Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium?

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I. INTRODUCTION

Many well-known studies of judicial independence in Latin America make what might be called monolithic and millenarian arguments. Keith Rosenn, for example, argues that all of Latin America suffers from a fairly permanent lack of judicial independence: “The sad reality is that the citadel of judicial independence has been perennially besieged in Latin America.”1 Moreover, the explanations he puts forth for this observation are—in keeping with the diagnosis—equally monolithic and millenarian. He attributes this perceived shortcoming in part to universal and longstanding regional features: Latin America, he says, “is heir to the civil law tradition” of “weak” judges, and has a “culture and political tradition [that] are heavily authoritarian.”2 He does, however, carve out an exception for Costa Rica.3 Such a diagnosis makes any hope of changing the situation seem remote at best, as Rosenn himself acknowledges: “[b]ecause [Costa Rica’s]
conditions are not readily replicable in most of Latin America, the path to judicial independence is likely to continue to be slow and tortuous."

Clearly, judicial independence has long eluded many of the countries of the region, and we should not present an overly rosy picture of the state of judicial independence in the region or underestimate the challenges faced by Latin American judiciaries. At the same time, it is important to recognize that judicial performance across the region is neither monolithic nor millenarian. There is a great deal of variation that scholars ignore at their peril. Indeed, ignoring the variation leads to misdiagnoses of potential causes: all the countries of the region, including Costa Rica, are to one degree or another “heirs to the civil law tradition” and yet they display very different levels of independence. The three countries with the most independent judiciaries—Uruguay, Costa Rica, and Chile—share some features to be sure, but Uruguay is the most secular of all the countries of the region, Chile among the most traditionalist Catholic countries of the region, and Costa Rica falls somewhere between these two extremes. Surely this poses some problems for Rosenn’s account that we can trace the roots of a lack of independence back to “the hierarchical structure of the Catholic church.”

In contrast to overly uniform empirical diagnoses, however, the more theoretical work on the topic shows altogether too much variation. Given the proliferation of definitions of independence used by the various scholars, if there is any surprise in the literature it is that everyone agrees that, whatever independence might be, Latin America does not have it. In this article, I seek to bring some clarity to the conceptual thicket by cutting through many of these disagreements, and some nuance to the empirical arena by exploring some recent political and institutional developments that could affect judicial independence in Argentina and Brazil. The first section will explore the concept of judicial independence and put forth some basic distinctions that capture what most scholars (and citizens) seem to be reaching for in their definitions of judicial independence. The second will offer a general theory of the causal mechanisms giving rise to levels of judicial independence. The third will describe the connection between institutional mechanisms and judicial autonomy as defined in the first two sections. Finally, the fourth section will explore recent changes in Brazil and Argentina, with a view to predicting their potential impact on judicial autonomy in these two countries in the new millennium.

II. DEFINING JUDICIAL INDEPENDENCE

There are nearly as many definitions and taxonomies of judicial independence as authors writing about the subject. Owen Fiss, for example, classifies “notion[s]” of independence according to the entity judges are (or are not) independent from parties to the dispute, other judges, or “other governmental institutions” that may or may not be parties. Christopher Larkins also focuses on impartiality (independence from parties) and political insularity (independence from other political actors) and adds the courts’ scope of authority as a crucial element in the definition. Some organization and synthesis of these disparate approaches is in order if we are to make sense of the subject and build on each other’s research. Some of the terminology is confusing, some concepts overlap, while others are

4. Rosenn, supra note 1, at 35.
5. Id. at 33.
6. Id. at 34.
relatively unhelpful for guiding empirical inquiry, either because they implicitly suggest or assume a connection between what should be explanatory variables and the outcome or because they import too many normative judgments into the definition.

The first and most easily dealt with issue is whether a definition of judicial independence should include the scope of authority afforded to a certain court, as Larkins argues.\textsuperscript{9} A simple example suggests that, in the interests of conceptual clarity, we should maintain the distinction between judicial independence and judicial power. Clearly, we can imagine a perfectly independent municipal tribunal whose competence is limited to disputes over parking violations, just as a university might have independent tribunals to adjudicate employment disputes. It seems unnecessarily confusing to say these tribunals lack independence simply because the scope of their authority is quite restricted. Withdrawing certain issues from the competence of a particular court reduces that court’s power, but not necessarily its independence. Independence becomes a problem for the legal system as a whole if those issues are then assigned to questionable, partisan bodies for decision—the case, for example, of permitting military justice tribunals to deal with cases involving members of the security forces, as was long the case in Brazil,\textsuperscript{10} Chile, and elsewhere.\textsuperscript{11} But it seems clear that this problem is a function of the lack of independence of the newly created bodies, which needs to be analyzed separately, not merely the result of limiting the jurisdiction of a preexisting court.

Also easily disposed of is the distinction between formal and actual or behavioral independence. Formal independence is taken to mean that institutional arrangement (secure tenure, salary protection, etc.) that in theory should produce judges who are not unduly beholden to the executive or the legislature.\textsuperscript{12} As a reflection of what we mean in ordinary parlance by judicial independence, however, formal independence is a singularly unhelpful construct, especially in the Latin American context. Most scholars acknowledge that formal institutional arrangements correlate poorly (indeed, often negatively) with actual independent behavior on the part of the courts.\textsuperscript{13} For example, a recent evaluation of institutional design based on Smithey and Ishiyama’s list of institutional mechanisms designed to guarantee independence placed Costa Rica and Uruguay dead last in all of Latin America,\textsuperscript{14} a conclusion that would, at minimum, surprise most scholars of the region. Kimberly Shaw properly acknowledges that there is no relationship between this measure of independence and public confidence in the courts.

Unless the goal is explaining institutional design per se, then, or exploring this counterintuitive finding that the two judiciaries with the least of it are by consensus among the most independent in Latin America, the concept of formal independence is not useful. My concern, and that of most scholars, is actual independence—behavior that can be classified in some sense as independent. As Charles Cameron argued, we should examine

\textsuperscript{9} Id. at 610–11; see also Christopher Larkins, The Judiciary and Delegative Democracy in Argentina, 31 COMP. POL. 423 (1998) (addressing the scope of authority afforded to Argentine courts and its impact on judicial independence).


\textsuperscript{11} Anthony W. Pereira, Virtual Legality: Authoritarian Legacies and the Reform of Military Justice in Brazil, the Southern Cone, and Mexico, 34 COMP. POL. STUD. 555, 556 n.2, 557 (2001) (noting that “military courts are often used for political purposes in ways inimical to the rule of law”).


\textsuperscript{14} Id. at 21–26, 36.
empirically the relationship between “structural features of a judicial system” and “the
operational fact of independence” rather than equating them, even implicitly, by defining
independence in terms of the former.\footnote{15} Some authors add a normative component to the definition—here, the contrast is
between independence and autonomy or independence and lack of accountability, where
the former is desirable and the latter is not.\footnote{16} The difficult normative question of just how
much independence is too much or not enough (especially for a democracy) lies at the heart
of much agonizing about whether the concept of independence itself is desirable or not and
whether independence itself is desirable or not, especially in a democracy.\footnote{17} But, as we
shall see below, the normative question actually cuts across much of the discussion of
dependence and is answered differently in different systems for different judges, and
so it should not be a part of the definition, if we can avoid it. By distinguishing
between control and independence as two separate dimensions of autonomy, I offer a
definition that can travel across political systems, yet retain some of the normative charge
that most people seek to express when they speak of judicial independence.

What do we mean by actual independence then? I begin, as have some others, by
reference to the “triad” logic of the courts as a dispute resolution mechanism.\footnote{18} Martin
Shapiro and Alec Stone Sweet point out that, when faced with an intractable dispute
between two parties, there is an almost universal human impulse to appeal to a neutral third
to resolve the dispute.\footnote{19} In modern organized political systems, judges (though not only
judges and not for all disputes) are meant to supply this neutral third.\footnote{20} If the third is to be
neutral, then she must be neither (1) identified with nor (2) unilaterally influenced by
anyone with an interest in the outcome of the dispute. These two conditions are rather
easily illustrated: imagine an argument with a colleague and a decision to appeal to a third
party to resolve it. We would neither want our colleague to have unilateral control over the
selection of this arbiter nor to unilaterally interfere in the arbiter’s decision-making
process—in general, we would want to have equal access to the process, under specified
rules, so that we can both “interfere” more or less equally.

