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DO CONSTITUTIONS MATTER? ESSAYS ON THE IMPACT OF CONSTITUTIONAL PROVISIONS ON *DE FACTO* JUDICIAL INDEPENDENCE IN LATIN AMERICAN COUNTRIES

by

CLARISSA DIAS

Under the Direction of Amy L. Steigerwalt and Robert M. Howard

ABSTRACT

Conventional wisdom holds that constitutions shape behavior, structures, and institutions. Looking at provisions in the constitutions of 19 Latin American countries, I show the level of judicial independence exercised by a country's courts and judges is a function of constitutional provisions.

INDEX WORDS: Judicial independence, *De jure* judicial independence, *De facto* judicial independence, Constitutional provisions, Latin America, Federalism, Bicameralism, Electoral design, Brazil

DO CONSTITUTIONS MATTER? ESSAYS ON THE IMPACT OF CONSTITUTIONAL PROVISIONS ON *DE FACTO* JUDICIAL INDEPENDENCE IN LATIN AMERICAN COUNTRIES

by

CLARISSA DIAS

A Dissertation Submitted in Partial Fulfillment of the Requirements for the Degree of

Doctor of Philosophy

in the College of Arts and Sciences

Georgia State University

2013

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DO CONSTITUTIONS MATTER? ESSAYS ON THE IMPACT OF CONSTITUTIONAL PROVISIONS ON *DE FACTO* JUDICIAL INDEPENDENCE IN LATIN AMERICAN COUNTRIES

by

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August 2013

DEDICATION

To my loving sisters, Mariana and Raquel.

ACKNOWLEDGEMENT

In 2004, I came to this country to pursue a Master's Degree. I never thought that that journey would take me to a PhD program. And here I am after 6 long years. This would have never been possible if I had not had the support of many friends and colleagues who assisted me during my graduate program. I am in debt to all of you.

I would like to express my deep gratitude to my friend and mentor, Dr. Amy Steigerwalt. Without her patient guidance, enthusiastic encouragement, and support this dissertation would not have been possible. I appreciate the feedback she gave me during the writing process. She carefully and diligently read all my rambling and has been the best editor I could ever have. I am privileged to have worked close with her. She is an amazing professor, a great scholar, but more than anything an admirable woman. Amy, it is not an exaggeration to say that I owe you this dissertation and my career path. You made it all possible. Thank you for being there for me.

I would like to express my very great appreciation to Dr. Robert Howard. I am privileged to have him as my dissertation chair. I appreciate the support and guidance through the process of writing my dissertation. His knowledge on the topic of my dissertation was key to develop this dissertation. Even when I thought I could not do it he was always there to say I could. Thank you for reminding me to have more trust in my abilities and everything was going to be fine. I am also thankful for Dr. Michael Fix for stepping in the middle of this process. I have always enjoyed statistics and methods, but working with Mike took this passion to an entire new level. His knowledge about topics that usually scare most people made the quantitative part of this dissertation possible. Lastly, but not least, I give much thanks to Dr. Jennifer McCoy, who provided valuable suggestions that enhanced this dissertation.

During my graduate classes I had the chance to study with great professors, who helped me develop research ideas and from whom I have gained tremendous amount of knowledge. I thank Dr. Mary Finn, who started this path for me when I was still doing my Master's program. I thank Dr. Pe-

ter Lindsay, from whom I have learned a great deal of sarcasm and enjoyed hours of good conversation, and of course from whom I have learned a bit about Political Theory. You made this journey much more fun. To Dr. Mario Feit, who I knew I would learn a lot from since his job interview at Georgia State. I took all his classes when it was possible and I have enjoyed every one of them.

Numerous individuals read drafts, provided feedback, and otherwise helped me through the bumpy roads I encountered in writing this dissertation. For taking time to read through my not always clear sentences and ideas, I thank Marina Boura Sawyer, Norm Sawyer, Aima Rotella, Veronica Luckow, and Aimee Wickman. They heard my complaints, my last minute phone calls begging to one more editing, and they were always there when I needed the support during my moments of despair and doubts.

All this would not have been possible if I did not have the support of my wonderful parents, Vera and Carlos. They have throughout my life encouraged my curiosity t to explore this world. They have always supported my adventures, my dreams, helping me to always stay focus to my goals. I will always be in debt to them. And I could not forget my dear sisters, Mariana and Raquel, to whom I dedicate this dissertation. Your support, encouragement, and love have been essential to conclude this dissertation. I love you both.

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Essay 1: Do Constitutions Matter? Assessing the Impact of Constitutional Provisions on De Facto Judicial Independence in Latin America

Abstract

How do constitutions affect the degree of independence courts and judges exercise? More specifically, do constitutional guarantees of judicial independence protect courts and judges against usurpations of their powers? Conventional wisdom holds that constitutional arrangements are automatically enforced, denoting that formal institutions, such as written constitutions, can shape the way others behave (Carey, 2000). This study examines the degree to which the level of judicial independence enjoyed by a country's judiciary is a function of constitutional provisions intended to safeguard its independence. This hypothesis is tested on 19 countries in Latin America. The findings show that constitutional provisions related to judicial independence affect courts' *de facto* level of independence. More specifically, I argue that nine provisions of judicial independence – the power of judicial review, length of judgeship, separation of power, selection and removal procedures, fiscal autonomy, qualifications, number of justices in the higher courts, and accessibility to the courts – works in unison to create independent courts. Moreover, the findings suggest that to create *fully independent* courts, two provisions – accessibility and removal procedures – are indispensible in the constitution. This study is intended not only to offer a general model for understanding judicial independence in developing countries but also to help explain under what conditions constitutional provisions are observed and enforced.

Introduction

How do constitutions affect the degree of independence courts and judges exercise? More specifically, do constitutional guarantees protect courts and judges against usurpations of their judicial independence? Furthermore, under what conditions have political institutions been able to violate these constitutional guarantees? Conventional wisdom holds that constitutional arrangements are automatically enforced, denoting that formal institutions, such as written constitutions, can shape the way others behave (Carey, 2000). Constitutional scholars in the 1990s equated constitutional provisions with institutions. While developed countries usually have stable constitutional frameworks and states ensure their enforcement, the same cannot be said of developing countries (e.g., Pozas-Loyo and Ríos-Figueroa 2010; de Vanssay and Spindler 1994). In developing countries, scholars suggest, these formal institutions are rarely adhered to and, instead, are often violated (Levitsky and Murillo 2009). Hence, the question arises, can some formal institutional conditions, i.e., constitutional provisions, ensure the protection of judicial independence in new democracies more effectively than other conditions?

This study examines the degree to which the level of judicial independence enjoyed by a country's courts and judges is a function of constitutional provisions intended to safeguard their independence. Using a cross-sectional time-series data of 19 Latin American countries from 1984 to 2009, I model the effects of *de jure* constitutional provisions on *de facto* levels of judicial independence. In countries transitioning from authoritarian regimes to democracies, constitutional reform is paramount as are the effects these reforms are having on *de jure* and *de facto* judicial independence. Many experts claim that problems with countries' political structures are due to poorly written or outdated constitutions (Smith 1995; Massrseveen and Ger van der Tang 1978; Gill 2002; Arato 1993). However, if constitutional provisions do not, in fact, help rebuild political institutions, then promoters of democracy and constitutionalists should focus instead on economic, political, and social structures. The analysis contained herein will therefore help policy makers and promoters of

democracy, who are considering constitutional design as a way to improve *de facto* judicial independence, provide a clear, empirical answer to the question of whether constitutions, specifically constitutional provisions, matter.

Why Judicial Independence?

There are several important reasons for studying determinants of judicial independence. First, for the rule of law to exist, judicial independence is necessary (United Nations 1985; Rio-Figueroa and Staton 2009). Second, independent courts are free to protect individual rights. Judicial independence also allows for the safeguarding of the constitution against governmental abuses. Finally, the importance of studying judicial independence increases as the judicialization of politics in developing countries and overreliance on the courts increase.

In order to exercise rule of law there must be judicial independence. In an evaluation report for the United States Agency for International Development, Blue (1999) explains the rule of law "embodies the basic principles of equal treatment of all people before the law, fairness, and both constitutional and actual guarantees of basic human rights; it is founded on a predictable, transparent legal system with fair and effective judicial institutions to protect citizens against the arbitrary use of state authority and lawless acts of both organizations and individuals" (13). Thus, independent courts are insulated from the other branches of the government and use the law to adjudicate cases.

The biggest threat to courts is the government, especially in cases in which the government has a clear stake in the outcome. As regulators and controllers of government power, only independent courts can restrain potentially tyrannical actions. Moreover, it is in the interest of the rule of law that judges are impartial. The principle of "equal treatment of all people before the law" requires independent judiciaries. Independent judges adjudicate cases by applying the law rather

than considering their personal policy preferences (see e.g., Segal and Spaeth 1993, 2002). In practice, judicial independence means courts and judges function free from outside influences.

A final reason for investigating the determinants of judicial independence is the recent increase in the judicialization of politics. Judicialization of politics involves the reliance on the courts to resolve conflicts that were historically the role of the other branches of the government, i.e., executive and legislative (Sieder, Schjolden, and Angell 2005). It is the displacement of politics from the political arena to the legal system (Taylor 2008; Iaryczower, Spiller, & Tommasi 2002; Rios-Figureroa & Taylor 2006; Santiso 2003). This phenomenon is likely due to the mistrust of these emerging countries on their political system. Coupled with the expansion of constitutional rights and remedies to protect these rights, the judicialization of politics includes the courts in the policy-making process. Thus, examining judicial independence helps us to understand the increasing judicialization of politics.

