JAMES MACGREGOR BURNS, *PACKING THE COURT: THE RISE OF JUDICIAL POWER AND THE COMING CRISIS OF THE SUPREME COURT* 33-34 (2009) (describing the Republicans' unsuccessful attempt to impeach Justice Chase after he severely criticized the government).

Bolivia, and Paraguay. Likewise, judiciaries with the highest public approval ratings have had the fewest attacks (Costa Rica, Colombia, Brazil, El Salvador, Panama, Uruguay, and Dominican Republic). Chile and Venezuela are the only two countries that do not fit the apparent pattern. In the case of Chile, however, it is worth noting that most of the threats did not come to fruition. The fact that the incidence of attacks throughout the region has tended to increase in the last two decades, while public support has generally decreased, is also roughly in line with the central thesis. Of course, from these descriptive data we cannot tell the direction of the causal arrow—it may be that attacks are lowering public support for the courts, not vice versa. Nor can we control for the influence of other plausible explanations for juridical instability.

To begin to address these questions, I estimate a series of logit regression models in which the dependent variable is whether or not a judicial crisis occurs and the unit of analysis is administration year. Judicial crises occur in roughly 5% of the observations.<sup>20</sup> Throughout, I use a lagged measure of public support of the judiciary to partly ameliorate the problem of endogeneity. Models 1–10 (shown in Table 1 below) allow us to compare the impact of public approval for courts to a host of other possible causal factors of judicial crises.<sup>21</sup> Drawing on the existing literature, these alternative factors include:

- (1) *Political Fragmentation.* Standard separation of powers theories contend that the level of political fragmentation impedes the political branches' capacity to punish courts.<sup>22</sup> Here, I capture this relationship using information on Latin American Presidents' seat shares in the lower house with a dummy variable coded 1 for presidents that lack a congres-

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20 There is no clear threshold for what constitutes a rare event; thus, all of these models are estimated both with and without the rare events software, ReLogit, available from Gary King. The ReLogit results are presented below, but the method has no material impact on the results. In addition, each model is run with the data clustered by country.

21 Because the *Latinobarómetro* data begin in 1995 (and skip 1999), I use Amelia software available on Gary King's website to impute the missing observations for 1985–1994 and 1999. I report below results based on the imputed data; however, the substantive results do not change materially if I restrict the analysis to the existing data and run the analyses only on the years 1995–1998 and 2000–2008.

22 Note, of course, that according to the theory such attacks should simply remain off the equilibrium path. Cf. Gretchen Helmke & Jeffrey K. Staton, *The Puzzling Judicial Politics of Latin America: A Theory of Litigation, Judicial Decisions, and Interbranch Conflict*, in *COURTS IN LATIN AMERICA*, *supra* note 2, at 306, 312–13 (“[M]ost strategic models of interbranch relations tell us that such attacks should remain strictly off the equilibrium path.”).

sional majority, and 0 for presidents that have majority control over congress.

- (2) *Constitutional Protections.* Although scholars of Latin American politics routinely fret that institutions are mere “parchment barriers,” dating back to Hamilton, constitutional theorists and judicial scholars alike assume that constitutional guarantees reduce the pressures judges face. To assess whether de jure institutional protections serve to or fail to insulate Latin American judges, I use an aggregate measure from an extensive new data set on Latin American constitutions constructed by Ríos-Figueroa.<sup>23</sup> The variable, *Insulation*, ranges from 0–4 and is based on whether two or more institutional actors are required to nominate constitutional judges, supermajorities are required to initiate impeachment, the number of judges is specified in the constitution, and judicial tenure is longer than that of their appointers.
- (3) *Judicial Power.* Scholars have persuasively argued that judicial independence without judicial power is meaningless.<sup>24</sup> At the same time, however, it may be that increasing judicial powers perversely increases the incentives for politicians to attack courts. To assess this possibility, I draw again on Ríos-Figueroa’s data, constructing an aggregate measure, *Judicial Power*, that captures the number of legal instruments for judicial review that constitutional judges can employ.<sup>25</sup>

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<sup>23</sup> See Julio Ríos-Figueroa, *Institutions for Constitutional Justice in Latin America*, in COURTS IN LATIN AMERICA, *supra* note 2, at 27, 36 (comparing the relative insulation of Latin American judges).