Both of these requirements are easier to state and illustrate than to define and measure
empirically. By “identified with,” I mean that the decision maker is not a proxy for one of
the parties—that her preferences are at least partially independent of the preferences of
either of the parties to the dispute. These preferences may, in the end, turn out to be
identical anyway—it is often the case that at the end of the day that the judge’s outcome
preference matches closely that of one of the parties. But in the presence of preference
independence, this is not a preordained result that follows more or less mechanically from
the appointment of the arbiter by a party with an interest in the dispute. The key condition
here, then, is that the decision maker’s preferences are sufficiently independent of whoever
controls appointments so that legally relevant characteristics of the dispute—and not merely
the identity of the parties—have at least the potential to affect the outcome. If the outcome

\footnote{17} See Judicial Independence at the Crossroads: An Interdisciplinary Approach, supra note 15, for a series of essays addressing this question.
\footnote{18} See Alec Stone Sweet, Judicialization and the Construction of Governance, 32 Comp. Pol. Stud. 147, 149–51 (1999); Martin Shapiro, Courts: A Comparative and Political Analysis (1981); Larkins, supra note 8, at 608.
\footnote{19} See Shapiro, supra note 18, at 1; Sweet, supra note 18, at 149–50.
\footnote{20} See Shapiro, supra note 18, at 1–17.
is predetermined by the preference of one of the parties, then the decision maker’s preferences are not sufficiently independent of partisan preferences.

For a real world example, consider the Argentine Supreme Court under President Menem. If one accepts the empirical claim that the court packing that took place under Menem produced an “automatic majority” in his favor on the Argentine Supreme Court, then that court failed this requirement, at least for any cases in which Menem or his government had an interest. Under this view, there was no meaningful difference between having the nine-judge court decide a case and having Menem decide it directly. To the extent Menem had an interest in the outcome—that is, if a government action was being challenged, a government policy or goal was at issue, or a Menem associate was a party—the Court lost its character as a neutral third.21

Important, that Court would be nonindependent in this sense even if Menem never picked up the phone to dictate the outcome of a case. It is the near-perfect identity of preferences that is itself objectionable. It is no comfort to a litigant if one of the parties gets to pick the judge, but then promises not to interfere with that judge’s decision-making process. This is not to say that judges who are either insulated from such pressures or subject to new pressures later on may not change their preferences. Gretchen Helmke argues that Menem’s court did exactly that, although many in Argentina continued to believe in a more or less permanent “automatic majority.”22 But our visceral reaction to the notion of submitting our case to a judge of our adversary’s choosing suggests that at the very least we must acknowledge the possibility that the manner of appointment (or some similar mechanism) can produce judges who are so identified with a party that they cannot be seen as independent in any meaningful sense. I will call this “preference” independence.23

The second requirement, the absence of undue influence upon judges as they make decisions, requires noninterference in the decisional process by anyone with an interest in the outcome of the case. We might call this “decisional” independence, a term that is already in use with a meaning very similar to what I have described here.24 The most blatant and improper instance is, of course, the payment of a bribe, but “telephone justice” is also known to occur throughout the region—one judge in northeastern Brazil told me he had on occasion received a phone call directing him to decide a criminal matter in favor of the defendant, and a recent study of trial courts in Bolivia shows a high percentage of judges who acknowledge this sort of interference.25 When certain well-placed lawyers have greater access to judicial chambers, as is often the case, decisional independence is compromised. Finally, decisional independence for trial judges may be affected by external disciplinary oversight—the ability of external bodies to discipline a trial judge who makes

21. Note, however, that this alleged loss of independence might be unobjectionable in the vast number of cases that did not raise even remotely any issues of interest to Menem. In addition to the classic question, “Independent from whom?” we should ask, “Independent with respect to what cases/issues/parties?”


23. Although there is a great deal of concern in the literature with appointment mechanisms that produce slavish monolithic judiciaries, I have not found a satisfactory term to describe this phenomenon. The term “structural independence” is often used to denote one aspect of this—the independence from the executive that is believed to derive from dominated appointment mechanisms—but that term actually cross-cuts the distinction I draw between preference independence and decisional independence (described below), as it includes postappointment control over judges.

24. See Fiss, supra note 7, at 55–58.

an unpopular decision clearly affects the latter’s ability to freely decide a case. In short, decisional independence operates upon sitting judges, limiting the scope of their decision making in the cases that come before them.

The question of decisional independence highlights one limitation of most current definitions of judicial independence, in which any oversight is equated with the loss of independence. In this view, only unaccountable, fully autonomous judges, free to decide according to their own preferences, are truly independent—hence the calls for taking a middle ground between absolute independence and excessive control over the courts. Taking the triad as the starting point for the analysis, however, leads to the conclusion that the touchstone for independence is not simply control, but rather unilateral partisan control. All organizations take some measures to ensure some degree of orthodoxy in policy making, and judiciaries are no exception. Every legal and political system allows some kinds of control over judicial decisions and proscribes others. Sometimes the very same devices are uncontroversial in some systems and unthinkable in others—Latin American judges express shock at the notion of subjecting judges to elections, as American states routinely do. All legal systems, however, proscribe—with more or less success—unilateral interference in the judicial process.

The critical distinction is between the loss of impartiality on the one hand and simply reducing uncertainty in judicial outcomes on the other. In the same example I use above, neither I nor my colleague are likely to object (at least on grounds of independence) to measures that increase our control over the appointment or decision-making process. We could agree that each of us may veto the decision maker thirty days after the initial appointment, in order to increase our ability to control that individual’s preferences. We could add an appellate layer, specific rules of decision, the ability to jointly decide on the level of compensation depending on the competence and diligence of the arbiter, and any number of measures that all, to one degree or another, increase our ability to control the decision-making process. None of this would imply a loss of independence in the objectionable sense, so long as the processes do not favor one party over the other. The key requirement for independence, then, is impartiality; this requires that judicial decision making be free from interference by one (and not the other) of the parties to the dispute. The touchstone for independence is not the lack of control, but the lack of partisan control:

Unilateral control by an identifiable faction with an interest in the outcome of the dispute.

Summarizing then, judges are independent when their appointment is not controlled by a party that has an interest in the outcome of a dispute and when they are not subject to unilateral interference in their decision-making process by a party with an interest in the dispute. The opposite of independence is partisanship, not control over the judiciary, judicial accountability, appellate oversight of the decision-making process, doctrinal control, or any other means of reducing the possible range of judicial outcomes. I will use “judicial autonomy” to refer to the absence of control, whether partisan or not, and “judicial independence” to refer to the absence of partisan control. This distinction preserves the universal normative element in the notion of judicial independence—the call for an impartial, neutral third to serve as an arbiter—while recognizing that there is considerable


27. As the earlier discussion suggests, by partisan here I mean “identified with a party to the dispute,” not necessarily associated with a political party.
diversity in the degree of political control that is seen as acceptable, both across and within legal cultures.28

The definition I propose and defend here does not single out political interference with judicial decision making. It is not only more parsimonious, but theoretically more consistent to treat the executive or the legislature as special cases of entities interested in the outcome of disputes, since their interference (i.e., their control of the decision-making or appointment process) is problematic when they are interested parties and less problematic when they are not.29 Legislation clearly directs judges as to how they should decide cases, and yet it is not troubling, so long as it is, in some relatively mysterious sense, “impartial.” From this perspective, interference by a political leader is neither more objectionable nor different in kind than interference by any other party. At the same time, given their interest in setting policy for the country as a whole, their dominant role in a political system, and the indisputable fact that judges routinely make policy decisions in private disputes that become public policy, political leaders will often have an interest and an opportunity to interfere in the outcome of disputes that are, seemingly, wholly between private parties. As a result, while it is not conceptually distinct from any other kind of interference, independence from political actors is a recurring theme, often treated separately.30

28. See generally JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA (2d ed. 1985) for a discussion of this issue within the civil law tradition. Some scholars seek to accommodate varying normative standards across legal cultures by arguing that “independent” judges are those who are free to decide cases “on the basis of reasons that an existing legal culture recognizes as appropriate.” See Ferejohn & Kramer, supra note 16, at 972. This, however, leads to severe difficulties in making valid comparisons across “legal cultures” and fails to acknowledge the deep debates within legal cultures concerning the proper bases for judicial decision making: Justice Scalia’s or Robert Bork’s emphasis on original intent and narrow statutory interpretation has a close kinship with some of the views expressed by conservative judges in Brazil and Argentina; Justice Brennan’s more expansive view of judicial decision making finds striking parallels in the ideas of “progressive” judges in Porto Alegre, in southeastern Brazil. Whose culture counts, then, in deciding the proper reasons for judicial decisions?

29. Of course, the extent to which judges should be subject to majoritarian control is the subject of an intense and unresolved debate. For an overview of the debate, see Barry Friedman, The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy, 73 N.Y.U. L. REV. 333 (1998). See also generally JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH, supra note 15.