Do Constitutions Matter?

This study investigates whether explicit constitutional guarantees can protect judges and courts from political influences. Scholars of constitutions and constitutional arrangements argue that constitutional provisions of judicial independence, i.e., removal and appointment procedures, protect courts from arbitrarily external influences (see Verner 1984; Dahl 1957). Thus, they posit that formal judicial structures, outlined in constitutions, provide the primary foundation for judicial independence.

Scholars maintain that constitutions matter for many reasons. They claim that constitutions shape the economic structure of a country (Hayek 1978; Gwartney and Wagner 1988). They suggest that constitutions are the source of human liberty and freedom. Moreover, these rights are the foundation for individuals' fulfillment of their other wants through economic activity. Similarly, in discussing the role constitutional reform plays in strengthening government, Dressel (2005) argues

that "a constitution defines and protects citizens' rights from governmental abuse. It also limits and balances government powers vis-à-vis other players and institutions, thereby safeguarding minority rights. The constitution is the touchstone for the legality of all other laws and the basis for reviewing executive and legislative actions" (1).

Moreover, promoters of democracy in authoritarian countries argue that constitutions set the standard for the new political regime. According to constitutionalists (Buchanan 1983; Epstein 1988; George 1979; Gwartney, Wagner, and Program 1988; Hayek 1978; Barros 2002; Olson 1982; Pilon 1988), constitutions control arbitrary takings by the state, set individuals' human rights, create systems of property ownership and limit transaction costs in order to promote efficiency, and maintain the "social contract" established between politicians and citizens. Thus, it is indispensable to explore the relationship between *de jure* and *de facto* judicial independence and the impact constitutions have in a country transitioning from a dictatorship. Constitutionalists and political experts suggest constitutional reforms to achieve structural changes. Thus, if constitutions are important for the survival of new democracies, then they must also guarantee that judges and courts can independently perform their functions. However, if constitutional provisions are insufficient to ensure judicial independence, promoters of democracy and constitutionalist should focus on restructuring social, economic, and political structures (Herron and Randazzo 2003).

As some scholars point out, there are shortcomings of constitutional provisions and what happens in practice. Duverger (1980), for instance, argues that differences between constitutional powers of the executive branch and what presidents actually exercise in practice are disjointed. Duverger points out that presidents often overstep the powers provided by the constitution. Thus, in some countries, presidents often exercise functions provided to the other branches of the government, such as legislative and judicial powers. Moreover, de Vanssay and Spindler (1994) explore the economic effects of the entrenchment of specific rights written in constitutions. They argue that government often spends too much time making laws, when instead they should focus on raising

the country's per capita GDP, in order to promote economic changes. Furthermore, the use of constitutional provisions to build better structure is viewed as time-consuming and inefficient. Posner (1986), for instance, argues that because the policy-making process takes time and is not cost-effective, changes should come from judicial or administrative processes. Thus, instead of spending time and money in rewriting constitutions, energy should be channeled to implementing the existing laws.

Furthermore, some scholars argue that writing or rewriting constitutions might not provide protection in practice. With regard to the courts, some scholars argue that constitutional provisions may not isolate courts and judges from external influences. Herron and Randazzo's (2003) study of formal institutions, i.e., written constitutions and statutes, explores the impact of constitutional provisions on courts after Communism. In their study, the authors conclude that in post-Communist countries constitutional provisions of judicial independence did not capture the realities of courts exercise of their power. They found that formal institutions very often were unable to protect courts and guarantee their judicial independence. Similarly, Rosenn (1987), discussing judicial independence in Latin America, argues that constitutional provisions of judicial independence are rarely enforced. According to Rosenn, "most Latin American courts are staffed by career judges with no independent political base or contracts and with relatively narrow experience. Asking them to perform this function [judicial review] (particularly in the context of exercising the power to declare statutes unconstitutional *erga omnes*) is to plunge them into a political role for which they are ill-prepared by both temperament and experience" (1987: 32).

This study seeks to add to this debate by looking at Latin American countries' constitutions. In Latin America, constitutional guarantees of judicial independence are readily available. The courts' independence, however, is not always guaranteed due to repeated violations of these constitutions. Political actors have been known to fill the courts (court packing) with ideologically similar

justices, to remove sitting justices who decide against government actions, and to force the resignation of justices through political pressure (Helmke 2005; Chavez 2004).

Violations of judicial independence are not exclusive to Latin American courts. Italian, Japanese, and even American courts have experienced threats to their judicial independence. A prominent example of attempted court packing in American courts is the Judicial Reform Bill of 1937. Frustrated by an old and conservative Supreme Court that struck down numerous pieces of New Deal legislation, President Roosevelt introduced the Judicial Procedures Reform Bill of 1937. To have his way and change the composition of the courts, Roosevelt asked Congress to increase the number of Supreme Court justices to twelve. In addition to that, he also proposed mandatory retirement to those who had reached the age of 70. Although he did not succeed in his attempt to change the composition of the Court, there is no doubt that Roosevelt was targeting the Supreme Court justices who would not align to his ideology. And, in what is called the "switch in time that saved nine," not long after introducing this legislation, the Supreme Court reversed course and began upholding key pieces of legislation proposed by Roosevelt (Quinn and Ho 2009: 2).

All these threats to judicial independence raise questions about discrepancies between formal rules and judges' and courts' exercise of judicial independence. Formal judicial structures provide guarantees for judicial independence. This study proposes that courts with high levels of formal guarantees of independence should have more opportunities to act in an independent manner. Yet significant debate remains over how much and under what conditions constitutions influence political processes and outcomes.

This study adds to the extant literature by analyzing the relationship between constitutional provisions designed to guarantee judiciaries' independence and the degree of judicial independence courts and judges exercise in practice. Previous studies fail to investigate whether all or only some of these constitutional guarantees protect judges' and courts' independence. As a result of this

study, this paper seeks to identify which provisions systematically influence *de facto* independence, and which ones do not. To that end, I gather data on the formal, or *de jure*, provisions for judicial independence provided in the constitutions of 19 Latin American countries, and then use them to predict *de facto* judicial independence. Since existing conclusions about the relationship between *de jure* and *de facto* independence are largely based on single-country case studies, they are not well suited to distinguishing more generally which *de jure* factors matter and to what degree.

Data and Methods

I test the effect of *de jure* judicial independence on *de facto* judicial independence in 19 countries in Latin America.[1] I utilize a cross-section time-series data of 19 Latin American countries constitutions from 1984 to 2009. The Latin American region provides a useful case for assessing the variance in the levels of *de facto* judicial independence. The Latin American countries used in this study have a common legal system. All 19 countries are civil law countries. They also have same regime type, but carry different political, social, and juridical structures (Pozas-Loyo and Ríos-Figueroa 2010).

Moreover, these countries were selected based on their constitutional design. During the democratization process in Latin American countries, the first step in the transition from authoritarianism to democracy was to draft new constitutions. These constitutions were supposed to outline the structures of the government, their functions, and limitations and to safeguard emerging democratic regimes. As a result, many of the constitutions of Latin American countries provide numerous provisions intended to safeguard the independence of the courts. Moreover, there are a lot of variations in the types of provisions as well as the observance of these provisions in practice. In Latin American countries, many of these provisions are either violated or not fully implemented. Thus, I explore whether these constitutional provisions of judicial independence can guarantee courts *de facto* independence in Latin American countries.

[1] The countries included in this analysis are: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic,

Furthermore, although this study focus on a particular region, its findings are useful for other regions for two reasons. First, most countries in the world use a civil law system or a combination of civil and common law systems (Central Intelligence Agency 2013). Thus, these civil law countries rely heavily on formal institutions, i.e., constitutions, to arrange their government systems, to delineate functions, and to identify rights and protections against arbitrary government actions. In studying Latin American countries' constitutions, this study can generalize its findings to a number of countries that uses the same system. Second, the fact that Latin American countries used formal institutions to transition from authoritarian to democratic regime raises the question of whether this process should be replicated in countries going through the democratic process. If the inclusion of constitutional provisions related to judicial independence protects courts in Latin America, promoters of democracy and constitutionalist should focus on these provision to create independent courts in these emerging countries. However, if *de jure* judicial independence does not matter for development of independent courts, then energy and time should be spent in other areas, *i.e.*, economic, social, and political arenas.

Dependent Variable

The dependent variable for this study is a country's level of *de facto* judicial independence. The *de facto* measure has corresponding indicators to *de jure* measures. Despite their corresponding indicators, these variables capture different measures of judicial independence. *De jure* judicial independence is measured using a dichotomous variable. Thus, I look at whether a specific constitutional provision, *i.e.*, removal procedure, length of judgeship, is provided in the constitution. If the constitutional provision related to judicial independence is present in the constitution, I coded 1, otherwise, 0. In the case of *de facto* judicial independence variable, the measure captures whether that constitutional provision is observed in practice. For instance, some constitutions provide for removal proceedings to oust judges from their positions. A *de facto* measure capture whether these proceedings are observed in practice. Thus, if judges are going through the appropriate process to

be removed from their position, the constitutional provision is observed in practice; otherwise, if external actors are arbitrarily removing judges, then constitutional provisions are being violated.