<sup>24</sup> See, e.g., José J. Toharia, *Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain*, 9 L. & SOC’Y REV. 475 (1975) (describing how Spain’s ordinary court system was independent but the presence of special courts compromised the power of the ordinary judiciary); see also Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605 (1996) (noting the importance of both independence and power for judiciaries in emerging democracies).

<sup>25</sup> See Ríos-Figueroa, *supra* note 23, at 40–50, for a description of the characteristics and effects of each of the models of constitutional adjudication used by Latin American democracies. For a detailed description of the variety of legal instruments available to Latin American judges, see generally Patricio Navia & Julio Ríos-Figueroa, *The Constitutional Adjudication Mosaic of Latin America*, 38 COMP. POL. STUD. 189 (2005).



- 4) *Level of Economic Development.* In general, juridical stability promotes economic development.<sup>26</sup> However, per modernization theory, economic development may also reduce institutional instability of all types, including attacks against courts. A recent study of tenure and turnover on Latin America's high courts, for instance, finds modest support for this claim.<sup>27</sup> To examine this, I use a logged measure of GDP.

TABLE 1

Variables	Model 1	Model 2	Model 3	Model 4	Model 5
Legitimacy (lagged)	-.017*** (.006)				
Fragmentation		.150 (.339)			
Institutional Protections			.031 (.146)		
Judicial Powers				.056 (.258)	
GDP					-.000 (.000)
Constant	-3.508*** (.552)	-2.445*** (.315)	-2.448*** (.531)	-2.473*** (.637)	-2.323*** (.180)
	<i>n</i> = 472				

<sup>26</sup> See Robert J. Barro, *Determinants of Economic Growth: A Cross-Country Empirical Study* 32–38 (Nat'l Bureau of Econ. Research, Working Paper No. 5698, 1996) (explaining that democracy fosters economic growth).

<sup>27</sup> See Pérez-Liñán & Castagnola, *supra* note 17, at 98 (asserting that modernization increases institutional stability and reduces judicial turnover).

Variables	Model 6	Model 7	Model 8	Model 9	Model 10
Legitimacy (lagged)	-.017*** (.006)	-.017*** (.006)	-.017*** (.006)	-.017*** (.006)	-.017*** (.006)
Fragmentation	.051 (.416)				-.002 (.136)
Institutional Protections		.003 (.130)			.065 (.274)
Judicial Powers			.050 (.247)		.077 (.420)
GDP				.000 (.000)	.000 (.000)
Constant	-3.537*** (.653)	-3.519*** (.671)	-3.622*** (.648)	-.349*** (.584)	-3.668*** (.753)

*n* = 472

Note: Statistically significant parameter estimates are denoted by \*( $p \leq .10$ ), \*\*( $p \leq .05$ ), and \*\*\* ( $p \leq .001$ ).

TABLE 2

Model	Explanatory Variables	Substantive Effects (min - max)	Percent Correctly Predicted	Number of Crises Predicted
1	Legitimacy (lagged)	2% - 29%	57%	27
2	Fragmentation	8% - 9%	42%	26
3	Institutional Protections	8% - 9%	11%	41
4	Judicial Powers	8% - 10%	11%	41
5	GDP	5% - 9%	15%	39
6	Legitimacy (lagged) + Frag- mentation	2% - 28%	56%	28
7	Legitimacy	2% - 28%	57%	27

	(lagged) + Institutional Protections			
8	Legitimacy (lagged) + Judicial Powers	2% - 27%	58%	29
9	Legitimacy (lagged) + GDP	2% - 25%	56%	27
10	Legitimacy (lagged) + Fragmentation + Institutional Protections + Judicial Powers + GDP	2% - 32%	57%	29

Table 1 provides the coefficients and standard errors for each of the regression models, and Table 2 reveals their substantive effects and tells us how well each of the models does in terms of correctly predicting the data. Three findings stand out in particular. First and foremost, the lagged measure of public support for the judiciary is consistently negative and statistically significant. Decreasing legitimacy from the maximum to the minimum increases the chances of a political attack on the courts from 2% to 29%. By itself, the level of public support correctly predicts the data about 57% of the time. Second, none of the other factors ever achieve statistical significance, nor do they have an even remotely meaningful substantive effect on the probability of institutional instability occurring.<sup>28</sup> Note that the relatively high percentage of correctly predicted cases for the *Fragmentation* variable stems almost entirely from the number of non-crises that are correctly predicted. Not surprisingly, adding all of the causal factors together in a single model does not improve our predictive capacity over simply knowing the level of public support. Third, however, combining the fact that we are only able to correctly predict a little over half of the cases with the observation that the constant terms in the regression models are consistently significant suggests that there is a good deal of the picture that we are still miss-

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<sup>28</sup> For the institutional variables, this may be due to the aggregation of the measures used here. Thus, before concluding that formal institutions do not matter, future work should, at a minimum, include separately each of the various institutional measures.

ing. Legitimacy may be important for the courts' stability, but it is only part of the story.