30. While I believe this approach is conceptually more sound, whether political insularity is best understood as a particular instance of party neutrality or as a separate requirement, as Fiss, supra note 7, at 56–57, argues, is to a large degree academic.
Table 1: Three dimensions for analyzing legal systems

We have, then, three dimensions we can use to analyze legal systems: partisanship versus independence, with varying levels of control, over either the preferences of decision makers or the decision-making process itself. In a well-established democracy, with clear limits on partisan interference with the courts, we might prefer a relatively high degree of control in order to enhance predictability in the law. But if we have reason to fear a loss of independence, we might wish to reduce the degree of control over the judiciary since the potential for strict partisan influences on judges increases as the level of control goes up. At the same time, a high degree of partisanship coupled with relatively inefficient instruments of control can produce a judiciary that is the worst of both worlds: unaccountable and unpredictable in routine cases and completely partisan in high visibility, important cases.

III. JUDICIAL MOTIVATION AND JUDICIAL INDEPENDENCE

In order to uncover what makes judges more or less independent, we need to know what judges want and how they might be influenced. Common sense and the available research suggest that judges are at least potentially influenced by a mix of two motives—a desire for personal benefit, including pecuniary gain, career advancement, social standing and recognition, and the like on one hand; and policy preferences, which may have to do with broad social goals or with a narrower desire to implement a certain vision of the law in a particular issue area on the other.32

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32. JEFFREY SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002). One need not accept all the arguments of the attitudinal model to agree that judges have policy preferences, especially as I define them here. Indeed, the legal model as presented by Dworkin, for example, also presents an image of judges who seek to maximize their own vision of what the law ought to look like, even as they search for what the law is. See RONALD DWORKIN, LAW'S EMPIRE 88 (1986). And even Bickel allows that judges "sort[] out the enduring values of a society," a process that inevitably involves competing judicial preferences. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 26 (1962).
To avoid longstanding debates about whether judges make or find law, I define policy preferences to include preferences about particular legal rules as well as broader, more “political” preferences. That is, we might say that judges in Allende’s Chile were motivated by a desire to preserve a capitalist, hierarchical, Catholic traditional social order;33 or we may argue that a particular judge in the United States prefers a restrictive interpretation of Rule 404(b) of the Federal Rules of Evidence to ensure that evidence of “prior bad acts” does not impair a criminal defendant’s right to a fair trial on the offense charged in the indictment. While the latter sounds like a more “legal” motivation, and the former seems more “political” or “policy oriented,” they are both, in the sense in which I use the term, policy preferences. The goal then is not the absence of policy preferences in the judiciary—an unattainable one—but their location more or less centrally in the relevant policy space so that they cannot be identified with any one faction.34

The focus on supreme courts—especially on the U.S. Supreme Court—and on the U.S. federal system in general probably accounts for the lack of much discussion of personal or career motives in the American literature on judicial motivation. A seat on the Supreme Court is typically (in modern times) the end point of a legal career, not a stepping stone to another position. The situation, of course, is quite different for lower court judges, particularly those in the sort of progressive, hierarchical, bureaucratized judiciaries that are common in Latin America and the rest of the world. Judges in Brazil, for example, begin their careers in low-status positions far removed from large cultural, commercial, and population centers and move up to more desirable positions, gaining in income and prestige as they go.35 Such an arrangement raises at least the possibility that judges will subordinate policy goals to personal ones (or, perhaps, craft the former so that they will secure the latter).

With these judicial ambitions in mind, we can begin to craft a general theory of judicial autonomy. First, as to control: very broadly, judges are more likely to be free of control (partisan or otherwise) to the extent that their pursuit of policy goals in deciding actual cases does not impinge on their ability to secure their personal goals. Similarly, judges are less likely to be uniform and orthodox in their preferences to the extent the selection process is subject to less scrutiny and oversight. This does not preclude the presence of courageous individual jurists who run counter to powerful interests in spite of near-certain adverse personal consequences. The theory merely describes the dominant tendencies we might expect in judicial bodies that are not, as a general rule, staffed exclusively with heroes and martyrs.

Strategic behavior is evidence of limits on decisional autonomy. I accept as a working hypothesis the strategic model of judicial decision making,36 including its

33. Lisa Hilbink, An Exception to Chilean Exceptionalism? The Historical Role of Chile’s Judiciary, in WHAT JUSTICE? WHOSE JUSTICE? FIGHTING FOR FAIRNESS IN LATIN AMERICA 64 (Susan Eva Eckstein & Timothy Wickham-Crowley eds., 2003).
34. Eugenio Raúl Zaffaroni further argues that a diversity of policy preferences within the judiciary is also a desirable goal, as it fosters more deliberation and debate. See Eugenio Raúl Zaffaroni, ESTRUCTURAS JUDICIALES 13–15, 107–18 (1994). Presumably, however, we would limit the range of diversity somewhat in order to preserve some predictability in the law.
36. See Lee Epstein & Jack Knight, THE CHOICES JUSTICES MAKE 10–18 (1998); see also Lee Epstein & Jack Knight, Toward a Strategic Revolution in Judicial Politics: A Look Back, a Look Ahead, 53 POL. RES. Q. 625
(superficially paradoxical) logical consequence: judges will act sincerely when they can, engaging in strategic behavior only to the extent it is necessary to achieve their desired mix of personal and policy goals. The debate between attitudinalists and “strategic actor” advocates is more about the degree of decisional independence afforded to particular legal actors within their political and institutional context than about the universal and essential nature of judicial decision making. Even Jeffrey Segal and Harold Spaeth, the leading advocates of the attitudinalist camp, limit their argument to the U.S. Supreme Court:

The failure of the separation-of-powers model as applied to the U.S. Supreme Court should not be seen as a categorical failure of the separation-of-powers model per se. The federal judiciary was designed to be independent, so we should not be surprised that it in fact is. Courts in diverse institutional settings, though, might evidence precisely the type of behavior predicted by the model. . . [As] we saw in Chapter 6, justices are capable of engaging in sophisticated behavior in arenas where sophisticated voting clearly makes sense.  

IV. INSTITUTIONAL MECHANISMS AND AUTONOMY

As noted earlier, despite its normative commitment to judicial independence, every judiciary, like any other organization, must have mechanisms in place to ensure a certain degree of orthodoxy in policy decisions. As discussed above, the system can accomplish this either by ensuring the appointment and continuance of “right-minded” members (and leaving them free to decide in accordance with their sincere preferences); by intervening in decision making to enforce orthodoxy in the actual outcomes (that is, by forcing rational strategic calculations that lead more often than not to orthodox outcomes); or, more likely, by some combination of both approaches. In fact, it is likely that institutional designers will build in more decisional independence to the extent that they can control the preferences of the judges, and vice versa—if they cannot predict the nature of the decision-makers or anticipate unfavorable ones, they will build in more oversight over the decision-making process. Different institutional mechanisms create the potential for greater or lesser control over either appointments or decision making. But if the key element in the loss of independence is partisanship, then the critical variable for judicial independence will be the factional or partisan capture of the mechanisms of control. How do the various systems produce different levels of independence, then?

Preference Independence: An enduring concern in Latin America has been the perceived capture of judicial appointments by identifiable factions or parties. The public reaction to Menem’s court packing led Argentina’s current president Néstor Kirchner to open up the process to more comment and scrutiny. Similarly, as we will see below in the case of Argentina and Brazil, many countries have put in place judicial councils or advisory bodies to manage the appointment and disciplinary process. These entities are typically staffed with representatives of Congress, the executive, the judiciary, the legal profession,
and the legal academy. Alternatively, countries have sought to make the appointment process more transparent, involving a greater diversity of interests in the selection and appointment process. Yet others have moved the process inside the judiciary, having judges appoint judges. This is the concrete manifestation of a logical inference from the notion of independence as partisanship: a politically fragmented judicial-appointments process will produce more consensual judicial appointees (or, at minimum, more diverse and balanced appointments if there is logrolling on the approval of nominees), and thus more preference independence. The broader the access to information about the candidate, and the more inclusive the nomination process, the less likely it is that there will be unilateral factional control over judicial preferences.

**Decisional Independence:** Recall that decisional autonomy is a function of the extent to which the achievement of personal goals is not dependent on compliance with the policy directives of an interested party. To achieve a greater separation of personal and policy goals, many countries have adopted rules intended to make judicial advancement meritocratic, rather than political. One example can be found in Brazil, where judges advance on a combination of merit and seniority: merit is intended to ensure that better judges (as determined by their superiors) advance more quickly, while the seniority backup is intended to ensure that even unpopular judges can make a career, thus increasing decisional independence.

But the definition of merit is itself a political, normative enterprise. Take a judge who insists on the unconstitutionality of, say, amnesty laws for human rights violations despite appellate rulings to the contrary. Is this judge passed over for promotion for political reasons or because he is a bad judge who cannot follow precedent? The success of the meritocracy device in depoliticizing judicial careers will depend on who defines merit and the extent to which, in practice, it is defined in ways that reflect a broad consensus on the proper role and behavior of a judge rather than the preferences of an identifiable faction. Standards that fall within that consensus will be construed as emphasizing judicial, legal, and technical matters, while standards that fall outside that consensus will be read as political, personal, partisan, and the like and thus as undue interference, detracting from judicial independence.