Many scholars use similar indicators because they want to determine if constitutional guarantees are followed. This study departs from these studies by investigating possible differences between *de jure* and *de facto* judicial independence (Feld & Voigt 2003; Kaufman 1979, 1980; La Porta et al. 2004; Larkins 1996). To do so, I look at the effect of *de jure* provisions on levels of *de facto* judicial independence.

I utilize the same measure of judicial independence as Cingranelli and Richards's (2008) derived from the United States State Department's country reports. It is an ordinal measure of *de facto* judicial independence and contains three categories: countries coded 0 are considered *dependent*, countries coded 1 are *partially independent*, and countries coded 2 are *fully independent*.[2] The data is available from 1981 to 2010 in their website.

According to Ríos-Figueroa and Staton's (2009) examination of eight distinct measures, the CIRI is one of the most reliable existing measures of judicial independence.[3] Although this measure relies on United States State Department country reports, all existing measures of judicial independence with country-year as the unit of analysis are constructed from two sources: expert or survey reports and the U.S. State Department reports. Moreover, despite the shortcomings existent in both sources, the U.S. State Department reports are more reliable and less problematic than country experts (Ríos-Figueroa and Staton 2009). In addition, recent studies (see Poe, Carey, and Vazquez 2001) argue that the biases that affected the reports during the 1970s and 1980s have been corrected and are not apparent in more recent years.

[2] The data is readily available on their website: http://ciri.binghamton.edu
[3] The other one is Howard and Carey's measure. This measure, however, is highly collinear with my other variables. I have tested it as well.

The Cingranelli and Richard's measure categorizes as *fully independent* judiciaries that fulfill the following criteria: 1) judicial review; 2) length of judgeship is seven years for the highest level courts; 3) judges cannot be removed by the president or ministers of justice; 4) the other two branches can be checked through courts proceedings 5) all proceedings are public; and 6) professional judgeships.

Since the dependent variable is a trichotomous ordering, linear regression models are not sufficient (Long and Freese 2005). I therefore employ an ordered probit analysis. This analysis uses a time-series cross-sectional data from 1984 to 2009.

Building the Model

De Jure Judicial Independence

The premise of this study is that courts with greater formal guarantees of independence should be fully independent. This notion is tested using two approaches. First, I create a *de jure* measure of judicial independence. This variable is based on my readings of the constitutions of 19 Latin American countries; panel data from 1979 to 2005 provided by Linda Keith; the Comparative Constitutions project which compiles information from all constitutions around the world;[4] and the Elkins, Ginsburg, and Melton dataset (2006).[5] My measure, named *De Jure Judicial Independence*, is an additive scale of relevant constitutional provisions[6].

This *de jure* judicial independence measure assumes that constitutional provisions work in unison, with one influencing the other. However, the use of an additive scale does not explain how much each provision contributes to the increase of *de facto* judicial independence. To assess their individual influence, I test each of them in a separate model.

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[4] http://www.comparativeconstitutionsproject.org/Downloads.aspx

[5] Elkins, Zachary, Tom Ginsburg, and James Melton. 2010. *Chronology of Constitutional Events,Version 1.1*. Comparative Constitutions Project. Last modified: May 12, 2010. Available at: http://www.comparativeconstitutionsproject.org/index.htm

[6] In addition to the theoretical reasoning to include these constitutional provisions, I tested these indicators using an explanatory factor analysis. The purpose of running this test is to ensure that these 9 provisions are a single common factor of my explanatory variable – *de jure* judicial independence.

The additive scale is created based on constitutional provisions of Latin American countries. To create the scale, I focus on whether these constitutional provisions of judicial independence are explicitly stated in the constitution. Thus, if a constitution guarantees, for instance, clearly provides for removal proceedings to oust judges from their position, I coded 1. However, if the provision is not clearly expressed in the constitution, I coded it 0. Notwithstanding the particularities of the text, the presence of a constitutional provision related to judicial independence should prevent arbitrary actions against the courts. Thus, regardless of whether the provision provides for more or less protection, I argue that *de jure* judicial independence should be observed in practice. If political actors are likely to violate constitutional provisions, they will do it regardless if a provision makes it more or less difficult to violate it.

The following list details the specific *de jure* judicial independence provisions included in the scale. These provisions were chosen based on the extant literature of judicial independence and the theoretical reasoning for using them:

Selection Procedure of Justices

The literature offers two reasons for why the selection process of judges is related to the independence of the courts. The selection process insulates judges from political influences (Apodaca, 2003; Berkowitz and Clay 2006; Cingranelli and Richards, 2008; Cross 1999; Despouy 2009; Fiss 1993). The idea is that the selection process should create impartial and autonomous courts.

Looking at the effect of constitutional provisions on human right protections, Keith (2002) argues that constitutional provisions, including selection, judgeship length, and removal processes, protect courts from external influences. She argues that these constitutional provisions allow judges to freely exercise their function, thus protect human rights. Keith concludes that constitutional guarantees of judicial independence affect judicial protection of human rights.

I hypothesize that the inclusion of a constitutional provision regarding a procedure for the selection of judges in the higher courts increases their *de facto* judicial independence. If a provision

regarding removal procedures was included I coded 1; otherwise, 0.

Length of Judgeship

As with the constitutional provision of selection process, a constitutionally-determined tenure provision ensures judges' and courts' independence from external influences. Setting the length of judgeship protects judges from being removed before their term has ended or through appropriate removal procedure (Keith 2002). Thus, I expect high levels of *de facto* judicial independence in countries where constitutions formally guarantees judges' tenure in office for the higher courts. This indicator was coded 1, for constitutions that provided for any length of judgeship, and 0 if there is no provision regarding how long a judge should exercise its functions.

Removal Procedures

The process of removal is crucial to judicial independence. A constitutional provision that provides a removal process has two goals. First, the constitutional process binds political actors, prohibiting them from removing judges without the appropriate due process. Second, this provision shields judges from political pressure (Keith 2002). The presence of a removal procedure, regardless of how these procedures take place, assesses whether political actors observe the constitution at all to discipline judges. Therefore, I expect more judicial independence in countries where there is a constitutionally specified removal procedure for higher court justices than in countries without one. This indicator was coded 1, for countries with a removal procedure, and 0 for countries without any removal procedure.

Accessibility

Limited access to courts can affect their judicial independence. Courts that are accessible by every citizen are more likely to remedy government violations. An increase in accessibility to the courts by a broad number of agents can increase a court's independence through its judicial review power. According to Arantes (2005), the increasing number of people with standing authorized to use remedies to protect constitutional rights in Brazil had a great impact on the Brazilian judiciary

system. After 1988, the number of agents rose to more than 75. The effect was an increase in the number of judicial review action to 200 per year (Castro 1993). As courts are being called upon to review government actions, they act as policy-makers, increasing their power and thus their independence. I posit that a constitutional provision that guarantees access to the courts as a constitutional right will increase courts' and judges' independence. This indicator was coded 1 for provisions that guarantees access to courts; otherwise, I coded it 0.

Number of Justices in the Higher Court

A constitutional provision that determines the number of justices in the higher court has one important goal: prevent political actors from changing the structure of the courts arbitrarily. In attempting to pack the courts, political actors can change the number of justices in order to eschew their decisions (Rasmusen 1994). Thus, the higher court is more likely to be protected if the number of justices is determined in the constitution. I expect higher independence in countries where the constitution sets the number of justices on the higher court. I coded 1 for constitutions that provided a number of justices in the higher courts, and 0 if no number was provided.

Judicial Review

In the 1990s, the democratization process of a vast majority of constitutions entailed the inclusion of the provision of judicial review. According to Larkins, independent courts "has the power to regulate the legality of government behavior and determine significant constitutional and legal values" (1996: 611). Judicial review measures the power judges and courts have to adjudicate the law. The introduction of new rights and longer constitutions makes this provision even more important (Van Cott 2000; Nolte and Schilling-Vacaflor 2012; Arantes 2005) because it increases the chance that courts will be called to check on the other branches of the government actions in allegedly violations of these rights. I thus expect high levels of *de facto* judicial independence in countries where the constitution guarantees such power to the higher courts (Feld & Voigt 2003; Kaufman 1979, 1980; La Porta et al. 2004; Larkins 1996). This indicator is coded 1 if there is a provision

regarding judicial review and 0 if no provision provided for judicial review power.

Separation of Power

This provision provides judicial autonomy, political insularity, and transparency. The lack of a separation of power provision is incompatible with the notion of an independent court. It is important that the branches of the government have distinct roles and functions before the law. I posit that judicial independence will be higher where separation of power provision is explicit in the constitution (La Porta, Lopez-de-Silanes, Pop-Eleches, & Shleifer 2004; Keith 2001; La Porta, Silanes, Pop-Eleches, & Shleifer 2002). This indicator is coded 1 for constitutions with explicit provisions of separation of power and 0 if there is no such provision.

Budget

The discretion in determining the budget of the courts may also affect their independence. If political actors have the power to decide a court's budget, then the independence of the court is questionable. Political actors can use the budget to manipulate courts. It is likely that poorly financed courts fall prey to the interests of the political actors. Thus, I hypothesize that a judiciary will have higher judicial independence in countries where it has financial autonomy (Despouy 2009; Feld & Voigt 2003). This indicator was coded 1 if a provision regarding financial autonomy is in the constitution; otherwise 0 if no provision is provided.