#### DISCUSSION

I now conclude by turning to some of the broader questions that the foregoing exercise raises in light of Friedman's thesis. The first is this: to the extent that public support and judicial attacks are inversely related beyond our borders, we want to know more about why this is so. The implicit mechanism there, as here, seems to be that the public will somehow punish politicians that transgress against courts. But is this entirely convincing? One criticism leveled against previous work in this vein is simply that elections, which are the main devices for enacting such punishments, are blunt instruments. Voters care about a lot of different issues. Particularly in contexts like Latin America, it hardly seems reasonable to imagine that how courts are treated outstrips the economy or crime.

Conversely, it may be that legitimacy is not always necessary for punishment to occur in the wake of an attack. Here, the case of Ecuador is extremely interesting. As we have glimpsed, Ecuador is both a country that has suffered multiple judicial attacks over the last two decades and one in which public support for the courts is abysmally low. In 2005, the number of people expressing any degree of confidence in the judiciary was just around 16%.<sup>29</sup> Nevertheless, when then-President Lucio Gutierrez decided to cut a deal with the opposition and pack the court with political appointees, the people came out on the street in droves to protest. Eventually, Gutierrez himself was forced to resign. Certainly, in this example, there was no diffuse public support for the judiciary to dissuade a potential attack, but when the attack occurred, people responded in just the way they might in a context where the court enjoys high legitimacy.

The other broader issue revolves around understanding why, if public support is so important for judges to cultivate, it often proves so elusive. Here, a number of possible explanations suggest themselves. One obvious observation is simply that not enough time has passed since the third wave of democratic transitions began for Latin American courts to establish their role. After all, one of the key lessons of Friedman's book is that it took several generations for the U.S. Supreme Court to iterate toward an equilibrium in which political attacks remain entirely off the path. In Friedman's words,

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<sup>29</sup> Analysis based on data available from *Latinobarómetro*, various years. See *supra* note 2.

it has taken the Court and the public some time to learn how their relationship might work; now that it is understood, violent upheaval is no longer necessary. . . . It took the Court quite a while to understand the limitations that motivated public opinion imposed on its freedom of movement. By the same token, it took the public several iterations to assess how it felt about disciplining the court, and in what ways.<sup>30</sup>

Perhaps the problem in Latin America then is simply that too little time has passed since democracy has been successfully established. But just as critics of the “democratic consolidation” thesis in Latin America and elsewhere have long pointed out, we should not simply assume an inherent teleology to institution building. History carries many different possible lessons, and sometimes the legacy of institutional instability is more instability. It is worth remembering that to justify his decision to pack the Argentine Supreme Court in 1990, it was enough for Carlos Menem to quip, “Why should I be the only president in Argentine history not to have my own court?”<sup>31</sup> Moreover, to the extent that attacks against courts further lowers public confidence, it seems just as plausible that a history of previous attacks instead triggers a cycle of institutional instability that is exceptionally hard to break.

Yet another possible factor at work is how aware (or unaware) Latin American publics are of their national courts. Recalling Gibson, Caldeira and Baird’s claim that “to know courts is to love them,”<sup>32</sup> perhaps a lack of familiarity is the core underlying problem. Of course, mere awareness may not necessarily bolster support. As Gibson and Caldeira put it, “we are not necessarily arguing that information per se leads to heightened institutional loyalty. Rather, the circumstances leading to information also contribute to legitimacy.”<sup>33</sup>

Latin American courts are arguably in the headlines much more frequently than their U.S. counterparts, but the content of the message that the public is getting about these courts matters deeply. As Jeffrey Staton’s work on the Mexican Supreme Court clearly demonstrates, Latin American judges are indeed aware of the importance of

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30 FRIEDMAN, *supra* note 1, at 376.