One institutional device for ensuring that evaluation standards are judicial rather than political is putting judges in charge of the evaluation. Thus judicial appellate mechanisms are typically not viewed as threatening independence, judicial discipline bodies run by judges are not overly problematic, and so forth. This assumes that internal mechanisms of decisional control do not threaten independence (because they will apply standards that are more likely to be defined as legal, meritocratic, technocratic, or judicial, than as political, partisan, improper, etc.), while external ones—staffed in whole or in part by political nonjudicial personnel—are more likely to do so. At the same time, external bodies may reflect a more or less broad cross-section of interests and apply more or less consensual standards. The purported apoliticism of internal review mechanisms assumes the existence of at least a minimal degree of preexisting independence—that is, it assumes that leadership in the judiciary does not already represent the interests of any one faction and cannot be interfered with as it makes promotion and discipline decisions. To the extent judges staffing internal mechanisms of control lack independence from external forces, they become mere surrogates enabling external control.

Finally, as noted, mechanisms of control may be stronger or weaker. In an institutional context that permits only weak control, even a strongly partisan mechanism

39. Hilbink describes just such a case in Chile. Hilbink, supra note 33.
will be limited in its capacity to politicize judicial appointments. The capacity to produce a partisan judiciary is a function of a number of variables—for example, the number of appointments a faction controls (and whether it can expand that number at will), or the likelihood that candidate choices will be challenged (at minimum) or vetoed by a broad array of other social and political actors. Thus, a certain faction may control the appointment mechanism itself but be open to greater scrutiny and subject to electoral or other disincentives that reduce its capacity to appoint blatantly partisan candidates. The same is true for decisional independence. Oversight of decision making (whether partisan or not) requires information and disciplinary power. Different oversight mechanisms can offer more or less access to information about judicial behavior and differing sanctioning faculties, and thus may be stronger or weaker.

In summary, then, a strong, independent and diverse oversight body will ensure that decisions are made according to accepted standards for judicial decision making. This can increase overall independence in the system by reducing corruption and other improper interference (as well as incompetence and other sources of uncontrolled variation). But strong control by a body that imposes narrow partisan standards clearly limits judicial independence. Institutional design thus determines the level of control an appointment or oversight body can achieve. Politics—in particular the political composition of these bodies—determines whether that control will be used to limit judicial independence or merely to limit the level of a priori uncertainty that will be tolerated in judicial decision making.

V. ASSESSING THE IMPACT OF NEW INSTITUTIONAL MECHANISMS ON JUDICIAL INDEPENDENCE

Argentina has seen a modification of its Supreme Court appointment process since the election of President Néstor Kirchner, and Brazil has just approved a series of reforms to its judicial oversight mechanisms. What is the likely impact of these changes on the prospect for judicial independence in each country? In this section I describe, first for Argentina then for Brazil, the starting point and the changes and evaluate the potential impact of the new institutional configuration in each country.

A. The Supreme Court in Argentina

The Argentine judicial structure will be familiar to lawyers trained in the United States. Argentina’s constitution dates back to 1853 and sets out a federal structure, with a federal judiciary and separate provincial judiciaries for each of its territorial subdivisions. Until 1994, its judicial appointment process was essentially identical to the process laid out in the U.S. Constitution, giving the president the power to appoint justices of the Supreme Court (along with other federal judges) with the advice and consent of a simple majority of the Senate. A reform in 1994 raised the bar for approval of nominees, requiring a two-thirds majority and that the confirmation process in the Senate take place in a public session. The latter two provisions were a reaction to what was widely perceived as the abuse of appointment powers by President Menem, who appointed a majority of the court after his election in 1989, producing a Supreme Court that was roundly criticized as

40. CONST. ARG. art. 108.
41. Id. art. 99, cl. 4. This reform also created a Judicial Council that is charged with naming lower court judges and overseeing and administering the lower courts. Except for limiting its authority over these issues, however, the Council does not affect the Supreme Court. Id. art. 114.
politically abject. Not only were the justices closely associated with President Menem’s preferences—one of the justices upon his nomination said, “My only two bosses are Perón [who was already dead] and Menem”—but it was clear that there was also ongoing interference and political direction in the decision making process during Menem’s tenure.42

One recent analysis of this court serves to illustrate and substantiate both the lack of independence of the Argentine Supreme Court going back many years and the distinction drawn earlier between preference and decisional independence.43 The authors’ basic argument is that individual justices on the Argentine Supreme Court who were not aligned with the president were more likely to vote against the executive when it was less likely that the president could punish the court or overrule its decisions.44 They conclude that the Argentine Supreme Court has been “more independent than it seems”; the conventional wisdom to the contrary, they argue, “may say less about the court itself than about the environment in which the court operated.”45

Parsing the findings in the article suggests that the difference between their conclusion and the conventional wisdom has more to do with different uses of the term independence than with any confusion about what is actually going on at the Supreme Court. The article makes clear that the referenced environment produced a court in which the median justice’s degree of political opposition to the sitting president exceeded .5 on a 0–1 scale on only five occasions from 1935 to 1997 and never for more than two years in a row.46 The degree of political opposition of the median justice was exactly zero forty-six out of those sixty-three years (73% of the time) (see the authors’ Figure 2).47 Similarly, the analysis shows the strong impact of variables suggesting strategic voting on the part of the justices: they vote less often to overturn current norms when the president has the capacity to punish individual justices or the court—a frequent occurrence in Argentina’s political history. On the other hand, their analysis shows that justices who are opposed to the president are more likely to vote against such legislation when their vote is nonpivotal (that is, will not affect the outcome).

Using the theoretical framework developed here, we might summarize these authors’ findings as follows:

(1) Argentina’s highest court, for most of its recent history and as a general rule, lacked preference independence since it was almost always composed of justices who held identical preferences to those of the sitting president.48 Moreover, individual justices preserve this identity of preferences with their appointing president since they not only vote with their benefactor while he is in power, but continue to hold to their original political preferences thereafter, expressing them whenever circumstances permit.

(2) At the same time, the court has some decisional independence (perhaps more than is attributed to it in the popular imagery) that it can exercise when the presence of a strong political opposition opens up the court’s decisional space. But we might also conclude that its decisional independence is rather low

42. See Larkins, supra note 9, at 427–35.
43. See generally Iaryczower et al., supra note 36.
44. Id. at 700.
45. Id. at 713.
46. Id. at 706.
47. Id.
48. Note, however, that the starkness of this result is partly a consequence of how “political opposition” was operationalized. See id. at 705–06.
overall, since it is subject to erosion whenever the political constellation gives the president the capacity to punish the court and impeach justices.

Spiller et al.’s conclusion, then, focuses on the presence of some decisional independence (as described in paragraph (2), above), which they label independence, while the conventional wisdom focuses on the lack of preference independence (see paragraph (1), above), which it labels independence. If anything, the conventional wisdom acknowledges the decisional independence of individual judges, once appointed, believing that the menemista judges were free to continue their protection of Menem even after he was no longer in power. Thus, popular opinion holds that Menem was able to pack the court with sycophants who were then free to act as his surrogates long after he left power, exempting corrupt Menem cronies from prosecution and continuing to impede policy making by successor governments whenever this served Menem’s interests. In this view, the justices’ decisional independence, which makes it hard to correct judicial behavior, coupled with their preference dependence, is the downfall of the rule of law in Argentina. Whether this popular judgment is right or wrong—and the evidence of strategic acting on the part of justices suggests it is at least exaggerated—attention to the different kinds of independence that are latent in the discussion helps to clarify the issues and guide the empirical inquiry.

The question then becomes whether anything changed during the administration of President Kirchner. Kirchner was elected in 2003, after what is probably the most serious institutional, financial, and economic crisis in Argentina in recent times—a crisis that led to the resignation of President de la Rúa, a series of interim presidents, serious street disturbances, the closing of all the banks, and an unprecedented economic collapse. On the heels of this collapse, groups of protesters gathered every Thursday before the steps of the Supreme Court building in Buenos Aires demanding the resignation of the entire Supreme Court. Upon his election, Kirchner took power promising to address the perceived lack of independence of the Court. Argentina has a long and familiar history of institutional instability; one aspect of this instability has been the routine dismissal of Supreme Court justices upon a change of regime, despite a constitutional guarantee of lifetime appointments and secure tenure. It is precisely this practice that has been blamed for the lack of judicial independence on the Court. Kirchner thus faced a dilemma—on the one hand, a politicized and openly partisan Supreme Court, discredited and the subject of popular and elite demands for resignation or impeachment while on the other, the appearance that by removing all the sitting justices he would himself be simply perpetuating a long tradition of appointing subservient justices that would compound and extend the problem. Kirchner adopted two strategies to solve this dilemma: he crafted a new rule governing judicial appointments and he adopted a middle ground on judicial turnover, targeting only the most notorious of the justices.