Qualifications

In addition to the selection process, some constitutions establish minimum qualification levels for the profession of judgeship. An example of this professionalization of judgeship is Brazil's focus on including the qualification of judges in the constitution. Amendment number 45 (2004) of the Brazilian Constitution allows the Judicial branch the power to select, train, and improve the judgeship position. It also describes the integrity, ability, and efficiency of judges. Additionally, the Brazilian constitution includes the Magistrate School, which is responsible for training and improvement of judges.

The reason for such minimum qualifications is that they give some guarantee that judges are qualified to effectively and efficiently perform their job, are knowledgeable about the law, and competent to make decisions. According to Keith (2002), "this provision should lead to judges who are more competent and who have been socialized to the norms of judicial independence, making them more capable of countering incursions upon human rights from other branches" (197). I coded 1 if there is a provision providing qualification for judgeship for the higher courts, and otherwise 0 if no provision was provided.

Alternative Explanations

Although the literature on judicial independence emphasizes the importance of formal rules, *i.e.*, selection procedures, judicial review, removal proceedings, to prevent arbitrariness against the judiciary, they also recognize that there are other potential explanations for the variation in the level of *de facto* judicial independence. Some scholars argue that while constitutions may promise a high degree of independence, judges and courts are also influenced by the interactions between institutional, economic, and contextual features. This study tests alternative independent variables to explain variance in the *de facto* judicial independence. The addition of these variables may tell us to what degree constitutional guarantees can protect courts and judges and what is left to external factors to guarantee their functions.

An additional explanatory variable to the level of *de facto* judicial independence is the number of veto players. Veto players are power holders who have the ability to bring about change. This ability of bringing about change is inversely proportional to the number of veto players. This is because a high number of power holders can create obstacles to change the *status quo* (Tsebelis 1995). For the courts, this creates incentive for them to freely exercise their functions. Veto players will need to convince a larger number of other players to bring about any change, rending the process slow and less efficient. I assume that the higher the number of veto players, the higher *de facto* judicial independence will be, since the cost to interfere with courts and judges functions is higher

as well. This variable is operationalized using the number of veto players in a political system. The idea is that the higher the number of actors to check on other actors, the lower the number of constitutional violations, particularly against courts and judges. I use Beck, Clarke, Groff, Keefer, & Walsh (2000) measure. The variable is measured in a scale from 1 to 6.

Three of the alternative explanatory variables are related to the government structure. Federalism, bicameralism, and type of electoral systems are possible explanations for the variance in the level of *de facto* judicial independence. In the case of federalism, it is difficult for political actors to interfere with courts' and judges' independence. In federal systems, decentralization of power increases the accountability process. Federalism allocates responsibilities and power to different layers of government, allowing various groups to gain political leverage (Meyerson 2009). Consequently, there is an increase in the number of power holders who can influence political outcomes. Changes can only occur if these power holders can reach some consensus. However, in a strong federalism where tension exists between the central government and the subnational and local government, it is difficult to reach a majority to bring about change, rendering the process slow and cost-effective. Thus, federalism affects the judiciary's independence by decreasing the likelihood that a majority coalition will form and intervene in the courts' functions, i.e., overturning their decisions, starting a removal process, and shaping the composition of courts through selection process. Thus, it is expected to see higher levels of judicial independence in countries with federal form of government. I use Institutions and Elections Project (IAEP) (Regan and Clark 2010) measure of this variable. The variable is coded 1 for federal systems and 0 for unitary systems.

In addition to federalism, the type of the electoral system has an effect in the level of *de facto* judicial independence. Depending upon the type of electoral system, the number of political parties can increase or decrease. Proportional systems tend to produce a multi-party structure, whereas plurality systems generally foster a two-party system (Duverger 1954; Downs 1957; Sartori 1976; Cox 1987). Thus, in two-party systems, there are few negotiations, bestowing policy changes

less costly and more likely to occur. In a proportional system, where a coalition is often needed, the number of actors is higher, making it more costly to successfully change policies. If we apply this logic to the judiciary's independence, in majoritarian systems it may be easier, for instance, to overrule judicial decisions than in proportional systems. In this case, in the majoritarian systems, it is only needed to convince the majority party in government to overrule judicial decisions whereas in proportional system a coalition is necessary. Thus, I hypothesize that in proportional systems, judges and courts are more independent than in majoritarian systems. I use the Institutions and Elections Project (IAEP) (Regan and Clark 2010) measure. This measure is coded 1 for proportional systems and 0 for all other systems.

The third governmental structure included in the alternative explanation is bicameralism. Similarly to the other two governmental structures, bicameralism affects the level of *de facto* judicial independence. The number of legislative chambers influences the courts due to the type of political structure it creates. Contrary to unicameral system, in bicameral system a bill is passed after it is deliberated on the two houses. This creates a system of checks of one chamber over another. In bicameral system, this oversight allows courts' decisions to be preserved, making it difficult for political actors to override it. Moreover, with more individuals to monitor each other's actions, political actors attempt to arbitrarily influence courts and judges is difficult at best. Consequently, courts and judges are more likely to act independently. Thus, in bicameral system, the judiciary has a higher level of *de facto* judicial independence than in unicameral system. I use Beck, Clark, Groff, Keefer, and Walsh (2000) measure. The measure is coded 1 for bicameral systems and 0 for unicameral systems.

Furthermore, other explanations for the variance level of *de facto* judicial independence are assessed. Another possible determinant is the age of constitution. The longer institutions are in place, the more likely rules are to be implemented, observed, and followed. According to Carey (2000), institutions can generate shared expectations about how others will behave. These expecta-

tions exist when formal institutions are embedded in the actions of power holders. The embedment process takes time thus I expect to find that younger constitutions have not been fully institutionalized to create sufficient expectation to enhancing judicial independence. I create a variable of the years all the constitutions from 1984 to 2009.

All those variables exist in different government regimes. Moreover, it is important to include in which type of regime those features take place. I then expect that judicial independence will be higher in democratic regimes. Here, political institutions are more likely to obey the rule of the game under democracy. In democratic regimes, the constitution is the rule of the game and political actors who decide to violate it can have reduced his or her chances to be reelected. It is also under democratic regimes that procedures are followed, therefore, political actors are more likely to follow the process of judicial appointment and removal, guarantee the judiciary's budget and refrain from diminish judges and courts protections. I use here a measure that combines average values of the Freedom House scores and Polity. Scale ranges from 0-10 where 0 is least democratic and 10 most democratic. Hadenius and Teorell (2005) show that this average index performs better both in terms of validity and reliability than its constituent parts. Also say that democracy here is not measured whether it is democratic or not, but degree of democracy.

In addition to the alternative explanations, I control for population size and GDP per capita. I use the Unites Nations country population report to measure population size. For GDP per capita, I use the IMF country year report.

Assessing the Achievement of Judicial Independence

This essay investigates whether constitutions matter. More specifically, I ask whether constitutional provisions concerning judicial independence protect courts and judges against undue political influence. I use an Ordered Probit Model since the dependent variable, *de facto* judicial independence, is an ordered, trichotomous variable.

Two models are shown here. The first model tests the *de jure* independence measure, an additive scale of nine constitutional provisions of Latin American constitutions. The *de jure* judicial independence measure assumes that constitutional provisions work in unison, one influencing the other. However, this scale does not account for how much each provision contributes individually to the level of *de facto* judicial independence enjoyed by courts and judges. The second model presented examines the effect of each constitutional provision used in the *de jure* judicial independence measure. This latter model also provides promoters of democracy as well as constitutionalist a list of constitutional guarantees that are important to include in the constitution to protect courts' and judges' independence.

Do De Jure Constitutional Provisions Matter?

Traditional diagnostics show that Model 1 performs well. Table 1 compares how close the model's predictions are to the actual outcomes, using the predicted probability of each level of *de facto* judicial independence.

Table 1.1: Predicted Probability of *de facto* Judicial Independence

***De facto* Judicial Independence**	**Predicated Probability**	**Actual Outcome**
Dependent	.23 (0.1572, 0.3034)	.20
Partially	.65 (0.6128, 0.6872)	.57
Independent	.12 (0.0696, 0.1699)	.22

*Categorical variables were set at their mode; all other variables at their mean.

Table 1.1 illustrates that the model predicts 23% of category *dependent*, 65% of *partially independent*, and 12% of *independent* courts and judges. Comparing to the actual outcome of *de facto* judicial independence, the statistical model used in this paper can be said to perform well. Examining predicted probabilities within the sample and comparing these with actual outcomes provide an initial check of the model.

Table 1.2 presents the parameter estimates for this model.

Table 1.2: Parameter Estimates for *de facto* Judicial Independence

Variables	Coefficient	Std. Errors	z	p-value
***De Jure* Judicial Independence**	.087	.033	2.61	.009
Age of Constitution	.002	.002	.90	.366
Number of Veto Players	-.215	.047	-4.58	.000
Level of Democracy	.363	.039	9.37	.000
Government System	-.306	.124	-2.46	.014
Bicameral	.363	.122	2.91	.004
Type of Electoral System	.354	.118	3.00	.003
Population	3.33e-09	1.65e-09	2.02	.043
GDP/pc	-.000	.000	-1.26	.206
Log Likelihood = -406.395				
Chi-Square (9) = 144.80				
N = 490				

As seen in Table 1.2, all independent variables are statistically significant except for Age of the Constitution and Gross Domestic Product per capita. Given the relative immaturity of Latin American constitutions (the average age is only 29 years), these results suggest that what really matters is the content of the constitution rather than its relative age. Alternatively, *de jure* judicial independence, the type of electoral system, the type of government system, and whether the legislature is bicameral are all constitutional provisions that affect the level of *de facto* judicial independence. I go on to explore the substantive and contextual implications of these estimation results.