31 GRETCHEN HELMKE, *supra* note 13, at 1.

32 James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 344 (1998).

33 James L. Gibson & Gregory A. Caldeira, *Knowing the Supreme Court? A Reconsideration of Public Ignorance of the High Court*, 71 J. POLS. 429, 437 (2009). Note that Gibson and Caldeira explicitly conceptualize diffuse support or institutional legitimacy as the public’s unwillingness to tolerate political attacks or to make fundamental structural changes. Legitimacy is then hypothesized as a function of 1) broader support for democratic institutions, 2) knowledge, and 3) controls for education, political efficacy, and partisan and ideological identifications. *Id.* at 437–38.

“going public” and strategically communicate their decisions precisely to build a supportive constituencies, which can potentially shield judges from political sanctions.<sup>34</sup> More specifically, Staton argues that judges aim to endogenously build their support by engaging in principled or impartial decision making. But precisely because judges are never fully insulated from political attacks, sometimes judges’ decision making is forced to depart from this ideal. The result is that judges find themselves with an unenviable trade-off: by behaving strategically in the short run they can avoid political backlash, but to the extent that the public is aware of what the court is doing, the judges’ legitimacy suffers in the long run.

In a recent paper, Staton and I build on just this sort of a tradeoff to derive the conditions under which Latin American judges engage in risky or bold decision making and suffer the consequences.<sup>35</sup> To motivate this exercise, we begin with the simple observation that standard separation of powers theories—first developed in the U.S. and applied elsewhere—wildly under-predict institutional instability. That is, if judges are strategic, such models tell us that politicians should have little need to discipline them; conversely, if politicians are not able to discipline judges, then judges have little reason to be strategic. Yet, reality is far more complex. For instance, while there is ample evidence to suggest that Latin American judges are often strategic in precisely the way our standard theories would predict,<sup>36</sup> sometimes judges engage in quite risky and bold decisions (e.g., barring Fujimori’s bid for a third term, or refusing to prosecute military leaders for a coup attempt against Chavez). Why?

The upshot of our theory is that judicial institution-building is fraught with difficulty. Especially relevant here, the development of public support for courts can have non-intuitive results on inter-branch conflict.<sup>37</sup> Indeed, we show that as the public backlash parameter increases up to a certain point, the likelihood of a judicial purge actually increases. This is so because at middling levels of beliefs about the likelihood of a public backlash, judges may be suffi-

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34 See JEFFREY K. STATON, GOING PUBLIC FROM THE BENCH: STRATEGIC COMMUNICATION AND THE CONSTRUCTION OF JUDICIAL POWER 7 (2010).

35 See Helmke & Staton, *supra* note 22, at 306 (noting that judges often engage in risky and bold decision making even when they face politically motivated attacks).

36 See, e.g., Chávez et al., *supra* note 13, at 221–22 (arguing that a judge will choose to assert autonomy or uphold the government’s position depending upon the government’s likely response to a challenge).

37 Cf. GEORG VANBERG, THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY 20 (2005) (explaining that public backlash may result against policymakers who resist popular judicial rulings).

ciently convinced that they are protected, while governments may be sufficiently convinced that they can get away with an attack. At lower levels, judges are dissuaded from bold decisions, whereas at higher levels, politicians are dissuaded from attacks. But, consistent with Stanton's other work, our model also suggests that prudence does not always necessarily pay off, either. Again, the critical problem with judicial prudence, or "ducking," is that it risks constructing inaccurate beliefs about judicial preferences, essentially teaching future litigants—not to mention the broader public—that judges are either extremely partisan or unwilling to defend rights.

Finally, to the extent that we have learned that public support only explains part of the picture, we need to have a better sense of the full range of factors that explain political attacks on courts. Elsewhere, I have shown that juridical instability often takes place in the shadow of other forms of inter-branch instability, namely early presidential removals.<sup>38</sup> Simply put, presidents who are themselves potentially at risk often seek to improve their lots either by preemptively attacking the court, or by appeasing the opposition with new judges to stave off their own demise. In either case, the famed cycle of omnipotence and impotence that often defines presidential politics in Latin America fundamentally shapes the incentives that politicians face for re-making courts in their own image.

Taken together, the value of studying courts comparatively is that it reminds us that the experience of institution building in the United States should not be taken for granted. While certainly there are success stories in Latin America, such as Costa Rica and Uruguay or, more recently, Brazil and Mexico, many of the other experiences emphasized here offer a much more sober view of the limits facing judges. The upshot is that this variation provides rich fodder for theorizing about the conditions under which courts achieve a modicum of power and stability.

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38 HELMKE, *supra* note 18.