49. This belief was held as recently as March 2003. Mariano Obarrio, Para el Duhaldismo, el Fallo de la Corte Suprema fue Impulsado por Menem, LA NACIÓN, Mar. 6, 2003, Economía, at 2 (on file with author).


52. Ventura, supra note 51.

53. Helmke, supra note 22, at 292.

54. CONST. ARG. art. 110.

55. See Helmke, supra note 22, at 291–92; Larkins, supra note 9, at 427–48.
 justices for removal and (apparently) attempting to stop short of a number that would give his appointees a majority on the Court. Each of these measures is discussed below.

Shortly after taking office, Kirchner signed a decree voluntarily limiting his freedom of action on judicial appointments to the Supreme Court.\footnote{Atribuciones del Poder Ejecutivo Nacional, Law No. 30175, June 19, 2003, B.O. 2.} Under this decree, whenever there is a vacancy on the Supreme Court, the president will propose one or more candidates whose names will be published for thirty days in the Official Bulletin (Boletín Oficial), the outlet for official government announcements, and for three days in at least two newspapers with national circulation. The nominees’ names must also appear on the official website of the Ministry of Justice. During this time, the candidates must file a sworn statement detailing their assets, and list, inter alia, all the civil and commercial associations with which they have been affiliated over the previous eight years, the law firms in which they have practiced, and a client list covering the same eight years. Individuals, nongovernmental organizations, and professional associations have fifteen days from the last publication in the Official Bulletin to file comments and objections. The Argentine internal revenue service must also conduct an investigation of the candidates’ tax history. The president then has fifteen days from the expiration of the comment period to decide whether or not to submit the nomination of the (or one of the) candidates to the Senate. The Senate, as prescribed in the Constitution, must then approve nominees by a two-thirds vote in an open and public hearing.

The procedure prescribed by this decree generates vastly more information about candidates than the prior practice or the constitutional norm. First, the candidates themselves make public more information than was required of them previously. In addition, members of the public have the opportunity to raise issues relating to the candidate’s suitability for the office. It is a dramatic change from prior practice, in which candidates were selected with no public notice and comment and approved by the Senate in closed, sometimes middle-of-the-night sessions. One response might be that this is merely a presidential decree and as such can be derogated (or ignored) at any time with little procedural difficulty. But, given the high level of political visibility of the issue of judicial independence on the Supreme Court in Argentina, a president seeking to avoid this public notice and comment procedure will almost surely pay a political price—once such a procedure is set in place, it is not so easy to dismantle.

Kirchner’s second strategy was to promote the impeachment or resignation of less than an absolute majority of the Court to preempt accusations that he was creating a new “automatic majority.” The Kirchner administration lobbied strongly for the impeachment of four of Menem’s appointees—Julio Nazareno, Eduardo Moliné O’Connor, Guillermo López, and Adolfo Vázquez\footnote{Adrián Ventura, 
Una Corte Suprema Demasiado Cercana a las Ideas de Kirchner, LA NACIÓN (Buenos Aires), Nov. 1, 2004, at 9, http://www.lanacion.com.ar/herramientas/printfriendly/printfriendly.asp?origen=3ra&nota_id=650113 (last visited Feb. 28, 2005). All but Moliné O’Connor resigned when their impeachment seemed certain.}—but has consistently opposed an ongoing move to impeach the last remaining member of Menem’s majority, Antonio Boggiano (even though Boggiano participated in exactly the same cases that formed the basis for the impeachment or resignation of all the others).\footnote{Kirchner Quiere que Boggiano Continúe en la Corte Suprema, LA NACIÓN, October 12, 2004 (on file with author).} While at the time of this writing it appears that Boggiano may well be impeached over Kirchner’s objections, it is clear that this runs contrary to the president’s intentions.
How might we expect Kirchner’s approach to impeachments and the new nomination system to affect the independence of the Supreme Court in Argentina? To answer this question we need, once again, to distinguish between judicial preferences and judicial decision making and between independence and control. In terms of judicial preferences, while Kirchner’s presidential decree reduces the executive’s unilateral control over the nomination process, it ultimately increases overall political control over the preferences and characteristics of judicial nominees by generating and exposing more information about the candidates’ interests and qualifications. But this greater capacity for control is vested in a broader array of political actors and thus is likely to improve the preference independence of the court. The public notice and comment period allows time and information to generate public pressure on the president to abort the nomination or, if the president decides to proceed with the nomination, on the Senate to withhold its consent. The two-thirds requirement for approval added in 1994 further allows (organized and represented) political minorities to veto judicial appointments. This devolution of a measure of control to civil society and less majoritarian political forces provides more opportunity for a range of actors to impinge on the composition of the Supreme Court, improving the likelihood that consensual, nonpartisan judges will be selected.

In summary, the new decree generates greater capacity for political control over the preferences of judicial nominees but vests some portion of that control in a more diffuse and diverse set of actors, thus increasing the likelihood of creating more preference independence on the Supreme Court.

What of decisional independence and control? On the one hand, the nearly wholesale removal of justices associated with Menem—especially given that Menem ran against Kirchner and lost in the election immediately preceding the impeachments—is on its face a straightforward continuation of the practice that marked the last fifty years of the Court’s history. It extends a practice that has been blamed for threatening the tenure security of sitting justices, thus exposing individual justices to political pressures and Supreme Court decision making to partisan control. Moreover, the charges against the justices were at least in part based on the content of judicial decisions rather than some other kind of misconduct or malfeasance.59 Clearly, this is yet another assertion of political control over the justices and the content of their decisions. In this sense, it does nothing to strengthen the institution of secure tenure in Argentina.

On the other hand, several factors suggest that at least this exercise of control does not constitute a blow to the Court’s independence in the partisan sense in which I have defined the term. In contrast to the 1976 military regime, for example, Kirchner chose the impeachment route rather than unilateral dismissal. In contrast to Perón’s (and Menem’s) substitution of sitting justices for new nominees, the impeachment rulings garnered multipartisan political support, rather than being based on the executive’s overwhelming political control over the legislature.

As discussed above, there was also clear majoritarian sentiment favoring the removal of the justices so that the entire effort was less a partisan maneuver than a response to sustained popular demand. Kirchner also signaled from the beginning his intention to produce a more independent court at the end of the day.60 And, perhaps most importantly, he put in place a nominating mechanism that moderates the executive’s absolute discretion over any replacement justice, limiting its capacity to simply replace independent justices.

with more compliant ones. As a result, it is clear that justices’ job security has not improved under Kirchner, but justices may at least expect that they will only be removed if there is general political support for their impeachment.

In summary, to the extent the justices can generalize rules for the future from Kirchner’s actions to the date of this writing—or to use slightly different language, to the extent they can update their beliefs about the security of their tenure and the potential grounds for their removal on the strength of the first year of Kirchner’s administration—it appears that his actions have reaffirmed the capacity for political control over the judicial decision-making process but in a way that fosters rather than hampers judicial independence. For the present at least, justices appear more likely to lose their jobs for complying with naked political pressures than for resisting them. As the opening to this paragraph suggests, however, it is hard to be too sanguine on the strength of one president’s actions over the course of a single year in a special political moment, given the long Argentine history to the contrary.

It is too soon, of course, to evaluate the impact of this brief history on the Court’s actual decisional independence, though all the indications are that the Court is deciding in an independent manner. Moreover, the composition of the Court has markedly changed since Kirchner adopted the new procedure and the process seems to work more or less as expected, producing a more varied set of justices who are less closely identified with the President’s preferences.

Since Kirchner assumed the presidency, the Senate has approved four judicial appointments, and each of them has generated intense interest and a great deal of public comment. Public interest in judicial nominations is so keen that a poll taken days after the nomination of Eugenio Zaffaroni shows fully 88.6% of respondents were aware of his nomination. As might be expected, only 23.6% of the respondents claimed some knowledge of the candidate before his nomination, yet by the time of the poll a full 64.6% believed he was a "good" or "very good" choice for the Supreme Court. Only some 25% failed to answer the question, suggesting at minimum that most respondents felt they had enough knowledge of the candidate to ground an opinion. The extended notice and comment period brought to light some irregularities in the candidate’s tax history and permitted conservative groups to raise objections to his nomination. In fact, it even gave time for such opponents as the Catholic Church to bring strong pressure to bear on individual senators, bringing his nomination within three votes of failing in the Senate.