Do Constitutional Provisions Matter?

The goal of this study is to assess whether constitutional provisions matter. The conventional wisdom is that constitutional provisions affect the level of *de facto* judicial independence judges and courts exercise. Thus, my initial hypothesis is that an increase in the level of *de jure* judicial independence has a positive impact on the level of *de facto* judicial independence. I test this hypothesis in two ways: the impact of maximizing the number of constitutional provisions and the effect of incremental changes of *de jure* judicial independence.

The first test gives us an overall impact of *de jure* judicial independence. If we add 9 provisions of judicial independence in the constitution of a given country, for example, then what impact would those 9 provisions have on *de facto* judicial independence of courts and judges. The second test allows us to look at the impact of incremental changes of the number of *de jure* judicial independence on *de facto* judicial independence. These changes help us understand what impact an additional constitutional provision has on *de* facto judicial independence. Knowing this, we can find the point at which additional constitutional provisions start to matter and when they fail to impact the level of *de facto* judicial independence.

Table 1.3 is a depiction of the overall change in the level of *de facto* judicial independence when the number of constitutional provisions related to judicial independence changes from the minimum (0 provision) to the maximum (9 provisions).

Table 1.3: Predicted Probabilities of *de facto* Judicial Independence when Changing from No Provision to 9 Provisions of *de jure* Judicial Independence *

Categories	9 Provisions	No Provision	Change	Conf. Interval
Dependent	0.1200	0.3509	-0.2309	-0.4301, -0.0316
Partially	0.6506	0.5864	0.0641	0.0303, 0.0979
Independent	0.2294	0.0627	0.1667	0.0693, 0.2642

*Veto player, bicameral, government system, and proportional set at their mode; all other variables set at their mean.

Table 1.3 uses the 95% confidence interval to assess the significance of the predicted probabilities. If the 95% confidence interval crosses zero, more specifically, the parameter value specified in the null hypothesis is within the 95% interval, then the effect is not significant at the 0.05 level. Conversely, if zero is not within the interval, the null hypothesis can be rejected. According to Table 1.3, an increase in the level of *de jure* judicial independence from the minimum to the maximum number of constitutional provisions has a positive impact on all courts *de facto* judicial independence.

This table reveals that my hypothesis that constitutions matter holds true. The biggest impact is on *de facto dependent* courts. According to the table, holding all the dichotomous variables at their model and all other variables at their mean, there is 23% less chance to find *de facto depend-*

ent courts when 9 provisions related to judicial independence is added to the constitution. Conversely, there is an increase in 16.7% chance in finding *de facto fully independent* courts when adding these 9 provisions. The results also reveal that there is a 6% increase in the number of *partially independent* courts when adding 9 *de jure* provisions.

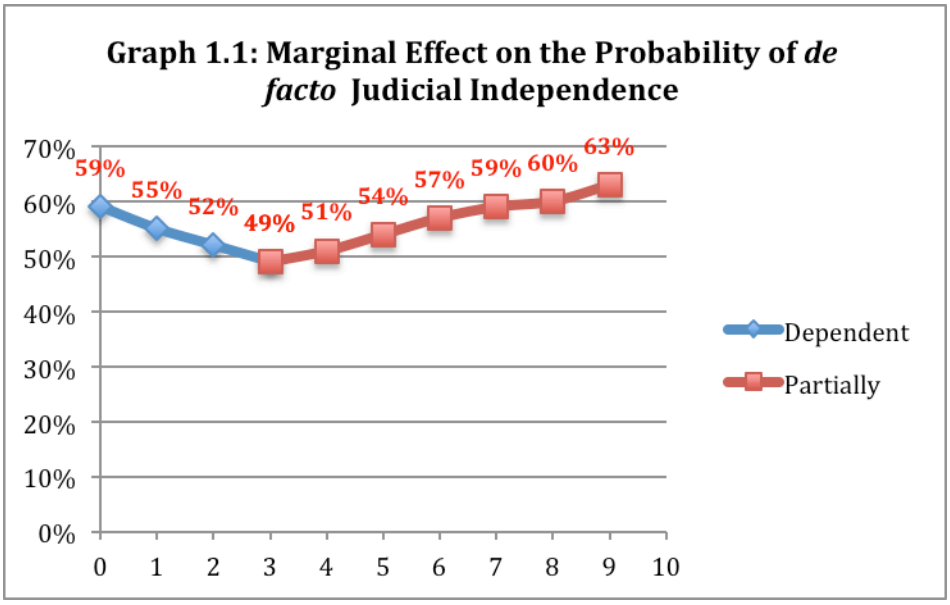
An analysis of the results of table 1.3 shows that constitutional provisions of judicial independence matter to create more *de facto* independent courts. This impact is particularly relevant when looking at courts that are *de facto dependent*. By adding 9 provisions where courts are not free to exercise their functions and often influenced by politicians, there is a 23% chance that courts will become less dependent. The magnitude of the change shows that these constitutional provisions have a great impact in these *de facto dependent* courts. It suggests that if we want to see less *de facto* dependent courts, 9 constitutional provisions should be added to the constitution. The addition of 9 provisions related to judicial independence also reveals that there is an increasing in predicting *de facto independent* courts.

This finding suggests that promoters of democracy and constitutional designers should focus on constitutional provisions of judicial independence to build independent courts. It shows that constitutional provisions can guarantee courts and judges from external influences, allowing them to freely exercise their functions. This finding also suggests that courts seem to be more protected when provisions regarding judicial independence are in the constitution. It is possible that formal institutions like written constitutions as opposed to ordinary laws have the power to curtail political actors from violating these provisions. This is because once included in the constitutions these provisions are under higher scrutiny. Political actors actions are under more supervision and violations of constitutional provisions are more likely to be identified than violations of ordinary laws.

Moreover, this finding contributes to the judicial independence literature for two reasons. It shows that formal institutions matter, in particular, written constitutions. Scholars have disagreed on whether constitutional provisions of judicial independence matter. This finding sheds light to

this debate, showing that including constitutional provisions related to judicial independence protect courts from external influences and allow them to function in an independent manner. This find also improves on the measure of *de jure* judicial independence, using a comprehensive number of indicators. By looking at them as part of *de jure* variable, I show that not one or few of these constitutional provisions matter. In fact, as table 1.3 shows, these constitutional provisions of judicial independence matter in a collective nature.

Next, I examine the impact of incremental changes on the level of *de facto* judicial independence. The following graph illustrates the effect of marginal changes in the *de jure* judicial independence measure on the level of *de facto* judicial independence under specific conditions. Thus, Graph 1.1 predicts the marginal effect of *de jure* judicial independence under the following conditions: changes on the level of democracy from low (.66) to high (10), a bicameral legislature (1), a federal system (1), a proportional system (1), and with 4 veto players. These conditions were selected based on the literature. According to the major literature regarding each of these provisions, *de facto* judicial independence is higher under high levels of judicial independence, where there are a federal, a bicameral system and a proportional system, and a relative high number of veto players.



Overall, we find that, under the conditions specified above, an additional provision of *de jure* judicial independence has a positive impact on the level of *de facto* judicial independence exercised by courts and judges in Latin America. Graph 1.1 illustrates that an increase in the number of constitutional provisions relating to judicial independence decreases the likelihood of *de facto dependent* courts and increases the chance of having a *de facto partially independent* court. Graph 1.1 also shows that the minimum number of provisions necessary to see a shift from *de facto dependent* to *de facto partially independent* courts under these conditions is three provisions. This means that, given these conditions, every additional provision to the minimum three, will likely predict *de facto partially independent* courts. This finding may provide a threshold to constitutionalists, constitutional designers, and democracy promoters to transform *dependent* courts into at least *partially independent* courts.

These results increase our understanding of judicial independence in two ways. First, under the given conditions, the graph shows that an increase in the number of constitutional provisions of judicial independence has a positive impact on the *de facto* level of judicial independence. Thus, the results reveal that adding constitutional provisions that protect courts and guarantee their judicial independence increases their chance to be, at least, *partially independent*. Second, the graph also illustrates that there is a threshold where we see the shift from *de facto dependent* courts to *de facto partially independent* courts. In order words, under federalism, a bicameral legislature, a proportional electoral system, an increasing level of democracy, and a relative high number of veto players, an addition of one constitution decreases the chance to have *de facto dependent courts* and increases the chance to create *de facto partially independent* courts. This is important because it allows constitutionalists, constitutional designers, and democracy promoters to build constitutions that would foster *de facto* judicial independence. It guides them to promote constitutional provisions that create a federal system, a bicameral legislature, and an electoral system that would allow independence courts to come about, at least *de facto partially independent* courts. Additionally, it

suggests that to see a shift in the courts independence, more than 3 provisions of judicial independence should be included in the constitution.

In light of these findings, the next section will take a closer look at each constitutional provision and focus on two goals. First, as my initial findings explain, *de jure* constitutional provisions have an effect on de *facto* judicial independence. However, what these findings do not define is how much each provision impacts the *de facto* judicial independence. Second, the initial findings show that there may be provisions that are necessary to create an independent court. Thus, an investigation of which provisions are important to sustain already independent courts may help define the necessary provisions to create independent courts or to guarantee independence to *dependent* courts.

Which Specific Provisions Matter the Most?

The support that constitutional provisions of judicial independence impact courts and judges functions in the previous section deserves a detailed investigation. In this section, I will look at each constitutional provision and its impact on the *de facto* judicial independence. The goal is to answer two questions. First, how much does each constitutional provision contribute to the level of *de facto* judicial independence? Second, what provisions are necessary to create or to sustain an independent court given our Model 1 findings?

Table 1.4 presents the parameter estimates for *de facto* judicial independence.

Table 1.4: Parameter Estimates for *de facto* Judicial Independence

Variables	Coef.	Std. Err.	z	p-value
Selection Procedure of the Judges	0.20	0.21	0.99	0.323
Length of Judgeship	-0.49	0.25	-1.99	0.047
Removal Procedures	0.76	0.17	4.61	0.000
Budget	-0.33	0.15	-2.11	0.035
Accessibility	1.93	0.50	3.84	0.000
Separation of Power	-0.73	0.19	-3.66	0.000
Judicial Review	-0.91	0.37	-2.47	0.222
Number of Justices in the Higher Court	0.11	0.14	0.75	0.396
Qualifications	-0.66	0.53	-1.23	0.786
Age of Constitution	0.00	0.00	-0.8	0.468
Number of Veto Player	-0.25	0.05	-4.88	0.000
Level of Democracy	0.36	0.04	8.61	0.000
Government System	-0.69	0.15	-4.69	0.000
Bicameral	0.48	0.17	2.9	0.004
Type of Electoral system	0.36	0.14	2.62	0.009
GDP/pc	0.00	0.00	-1.52	0.128
Population	0.00	0.00	2.15	0.032

Table 1.5: Predicted Probability for *de facto* Judicial Independence

***De Facto* Judicial Independence**	***Dependent***	***Partially Independent***	***Fully Independent***
	0.2106 (0.1266, 0.2945)	0.6914 (0.6553, 0.7276)	0.0980 (0.0464, 0.1497)

*Veto player, bicameral, government system, and proportional set at their mode; all other variables at their mean.

To facilitate interpretation, we calculate the predicted probabilities of *de facto* judicial independence when each individual *de jure* judicial independence provision is in place in the constitution. These predicted probabilities give a detailed picture of the effect of the presence of all those provisions on the *de facto* judicial independence. Additionally, the negative coefficient on some of the parameter estimates may be a function of the trichotomous dependent variable. Thus, to correctly determine the impact of each variable, we must calculate the predicted probabilities. The results indicate that there is a 69% probability that courts will be *partially independent* if all those provisions are in place.

Finally, we look at how much each individual variable contributes to the level of *de facto* provisions of judicial independence. Table 1.6 shows the result.

Table 1.6: Individual Variable Impact on *de facto* Judicial Independence

	Dependent	***Partially Independent***	***Fully Independent***
Tenure	0.4294	**0.5431**	0.0275
	(0.0894, 0.7694)	**(0.5299, 0.5564)**	(-0.0274, 0.0823)
Removal	0.0710	**0.6644**	0.2646
	(-0.0364, 0.1784)	**(0.5959, 0.7328)**	(0.0143, 0.5150)
Budget	0.3975	**0.5694**	0.0331
	(0.0717, 0.7233)	**(0.5540, 0.5848)**	(-0.0290, 0.0951)
Accessibility	0.0021	0.2204	**0.7775**
	(-0.0072, 0.0114)	(0.1581, 0.2827)	**(0.3720, 1.1830)**
Separation	**0.5546**	0.4326	0.0127
	(0.2641, 0.8452)	(0.4258, 0.4395)	(-0.0117, 0.0372)
Judicial Review	**0.6154**	0.3762	0.0084
	(0.2931, 0.9377)	(0.3714, 0.3810)	(-0.0111, 0.0279)

Table 1.6 illustrates how individual variables impact *de facto judicial* independence. To calculate, I ran predicted probabilities for each judicial independence provision, setting all the other judicial independence provisions to zero. This way I can track which judicial independence variables are most likely to predict which level of *de facto* judicial independence. The table shows what variable is a significant influence under each level of *de facto* judicial independence.

Table 1.6 can be interpreted in twofold. First, it shows how each of the *de jure* constitutional provision influence *de facto* judicial independence. The bolded numbers identifies the *de jure* judicial independence provisions that are significant in each type of *de facto* judicial independent courts. For instance, separation of power is highly predicted in countries with courts that are *de facto dependent* courts. However, they seem to have no impact on *de facto fully independent* courts.

Moreover, table 1.6 also shows that some constitutional provisions matter to create *de facto partially independent* and *fully independent* courts. In other words, there is a high probability to create *de facto fully independent* courts where constitutions provide for removal procedures and accessibility provisions Moreover, to construct at a minimum a *de facto partially independent* court,

promoters of democracy and constitutional designers should include length of judgeship, removal procedure and financial autonomy in a country's constitution.

This might be surprising for some because judicial review is emphasized in most of the literature that promotes judicial independence (Feld & Voigt 2003; Kaufman 1979, 1980; La Porta et al. 2004; Larkins 1996). In my opinion, this departure from common literature can be explained as follows. The data set deals with Latin America where most constitutions contain some sort of provision establishing judicial review. In addition, the table does not show that judicial review is not important; it shows that it is sufficient to predict *de facto dependent* and *partially independent* courts. However, we are likely to predict *de facto independent* courts, or at least *partially independent* ones, when removal procedures and accessibility provisions are included in the constitution. According to Arantes (2005), a broad accessibility to courts gives them more power. Accessibility allows the courts increased opportunities to say what the law is, giving courts the power to create policy (judicialization of politics).

In the case of removal procedures, the importance of this provision in this dataset may reveal a particular characteristic of Latin America countries. Case studies in Latin America (Chavez 2004; Helmke 2005) reveal that presidents directly or indirectly use their power to remove judges from their position if a court's decisions contradict the president's political agenda. This is an example of the importance of having a provision that guarantees the removal of a judge only under the appropriate procedure.

Overall my findings are that length of judgeship, removal procedures, budget, and accessibility predict *de facto partially independent* and *fully independent* judicially independent courts and judges in Latin America. This is not to say that those provisions alone contribute to the protection of courts and judges. In fact, an additive scale of only those variables is tested and our findings show that it is not statistically significant. This means that those provisions are necessary but not sufficient to protect courts and judges. Moreover, our findings show that the *de jure* judicial independ-

ence provisions that are not statistically significant are in fact important to construct the additive scale. Therefore, although they do not have significance on their own, they do in a collective nature.

Conclusion

In this paper, I explore the effect of constitutional provision of judicial independence on *de facto* judicial independence. I argue that constitutional provisions of judicial independence are a function of the level of judicial independence courts and judges exercise in practice. I use 19 Latin American countries to test this hypothesis.

The data shows that constitutional provisions of judicial independence do affect the level of independence courts and judges exercise in practice. In particular, the findings show that nine constitutional provisions of judicial independence were sufficient to predict a change in the level of *de facto* judicial independence courts in Latin America. More specifically, I show that nine provisions of judicial independence in the constitution reduces the chances of having *de facto dependent* courts and increases the chance to create more *de facto fully independent* courts. This finding contributes to the extant literature on the effect of formal institutions. Conventional wisdom posits that formal institutional, *i.e.* written constitutions, matters. They shape governmental, economic, and social structures. This study shows that these formal institutions also affect the courts judicial independence. Despite disagreements on whether constitutional provisions of judicial independence matter, this finding sheds light to this debate, showing that including constitutional provisions related to judicial independence protect courts from external influences and allow them to function in an independent manner. Additionally, this study also improves on the measure of *de jure* judicial independence, using a comprehensive number of indicators. By looking at them as part of *de jure* variable, I show that not one or few of these constitutional provisions matter. In fact, as table 1.3 shows, these constitutional provisions of judicial independence matter in a collective nature.

This study suggests that promoters of democracy and constitutional designers should focus on constitutional provisions of judicial independence to build independent courts. I argue that con-

stitutional provisions can guarantee courts and judges from external influences, allowing them to freely exercise their functions. Moreover, this study also suggests that courts seem to be more protected when provisions regarding judicial independence are in the constitution. It is possible that formal institutions like written constitutions as opposed to ordinary laws have the power to curtail political actors from violating these provisions. This is because once included in the constitutions these provisions are under higher scrutiny. Political actors actions are under more supervision and violations of constitutional provisions are more likely to be identified than violations of ordinary laws.

This study provides evidence on the importance of constitutional provisions related to judicial independence to create *de facto* independence courts. This is likely to help constitutionalist and promoters of democracy in building new constitutions for transitioning countries. This study also raises questions for future research. Future studies should focus asking some of the following questions: why do violations still occur in countries with constitutional provisions that protect the courts? What provisions are likely to be violated? Under what conditions are violations likely to occur?