The next three candidates underwent similar levels of public scrutiny and debate, prompting a series of comments remarking on the increased access to information about judicial nominees: “[a]bout the background of [Vázquez, one of Menem’s nominees] we knew little more than his friendship with Carlos Menem, just as about Julio Nazareno

61. See, e.g., Hauser, supra note 51 (arguing that the Court has ruled against the interests of President Kirchner on important issues); Ventura, supra note 57 (characterizing the Court as acting independently even as it criticizes the Court for being too far to the left on the political spectrum).
[another Menem nominee] we know only that he had belonged to the Menem-Nazareno law firm in La Rioja.\(^65\)

The question remains, however, whether all this information produced a Court that is less identified with the executive. La Nación, a conservative newspaper not known for supporting the Justicialist (Peronist) Party of President Kirchner, has been severely critical of two of the four nominees.\(^66\) In the end, however, it conceded that while the first two nominations (Eugenio Zaffaroni and Carmen Argibay) moved the court markedly toward center-left, the third one (Elena Highton) brought it closer to the center.\(^67\) The last nomination similarly placed on the court a respected lawyer and academic with a centrist political profile.\(^68\) In the end, this (center-right) newspaper concludes the Court is perhaps too close to Kirchner’s own political profile, even as it acts out of its convictions.\(^69\)

Meanwhile Página 12, a center-left paper, emphasizes the instances in which the Court ruled against the government and suggests that the Court’s preferences are still largely uncertain—and therefore, at minimum, that they are not predetermined by presidential preferences.\(^70\) In short, the press seems to place the Court near but not on the president’s preferred policy positions.

In terms of actual rulings, the Court has on many issues supported the executive’s agenda. It ruled in favor of the conversion of dollar-denominated accounts to pesos, for example, thus avoiding a banking and financial crisis.\(^71\) It found that crimes against humanity are not subject to any statute of limitations, thus keeping open the possibility, openly advocated by this administration, of prosecutions for the crimes of the last military regime.\(^72\) But it also ruled against the government on several important issues. In spite of the opposition of the solicitor general (procurador general), the Court denied the federal government authority to call a constitutional convention in the province of Santiago del Estero\(^73\) and struck down a series of labor laws dating to the 1990s that restricted worker

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65. Fernando Laborda, La Nueva Corte Suprema, LA NACIÓN (Buenos Aires), Oct. 15, 2004, at 10
68. Laborda, supra note 65.
69. Ventura, supra note 57.
70. Hauser, supra note 51.
rights to compensation for job-related injuries and not-for-cause dismissals. This impressionistic review of a few highly visible cases is, admittedly, short of conclusive proof that the Court’s preferences are independent from Kirchner’s and that the court is exercising true decisional independence, but they are highly suggestive of a trend in that direction. The new reforms and the events of the last year, then, appear to have increased the preference and decisional independence of the court, even as they broaden and extend political control over nominees’ preferences, and continue a practice of asserting political control over judicial decision making. I now turn to an examination of Brazil.

B. Judicial Reform in Brazil

The courts in Brazil have been criticized for many things—they are allegedly too slow, formalistic, inefficient, and out of touch with current social and economic realities. In contrast to the Argentine Supreme Court, however, the courts in Brazil have been accused of being overly rather than insufficiently independent and for hampering the ability of the executive to carry out needed reforms. From equivocal and inconclusive clashes with President Collor in 1990 over presidential decrees to more assertive clashes with current President Lula da Silva over pensions for judicial personnel, the image is one of courts that increased in independence throughout the 1990s to the point where they can impede governability. The repeated appearance of judicial scandals in the press relating to corruption in construction contracts and the like has fed the perception that Brazilian judges are unaccountable.

In terms of inefficiency and delays, one of the main targets for criticism has been the possibility of multiple interlocutory appeals and the lack of binding precedent, both of which encourage procedural delays and continuing appeals on issues that have been repeatedly settled by the Supreme Court. During periods of high inflation, for example, the government itself had an official policy of appealing all judgments against it, regardless of the merits of an appeal, simply to delay payment and allow inflation to erode the value of the judgment. The current debate over judicial reform began more than ten years ago against this double backdrop of concern regarding an unaccountable and inefficient judiciary. In this section, I first describe the current institutional features of the judiciary


76. See BASTOS ARANTES, supra note 75, 104–15; PRILLAMAN, supra note 26, at 117.

77. PRILLAMAN, supra note 26.

78. See Faria, A Crise, supra note 75; Faria, Mitos, supra note 75.


80. One of the very first reform proposals was introduced by Hélio Bicudo, then a federal deputy, in 1992. The first truly comprehensive proposal in this regard is probably the package of reforms introduced by Federal Deputy Nelson Jobim beginning in 1993. For a full discussion of the history of the reform, see id. More than ten years later, on November 17, 2004, the Senate followed the lead of the lower chamber and approved most of the
and the recent reforms and then evaluate the potential impact of the new institutional arrangement on independence and control.

As in Argentina, the Brazilian judiciary follows a standard federal model with a single federal structure and separate judiciaries for each of the states of the union and the federal district of Brasilia. At its apex, however, the federal system has a rather unique arrangement, consisting of an eleven-member constitutional court (the Supremo Tribunal Federal, or STF) empowered to hear, inter alia, direct actions concerning the constitutionality of legislation, jurisdictional disputes among tribunals, and disputes between the central government and the states, as well as appeals in decisions involving the constitutionality of legislation or government acts and appeals in denials of certain habeas corpus cases. In addition, it has a single national court of appeals for ordinary cases (the Superior Tribunal de Justiça, or STJ), which receives appeals from five regional intermediate appellate courts. Appeals from the highest courts in each state, in cases within its jurisdictional competence, also lie with the STF. The STF, therefore, is both a constitutional court of original jurisdiction and, in certain cases including those primarily relating to constitutional questions, the ultimate appellate instance. In spite of the STF’s limited jurisdiction, the proliferation of appeals has flooded even this court with cases: in 2003, for example, the STF decided no less than 110,000 cases.

Judges are appointed to the STF by the president with the approval of a simple majority of the Senate acting in a public session (in the previous Constitution, the Senate met in a closed session to approve judicial nominees). Judges on the constitutional court are appointed for life and have secure tenure; they can only be removed through impeachment and trial in the Senate. Importantly, STF judges are the most politically accountable of all judges in Brazil. Lower court judges follow a judicial career that is much more insulated from direct political pressures: they enter by sitting for an exam and passing rigorous personal interviews and ascend by seniority or merit (as evaluated by their superiors). The judges on the STJ are also nominated by the president with the approval of the Senate, but in this case the president must select the nominee from lists of candidates submitted by either the STJ itself (in the case of the judges who must make up four-fifths of the court) or by majority vote of the national bar association and national prosecutors’ association (in the case of the lawyers and prosecutors who must make one-fifth of the court). Despite the courts’ overall reputation for independence, this difference in nomination procedures and closeness to political power generates the perception among lower court judges (and others) that their superiors on the STF are more sensitive to political concerns than the typical judge in the inferior courts. The STJ judges follow on
their heels in terms of susceptibility to political influence, while appellate and trial court judges are the least exposed.\(^9\)

The long-awaited reforms are typically advertised as attempts to increase external control over the judiciary (fueled by the widely publicized cost overruns in judicial construction projects and various other corruption scandals) and to reduce the delays and inefficiencies that pervade the system (fueled by constant stories relating to delay and inefficiency in the courts). The two most relevant and most discussed measures relating to independence and control are (1) the creation of a National Judicial Council (Conselho Nacional de Justiça), which will oversee the administration of the courts and exercise some disciplinary authority over lower court judges (though it will not have the capacity to remove a judge from office) and (2) a series of proposals to give STF and STJ decisions binding precedential effect.\(^9\) The first of these sets up a completely new disciplinary and administrative organ for the judiciary, composed of fifteen members, as follows:

- one judge of the STF named by the STF;
- one judge from the STJ selected by the STJ;
- one judge from the highest labor court, the Tribunal Superior do Trabalho (TST), chosen by the TST;
- one appellate judge from one of the state highest courts (a Tribunal de Justiça) selected by the STF;
- one state court judge selected by the STF;
- one federal appellate judge named by the STJ;
- one federal trial court judge named by the STJ;
- one appellate judge from the regional labor court selected by the TST;
- one trial court judge from the labor courts also chosen by the TST;
- one member of the federal prosecutors’ office selected by the solicitor general;
- one state prosecutor chosen by the solicitor general from among nominees put forth by each state’s prosecutorial entity;
- two lawyers selected by the Brazilian Bar Association (the Ordem dos Advogados do Brasil);
- two persons of “notable juridical knowledge and unimpeachable reputation,” one chosen by the House and one by the Senate.\(^9\)

The other provisions that are most relevant to questions of control and judicial independence relate to the binding nature of precedent.\(^9\) Two new measures and the
extension of an existing measure in this regard were approved by the Senate in November 2004. The extension concerns a narrow range of constitutional cases: while the Court’s decisions already had binding effect in all its declaratory-judgment cases seeking an affirmation of the constitutionality of laws and decrees, the reforms extend this effect to its decisions in direct actions challenging the constitutionality of laws and decrees. The first new measure is found in new Article 103-A. This measure, applicable to the STF and labeled *súmula de efeito vinculante*, or SEV, would give certain STF decisions the force of law, requiring lower court judges to follow the decision even if they disagree with it. The second, applicable to the STJ and the highest labor law court, is called a *súmula impeditiva de recursos*, or SIR. The SIR seeks to give lower court judges the option of making their decisions unappealable by basing them on a decision of the STJ that has been designated as having this extraordinary force. The latter is, in my experience, unique. These measures are described in more detail in the accompanying table and the subsequent discussion of their potential effect.

determinacy of the law and the force of precedent versus naked policy preferences. For a brief discussion of this issue see, e.g., SEGAL & SPAETH, supra note 32. For the opposite view see, e.g., DWORKIN, supra note 32, at 24–26, 401. Suffice it to say that I take as a given that the law has some constraining effect on lower court judges, however slight and derogable this effect may be in some contexts.