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Appendix A

Summary statistics for the Model

Variables	Mean	Std. Deviation	Minimum	Maximum
De Facto Judicial Independence	2.022	.653	1	3
De Jure Judicial Independence	7.12	1.67	3	9
Age of Constitution	29.01	34.30	1	157
Number of Veto Players	3.26	1.34	1	7
Level of Democracy	7.50	1.89	.67	10
Government System	.69	.46	0	1
Bicameralism	.57	.49	0	1
Type of Electoral System	.48	.50	0	1
Population	2.48e+07	3.95e+07	2129970	1.94e+08
GDP per capita	2296.246	1805.417	246.3823	11404.01

N = 494

Summary Statistics of the Constitutional Provisions (*de jure* Judicial Independence)

Constitutional Provisions	Mean	Std. Deviation	Minimum	Maximum
Selection Process	.88	.32	0	1
Tenure	.87	.33	0	1
Removal Proceedings	.57	.49	0	1
Budget	.53	.50	0	1
Accessibility	.91	.28	0	1
Separation of Power	.85	.35	0	1
Judicial Review	.94	.23	0	1
Number of Justices in the Highest Court	.59	.49	0	1
Qualifications	.94	.22	0	1

N=494

Appendix B

De Jure Judicial Independence Coding

	Selec-tion	Tenure	Remov-al	Budget	Access	Separa-tion	Review	Number	Qualif
Argentina	1994	1994	1984	X	1984	1984	1984	X	1984
Bolivia	1984	1984	1984	1984	1984	1984	1984	1984	1984
Brazil	1984	1984	1984	1984	1984	1984	1984	1984	1984
Chile	1984	1984	1984	1984	1984	1984	1984	1990	1984
Colombia	X	1984	X	X	1984	1984	1984	1992	1984
Costa Rica	1984	1984	1984	2004	1984	1984	1984	X	1984
Dominican Republic	1984-2003	X	X	X	1984-1993	1984	X	1984	1984
Ecuador	1984-1998	1984-1998/ 2007-2009	X	X	1984	X	1984	1984-1998/ 2008-2009	1984
El Salvador	1984	1984	2000	1984	1984	1984	1984	1984-1999	1984
Guatemala	1984	1984	X	1984	1994	X	1985	1984	1984
Haiti	1984	1984	1984	X	X	1984	1984	X	X
Honduras	1984	1984	1984	1984	1984	1984	1984	1984	1984
Mexico	1984	1984	1984	1994	1984	1984	1984	1984	1984
Nicaragua	1987	1984	X	1984	1984	2004	1984	X	1984
Panama	1984	1984	X	1984	1984	2004	1984	X	1984
Paraguay	1984	1984	1992	1992	1984	1984	1984	1984	1984
Peru	1984	1984-1992	1984-1992	1984-1992	1984	1984	1984	X	1984
Uruguay	1984	1984	1984	1984	1984	1985	1985	1984	1984
Venezuela	1984	1984	1999	1999	1984	1984	1984	X	1984

*The year identifies the constitution where the provision appears.

* X means it is not present in the constitution from 1984 to 2009.

Essay 2: Do Government Structures affect Judicial Independence? Exploring the Impact of Constitutional Government Frameworks on Courts *De Facto* Judicial Independence.

Abstract

This paper explores the effect of three constitutional provisions on *de facto* judicial independence. Conventional wisdom holds that federalism, electoral design, and the number of chambers in the legislature shape the structures of the government and their outcomes. I argue that these three institutional frameworks can foster judicial independence. More specifically, I hypothesize that countries under a federal system, with a bicameral federal legislature, and a proportional electoral rule create a structure where courts are likely to act independently. I test this hypothesis on 19 Latin American countries. The results are two fold. First, the findings show that proportional and bicameral systems are likely to predict independent courts. Conversely, the results show that under federalism, courts are likely to be *de facto dependent*. I argue that the hypothesis does not hold true with regard to federalism because of the type of federalism existent in Latin American countries. In Latin American countries, only few countries have a true federal system, i.e., Brazil, Mexico, and Argentina. All other countries in Latin America are unitary or exercise a *pseudo-federalism*. In the latter instances, federalism is a constitutional arrangement provided in the constitution; however, subnational governments excessively rely on the federal government, depending on financial transfers. This overreliance allows the federal government to pressure subnational governments to align to the central government needs. Thus, in this *pseudo-federalism* or unitary systems, without less oversight from the subnational governments, the central government has more power to pressure courts to align to their preferences, threatening the level of their independence.

Introduction

Do constitutional provisions unrelated to the functions of courts, such as the type of electoral system, governmental regime, or the number of houses in the legislature, affect the level of *de facto* judicial independence courts and judges exercise? The conventional wisdom is that in carrying out the basic and more permanent elements of political governance, written constitutions have a great role in shaping the economic, social, and political structure of a country. Constitutions impact countries' economic systems through provisions about taxation and government interference with property rights (Epstein 1982; Pilon 1988). They can also shape social and cultural structures such as religious practices, establish basic rights, and provide general education. For example, until 2008, Bolivia's Constitution recognized the Roman Catholic Church as the official state religion. Moreover, constitutions can alter the political structure of a country through provisions concerning federalism, separation of powers, and the judicial system (Riker 1964; Epstein 2011). This paper focuses on the latter: the judiciary.

Research argues that institutional frameworks shape the organization, structure, and political outcomes of a country. With respect to federalism, studies point out that it accommodates regional diversity, fosters policy innovation and political participation, and increases accountability, (Gordon 2001). Studies show that by creating a decentralized structure, federalism gives voice to the differences between each subnational state needs and wants (Wheare 1963; Franck 1968). Moreover, in shaping the organization and structure of a country, federalism creates a decentralized structure of governing that fosters policy innovation, in an attempt to accommodate the diverse preferences of the different regions (Heywood 1999). Furthermore, it is said that because federalism is suitable for more political participation, policy innovation is encouraged (Gibson 2001).

Followed by federalism, bicameralism also affects the structure of the government. Whereas federalism has a broad impact in the structure of the government, bicameralism impacts particular-

ly the policy-making process. It functions as a check and balances system. The lower house, which is usually proportionality to population for each state, district or region, accommodates various interests and preferences, enhancing representation of subnational governments. Conversely, the upper house, usually composed by few members, provides a more aristocratic view that is less dependent on party preferences (Wheare 1987). These differences in composition between both chambers increase supervision of one chamber over another. Generally, the upper chamber tries to balance the diversity, and often unpredictability, of the lower chamber policy outcomes. Thus, as Riker (1992: 101) argues, bicameralism "slows down the legislative process, renders abrupt change difficult, forces myopic legislators to have second thoughts, and thereby minimizes arbitrariness and injustice in government action."

Finally, similarly to the bicameral system, electoral systems shape the composition of the legislature, creating more or less political parties. According to Duverger (1955) the plurality, or majoritarian rule, foster a two-party system, while proportional electoral rules favors a multi-party system. The reasons for choosing one over the other are threefold. In shaping the composition of the legislature, electoral system impacts the number of votes per seat (Lijpart 1984; Gallagher, Laver and Mair 1995), the production, or lack thereof, of coalition (Blais and Carty 1987; Laver and Shepsle 1995; Norris 1996), and the representation of minority groups (Lovenduski and Norris 1993; Norris 1995).

All these effects on government suggest that institutional frameworks matter. They shape government structures impacting social, political, economic, and policy outcomes. Moreover, as the above arguments suggest, these institutional structures matter as a whole. They influence the executive, legislative, and judicial branches. It is depending upon the number of chambers in the legislature, for instance, that policy-making can be either a very strenuous and complex process, where laws are hardly changed, or an easy one, where only a simple majority can make decisions. Or, for

example, it can centralize power on the hands of the president, in unitary systems, or decentralize it to subnational regimes own political structure.

This article explores the impact of these institutional features on the judiciary. More specifically, federalism, bicameralism, and the number of chambers in the legislature affect the independence of the judiciary. If these structures impact the government as a whole, it is reasonable to say that in one way or another they will also foster, or not, an independent judiciary. In other words, these structures can, for instance, create an environment where courts' decisions are not routinely ignored or poorly implemented, fostering judicial independence. The extant literature on judicial independence has yet to give systematically attention to the link between the aforementioned institutional features and judicial independence. Therefore, this paper seeks to fill a gap in the literature on judicial independence and constitutional design that focuses primarily on constitutional guarantees of the courts, *i.e.*, judicial review, removal procedures, and judicial selection (Verner 1984; Dahl 1957; Feld & Voigt 2003; Kaufman 1979, 1980; La Porta et al. 2004; Larkins 1996). I posit that many constitutional provisions affect the structure of government as a whole, including the judiciary. However, the extant literature focuses exclusively on provisions that directly concern the courts, obscuring the potential significance of other constitutional provisions. Thus, I explore the effect of three constitutional provisions on courts' *de facto* judicial independence: federalism, type of electoral system, and the number of federal legislative chambers.

This article further explores additional findings of my previous study. In this study I tested the effect of *de jure* judicial independence on *de facto* judicial independence in 19 Latin American countries. Overall, I found that constitutional provisions related to judicial independence have a positive impact on the courts' level of *de facto* judicial independence. The data also reveals, and the focus of this paper, that three other constitutional provisions – federalism, bicameralism, and electoral systems – were highly significant. Using predicted probabilities, my initial test reveals that with regard to bicameralism and proportional systems, *partially* and *fully* independent courts were

positively affected by these structures, as expected. In other words, in countries with bicameral systems and proportional electoral system, courts were at a minimum *partially* independent. In the case of federalism, on the other hand, the findings show that this institutional framework was more likely to predict *dependent* courts, contrary to my expectations. As it will be further explained in this paper, I argue that this is a particular characteristic of the dataset used in my previous study. Thus, the purpose here is to replicate the findings of my previous study, focusing on investigating why these constitutional provisions unrelated to the courts foster judicial independence.