93. Vasconcelos & Medeiros, supra note 85.
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<th>Effect</th>
<th>Scope of Application</th>
<th>Requirements</th>
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<tr>
<td>Automatically binding precedent (decisões... com eficácia contra todos e efeito vinculante)</td>
<td>Supremo Tribunal Federal (STF—the constitutional court)</td>
<td>Gives decisions <em>erga omnes</em> effect and precedent the force of law</td>
<td>Final decisions on the merits in direct actions challenging constitutionality of laws; Declaratory judgment cases deciding the constitutionality of laws or executive branch promulgations (regulations, decrees, etc.)</td>
<td>Automatic</td>
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<tr>
<td>SEV (súmula de efeito vinculante); Binding opinions</td>
<td>STF</td>
<td>Gives precedent the force of law so that lower courts must follow it</td>
<td>Any decision of the STF that is so designated</td>
<td>A vote to designate the decision as SEV by at least two-thirds of all judges on the STF, “after repeated decisions on the issue”</td>
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<td>SIR (súmula impeditiva de recursos); Opinions precluding appeal</td>
<td>Superior Tribunal de Justiça (STJ—the highest court of appeals) and Superior Tribunal de Trabalho (the highest Labor Law court)</td>
<td>Bars appeals from lower court decisions that apply it but allows lower courts to disregard it (subject to appeal)</td>
<td>Decisions regarding “the validity, interpretation and efficacy of a norm, concerning which there is an actual controversy among courts or between courts and the administration that might generate judicial insecurity or multiple causes on identical issues.”</td>
<td>A vote to designate a decision as SIR by at least two-thirds of all judges on the relevant court “after repeated decisions on the issue”</td>
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Table 2: Constitutional Amendments Conferring Binding Effect on High Court Decisions in Brazil

The Association of Judges for Democracy (Associação Juízes para a Democracia)—the Workers’ Party (PT) before it controlled the presidency—and many others have long opposed giving STF precedents binding force, arguing that this would give the highest courts too much power, thereby limiting the independence of trial court judges.\(^\text{94}\) While

binding precedent is uncontroversial in the United States,\textsuperscript{95} it is not uncommon in civil law systems to find that higher court decisions do not have \textit{erga omnes} effects and that lower courts are not required to follow the precedents of higher courts.\textsuperscript{96} Odd and inefficient as the practice may seem to U.S.-trained lawyers, this approach has a long history and a normative justification based on democratic theory, which need not be revisited here.\textsuperscript{97}

While deceptively similar in designation and effect, the various measures are propelled by radically different goals for the distribution of power within the Brazilian political and judicial structure. The SEV and the extension of binding effect to all constitutional decisions arising out of the STF’s original jurisdiction attempt to shift more power to the constitutional court and to rebalance power among majority and opposition political actors. To understand why this is so, we first need to review the causes of action to which they apply.

A constitutional reform in 1993 authorized a limited number of entities (the president, the solicitor general, and the leadership of the House and Senate) to request a declaratory judgment from the STF \textit{affirming} the constitutionality of a law or other federal norm, such as a presidential decree (\textit{ações declaratórias de constitucionalidade de lei ou ato normativo federal}).\textsuperscript{98} These rulings were given \textit{erga omnes} effect and binding precedential force upon lower courts and other government actors.\textsuperscript{99} Along with all other decisions of the STF, however, decisions in direct actions \textit{challenging} the constitutionality of legislation (\textit{ações diretas de inconstitucionalidade}) remained purely \textit{inter partes}.\textsuperscript{100} This inconsistency in the system favored the party in power since legislative majorities and the president could insulate legislation from repeated challenges while anyone in opposition to a particular piece of legislation or presidential decree was forced to relitigate and reargue the issue in every new case. The new amendment extends the binding force of precedent to both kinds of cases, thus putting majority and opposition parties on a more equal footing in litigating the constitutionality of legislation.

At the same time, both this provision and the SEV shift power within the judiciary from trial and appellate judges to the STF. All judges, from the STF on down, currently have the legal right (and, many feel, the ethical obligation) to disregard decisions of the STF with which they disagree. The SEV removes this normative justification for disregarding high court decisions. One judge argued, somewhat hyperbolically, that giving STF decisions binding effect would “abrogate the principle of . . . the impartial judge . . . [and] [o]ffend the principle of human dignity in that it would take from the judge what is essential in judicial activity, which is self-determination.”\textsuperscript{101} Without going quite so far, it is clear that this entire debate—while it has implications for repetitive litigation and inefficiency—is fundamentally about judicial hierarchy and the centralization of jurisprudential power in the highest court.\textsuperscript{102}

\textsuperscript{95} Note, for example, that Professor Rosenn finds it “difficult to take these claims seriously.” Rosenn, \textit{supra} note 1, at 5.

\textsuperscript{96} It is also the case, as numerous studies have shown in Brazil and elsewhere, that as a practical matter lower courts bow to judicial hierarchy. \textit{See}, e.g., Brinks, \textit{supra} note 35, at 219–20; \textit{SHAPIRO, supra} note 18, at 135–36. In the ordinary case, then, lower court judges’ purported freedom to follow the law as they see it is more theoretical than actual.

\textsuperscript{97} For a discussion of this view as well as its (limited) practical effect, see \textit{SHAPIRO, supra} note 18, at 126–56.

\textsuperscript{98} C.F. art. 102, para. 2.

\textsuperscript{99} Id.

\textsuperscript{100} Id.

\textsuperscript{101} Arantes, \textit{supra} note 79, at 42 (quoting former São Paulo Judge Luiz Flávio Gomes).

\textsuperscript{102} See the discussion in \textit{id}.
The SIR has similar efficiency-increasing potential, but its intended effect on the distribution of power is almost exactly the opposite. The SIR allows lower court judges to foreclose some appeals simply by proclaiming that their decision is based upon a (special) decision of the STJ, while leaving them free to ignore, disagree with, or otherwise flaunt any decision of the STJ—including SIRs. The only control over this is, as at present, an appeal; and an appeal that must be repeated over and over, if a judge insists on an idiosyncratic interpretation of the law. The SIR actually increases the autonomy of lower court judges since they are still free to disregard precedent but can now seek to immunize their decisions from appeal by finding a way to bring them under the aegis of a SIR. In sum, the SIR gives lower court judges a greater ability to foreclose appeals in certain cases while preserving their legal right to ignore prior rulings of higher courts whenever they deem appropriate.

Of course, we might question the practical effect of either of these measures. Faced with a ruling that applies a SEV, creative lawyers and trial court judges will merely shift their argument from a direct focus on the underlying legislation to what is currently grist for the mill of the (not insignificant) legal practice in common law systems—the interpretation and application of high court decisions. Similarly, seeking to insulate a decision from appeal by application of a SIR will simply shift the focus of an appeal to whether the SIR was properly interpreted and applied. Indeed, the constitutional amendments explicitly recognize this fact in the context of the SEV, authorizing direct applications to the STF on claims that a judicial decision contravenes a SEV or improperly applies it. Similarly, superior judges already exercise a great deal of control over their subordinates, since they control raises, reassignments, promotions, and all disciplinary matters. Judges who insist on sui generis interpretations of the law face considerable real-life sanctions with or without these amendments, in addition to seeing their decisions overturned by appellate instances. The new measures are better described as adding a legal and normative layer to this oversight than as creating judicial hierarchy were none existed.

Both the SEV and the National Judicial Council tend toward concentrating policy-making authority in the highest tribunal and are likely to increase both appellate and political control over lower court conduct and decision making. First, given that it is a specialized body dedicated to oversight of administrative and disciplinary matters, the National Judicial Council promises to increase control over judicial conduct, especially administrative misconduct. A brief review of the future composition of the Judicial Council shows that the three highest courts (STF, STJ, and TST) will name nine of the fifteen members of the Council, the executive (through the quasi-autonomous solicitor general) names two, and the House and Senate name one each. As we saw earlier, political actors have vastly more influence on the selection and appointment of high court judges than lower court judges and directly name a substantial portion of the membership of the Council. It is fair to conclude then that the creation of the Council increases, as intended, political control over judicial administration and discipline.

Secondly, the SEV shifts power to a more political court in crafting constitutional jurisprudence. Not only are higher court decisions more visible, and therefore more subject to criticism and review by outside actors, but, as we saw above, the STF is selected in a more political process than lower court judges. Giving the STF’s decisions more binding force through the SEV will increase hierarchical control, adding to the already significant

103. A decision of the STJ must meet certain conditions and be designated a SIR by at least two-thirds of the thirty-three members of the STJ before it could be used to this effect. Proposed C.F. art.105-A.
104. C.F. art. 102, § III.
105. See Brinks, supra note 35, at 219–21.
potential for career sanctions imposed on rebellious judges.\textsuperscript{106} Shifting jurisprudential power to the STF ensures that judges whose preferences are more likely to be aligned with current political majorities make more consequential decisions on constitutional questions.

It is not clear, however, that these measures necessarily decrease independence as defined here. The shift of power to a more politically accountable court and to an external disciplinary and administrative body raises that concern, but the fragmentation of the Brazilian polity suggests that extreme politicization of either the STF or the Judicial Council is not likely under the current configuration of the political arena. Given its composition, the Council promises to be a relatively politically diverse entity, although largely reflective of the preferences of the judicial elite, as nearly two-thirds of its nominees will be approved by a majority of the highest courts. As noted, these elites are typically viewed by critics of this reform as more conservative than the typical trial court judge. Still, it is hard to imagine an alignment of political forces that could produce a truly monolithic political environment on a Council that is drawn from three different courts, the executive branch, and the legislative arenas in Brazil. It seems likely, therefore, that the combination of a Judicial Council and SEV will increase internal hierarchical and external political control over judicial decision making. The influence should be felt most strongly in the administrative and constitutional areas. At the same time, these reforms may not appreciably diminish independence in the partisan sense, so long as the Senate continues to exercise a veto over judicial appointments and continues to be a pluralistic political body. By contrast, the SIR increases trial court autonomy in decision making outside the constitutional arena and may increase judicial efficiency.

To say there will not be an excessive diminution in independence as a result of these reforms is a normative judgment, based on a view that judicial independence is, at its core, about impartiality and partisanship rather than simply oversight by a political body. The judges in one of Brazil’s most respected judicial associations, the Association of Judges for Democracy, have long argued the contrary—that the SEV strikes a direct blow against the independence of Brazilian lower court judges.\textsuperscript{107} Their own package of reform proposals states, “The members of Judges for Democracy vehemently repudiate such an idea.”\textsuperscript{108} On the other hand, and for the same reasons, they support the SIR.\textsuperscript{109} Their disagreement with the SEV is grounded in sensible political and normative grounds and cannot be dismissed as merely an attempt to preserve their own power. They argue that lower court judges are the most democratic force in the Brazilian judiciary, that the current freedom of decision among them permits the infusion and testing of new ideas, and that preventing innovation from below will further ossify an already too conservative judiciary.\textsuperscript{110} They note that high court decisions are already followed for the most part—arguing that this is precisely because they represent a synthesis of the wisdom generated by the more democratic debate among lower court judges—so additional control is unnecessary.\textsuperscript{111} This is largely true—as noted, the hierarchical organization of the Brazilian courts makes extreme dissent difficult and unlikely.\textsuperscript{112} Despite the criticisms some have leveled against the Brazilian judiciary,\textsuperscript{113} it seems clear that lower court judges are beginning to break the hold that social and

\textsuperscript{106} See id.
\textsuperscript{107} Interviews with Kenarik Boujikian de Filippi, past president of the Associação Juízes para a Democracia, and other members, in São Paulo, Braz. (1999 & 2001).
\textsuperscript{108} Associação Juízes para a Democracia, supra note 94.
\textsuperscript{109} Arantes, supra note 79, at 43.
\textsuperscript{110} Associação Juízes para a Democracia, supra note 94.
\textsuperscript{111} Id.
\textsuperscript{112} Brinks, supra note 35, at 219–21.
\textsuperscript{113} See Faria, A Crise, supra note 75; Faria, Mitos, supra note 75; PRILLAMAN, supra note 26.
economic elites had on this institution.  This makes the argument more compelling than, as some have claimed, a mere attempt to protect entrenched interests.

At the same time, it is clear that some streamlining of the judicial process is desperately needed in Brazil, and the SEV and the SIR both tend in that direction. While both tend toward greater efficiency, the SEV centralizes control over constitutional issues, and the SIR preserves and expands the normative basis for lower courts’ resistance to hierarchical control and jurisprudential innovation in ordinary cases. It seems difficult to defend on normative grounds a great deal of heterogeneity in constitutional interpretation and innovation; and in a democracy, it is easier to defend locating this function in a more politically responsive, though still independent, body. Thus the arguments of the Association of Judges for Democracy are less compelling in the case of the STF and perhaps more persuasive in the case of the STJ. In combination, then, the new provisions appear to strike a defensible combination of lower court autonomy and political responsiveness, without necessarily eroding judicial independence by fostering overtly partisan conduct.

VI. CONCLUSION

In summary, in this article I presented and defended an alternative definition of judicial independence. This definition conceives of judicial autonomy as consisting of two dimensions: control (which relates to any kind of oversight) and independence (the touchstone for which is partisanship or partiality). The former describes mechanisms that seek to reduce the range of uncontrolled variation in judicial decision making. The latter describes the unilateral interference with the judicial process by a party with an interest in a dispute. Either of these dimensions can affect judicial appointments, leading to a loss of what I termed preference independence, or judicial decision making, leading to a loss of what I have called decisional independence.

I then applied this theoretical framework to recent reforms in Argentina and Brazil and evaluated the potential impact of the reforms on preference and decisional independence in each case. I concluded that in Argentina the new measures tend toward the continuation or extension of political oversight or control over both appointments and decision making on the Supreme Court. At the same time, because they tend to diffuse control over these areas to a broader range of political actors, it appears they have not impaired judicial independence in the partisan sense. The preferences of new Supreme Court nominees, selected under the new procedure, appear to be relatively independent of the president’s own policy preferences, and the decisions of the newly constituted Court appear to reflect a great deal of independent decision making. In short, the Argentine Supreme Court appears to be entering a period of increased judicial independence, though, admittedly, it is too soon to tell if there will be any enduring effects.

The reforms in Brazil tend to bring constitutional decision making and court administration under closer political control while expanding lower court discretionary power in nonconstitutional cases. The creation of a Judicial Council to oversee discipline and administration is likely to result in greater control over judicial conduct while the

115. See, e.g., PRILLAMAN, supra note 26, at 167.
116. See, for example, discussions of the normative implications for democracy of retaining some degree of political accountability in high courts in such otherwise empirical works as Robert A. Dahl, Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker, 6 J. PUB. L. 279 (1957); see also Epstein et al., supra note 36.
adoption of binding precedent at the Constitutional Court level tends toward consolidating control over constitutional jurisprudence in a more politically accountable court. A unique device allowing lower court judges to (partially) insulate their decisions from appeal appears to give these judges more autonomy in nonconstitutional cases. As in Argentina, it is too soon to know for certain what the consequences of the changes will be for judicial independence. For the present, however, given the composition of the Constitutional Court and the Judicial Council, and given a relatively high degree of political fragmentation, it appears unlikely that the new measures will erode the independence of the courts in Brazil to any significant degree. It is worth cautioning, however, that by centralizing control in a more politically accountable court, these new measures carry the potential for a more politicized court in Brazil should political power become more concentrated.

As this discussion makes clear, it is a mistake to assume that the lack of judicial independence in Latin America is a static, uniform condition or responds with glacial change to deeply rooted enduring characteristics of regional culture. Shifts in political demands for improved courts correspond with institutional changes that have the potential to improve (or detract from) judicial independence. In the current climate of low confidence in the courts and strong pressure from domestic and international constituencies for better justice, we may be at the beginning of a new era for courts in Latin America. Making serious and lasting improvements, however, will require a level of political commitment that has been altogether absent in prior decades. One important element in writing this new history will be the extent to which civil society continues to press for more autonomous, more effective courts. If this occurs, political leaders may finally conclude that it is politically more advantageous to create truly independent courts than to continue to rely on a compliant judiciary.