The paper consists of three parts. In the first part, I discuss the role of constitutions in shaping the political, social, and economic structure of a government. In particular, I explore the literature written on the effects of federalism, bicameralism, and electoral rules on political and economic outcomes. Additionally, I look at the theoretical explanation of the effect of provisions of federalism, bicameralism and electoral rules on judicial independence. Federalism, electoral design, and bicameralism, in one way or another, impact the courts by rendering it difficult to interfere with courts' and judges' independence. The literature on the effect of various constitutional features in shaping government structure tells us that there is a relationship between the two. Whether they have a positive or negative effect, federalism, bicameralism, and electoral rules influence public stability, policy creation, and power-sharing in government (Riker 1992; Tsebelis 1995; Lijphart 1984). Notwithstanding these studies, this paper seeks to include in this literature the impact of these features on the level of judicial independence courts exercise in practice. Building from Tsebelis (1995) study, courts will more freely exercise their functions if they exist in a system in which their independence cannot be easily diminished. These structures guarantee, at least for the time it takes to produce any change, that courts will have their independence safeguarded. As Tsebelis points out "if courts and bureaucracies are interested in seeing their decisions stand, and not being overruled by the political actors, they will be more important and independent in systems with multiple incongruent and cohesive veto players" (1995: 323). The third section replicates my

previous study on the effect of constitutional provisions on the *de facto* judicial independence. In doing that, I show that the institutional provisions explored in this article affect *de facto* judicial independence. I utilize a large-n empirical analysis of Latin American constitutions to illustrate the main argument of this paper. I find that, in addition to constitutional provisions of judicial independence guaranteed to the courts, provisions related to the institutional framework of government also affect the level of judicial independence courts and judges exercise. The last section sets forth my conclusion and suggests future research

Do Constitutions Shape Government?

Conventional wisdom holds that formal institutions matter. Formal institutions, such as constitutions, shape the economic, social, and political structure of a government. They fashion the political structure of a country through provisions regarding government frameworks, separation of power, and the structure of the judiciary (Riker 1964; Epstein 2011). Constitutions also impact countries' economic systems through provisions about financial regulations and limits on property rights (Epstein 1988; Pilon 1988). Finally, they mold social and cultural structures such as religious practices, establish basic rights, and provide general education.

This paper explores these impacts of constitutional provisions regarding government frameworks on the level of *de facto* independence courts and judges exercise. I specifically focus on three institutional provisions, federalism, electoral rules, and bicameralism.

In this section, I will discuss the current literature on the effect of these provisions on the government structure. I also investigate the link of these provisions on the independence of the judiciary.

Federalism

According to Dahl (1986), federalism is "the system in which some matters are exclusively within the competence of certain local units – cantons, states and provinces – and are constitutionally beyond the scope of the authority of the national government, and where certain other matters

are constitutionally outside the scope of the authority of the smaller units. […] In federal systems a national state majority cannot prevail over a minority that happens to constitute a majority in one of the local units that is constitutionally privileged" (114-126). This definition avoids defining federalism as merely a "decentralization of power." On the contrary, it defines it as separation of power between federal and local governments. The importance of this argument is that there is a possibility that unitary states are decentralized and federal states are not.

These constitutional delimitations of authority have great consequences to the structure of a country. Provisions on federalism affect the policy-making process, political power distribution, and economic structures of a country (Riker 1964; Chandler 1987; Weingast 1995; Dyck 1997; Stepan 1999; Davoodi and Zou 1998; Manor 1998; Ross 2000). Federalism is often linked to economic growth (Oates 1993, 1999), to foster policy innovation and political participation, and to accommodate regional diversity.

An extent literature on government framework suggests that federalism promotes economic growth (Rodden 2002; Brzinski, Lancaster, and Tuschhoff 1999; Coffee 1986; Dye 1990; Oates 1993, 1999). Oates (1993) argues that "the basic economic case for fiscal decentralization is the enhancement of economic efficiency: the provision of local outputs that are differentiated according to local tastes and circumstances results in higher levels of social welfare than centrally determined and more uniform levels of outputs across all jurisdictions" (240). Research findings support both positive and negative impacts of federalism on economic growth (Kim 1995; Huther and Shah 1996 for positive impact; Xie, Zou, and Davoodi 1999; Rodden 2002 for a negative impact). Where federalism works, fiscal autonomy and scope of authority are clear, and subnational and local governments are likely to function independently from the central government. In countries where subnational governments are weak and often rely on the federal government for funds and grants, the economic structure of subnational government are dictated by the central government (Gibson 2004).

Furthermore, politically, federalism allows minority groups to gain political leverage (Myerson 2009; Lijphart 1984). Studies suggest that ethnically and religiously diverse countries should adopt federalism as a form of government to allow minority groups to gain voice in the national arena (Cameron 2001; Global Intelligence Update 1999; O'Leavy 2002; Myerson 2009). Studies point out that federalism integrates regional diversity, fosters policy innovation and political participation, and increases accountability (Gordon 2001). Studies show that through decentralized structures, federalism accommodates differences between each subnational state needs and wants (Wheare 1963; Franck 1968). In shaping a decentralized organization and structure of a country, federalism fosters policy innovation, in an attempt to accommodate the diverse preferences of the different regions (Heywood 1999). Furthermore, it is said that because federalism is suitable for more political participation, policy innovation is encouraged (Gibson 2001).

With respect to courts, federalism renders it difficult for political actors to interfere with courts' and judges' independence. In federal systems, decentralization of power increases the accountability process. Federalism allocates responsibilities and power to different layers of government, allowing various groups to gain political leverage (Meyerson 2009). Consequently, there is an increase in the number of power holders who can influence political outcomes. Changes can only occur if these power holders can reach some consensus. However, in a strong federalism where tension exists between the central government and the subnational and local governments, it is difficult to reach a majority to bring about change, rendering the process slow and cost-effective. In this system, changes do not happen quickly and the *status quo* is easily preserved (Tsebelis 1995). Federalism affects courts and judges' independence by decreasing the likelihood that a majority coalition will form and intervene in the courts function, *i.e.*, overturning their decisions, starting a removal process, and shaping the composition of courts through selection process. Thus, it is expected to see higher levels of judicial independence in countries with federal form of government.

Electoral Design

Like federalism, electoral design shapes governmental frameworks. Electoral rules can influence the number of political parties in the political arena, promoting diversity. According to Duverger (1955) the plurality, or majoritarian rule, foster a two-party system, while proportional electoral rules favors a multi-party system. The reasons for choosing one over the other are fourfold. In shaping the composition of the legislature, electoral system impacts the number of votes per seat (Lijpart 1994; Gallagher, Laver and Mair 1995), the production, or lack thereof, of coalition (Blais and Carty 1987; Laver and Shepsle 1995; Norris 1996), and the representation of minority groups in the legislature (Lovenduski and Norris 1993; Norris 1995).

In electoral system different party government can be created, i.e., a coalition, a minority or a single party government (Duverger 1954; Rae 1967; Taagera and Shugart 1989; Lijpart 1994). Each of these different makeups of legislative composition affects the process of policy-making. For instance, in coalition type of government, the process of policy-making is often sluggish. Time is often spent in compromising, lobbying, and articulating strategies to bring about policy change. Thus, in countries where the policy-making process requires coalition, policy change is less likely to occur, or requires more effort to bring about change.

The impact of electoral design on the composition of legislatures has also shaped the judiciary and its level of independence. Depending upon the type of electoral system, the number of political parties can increase or decrease. Proportional systems tend to produce a multi-party structure, whereas plurality systems generally foster a two-party system (Duverger 1954; Downs 1957; Sartori 1976; Cox 1987). Thus, in two-party systems, there are few negotiations, bestowing policy changes less costly and more likely to occur. In a proportional system, where a coalition is often needed, the number of actors is higher, making it more costly to successfully change policies. If we apply this logic to courts' and judges' independence, in majoritarian systems it may be easier, for instance, to overrule judicial decisions than in proportional systems. In this case, in the majoritarian system, it is only needed to convince the majority party in government to overrule judicial decisions

whereas in proportional system a coalition is necessary. Thus, I hypothesize that proportional systems of electoral rules enhance judges and courts judicial independence, as opposed to plurality or majority rule.

Bicameralism

The third constitutional feature that I explore in this article is bicameralism. This constitutional framework shapes political and economic structures. According to scholars, bicameralism can bring about government stability (Llanos and Nolte 2003; Riker 1992). Bicameralism brings stability by making it difficult for changes to occur, particularly in the policy-making process. The reason being, in legislatures with two chambers a majority is needed in both houses to pass laws. Conversely, legislatures with one chamber are likely to need only a simple majority. An example of bicameralism and its impact on policy-making process is Weingast's (1991) study. Weingast argues that Congress could not pass antislavery legislation during the republic. He argues that bicameralism was fundamental to protect slave states by preventing any anti-slavery legislation to pass the Senate house, which was dominated by slave states. Thus, in bicameral system, the law-making process has to pass through two houses, slowing down the legislative process or even impeding some legislation to pass all together. This process makes it difficult for political actors to change laws arbitrarily or without an agreement from both houses (Riker 1992).

Third, the number of legislative chambers may influence the degree of independence courts and judges exercise. This is due to the political structure bicameralism creates. In bicameral systems, twofold structures are observed. First, there is an increase in the number of veto players (Riker 1992). Contrary to unicameral system where a simple majority is likely to emerge, in a bicameral system, a coalition is often necessary not only within each house but also between the two houses in order to pass legislation. Additionally, it creates a check system of one chamber on the other. To courts and judges, this structure creates a shield that protects courts and judges from political influence. Thus, it is right to assume that bicameral systems allow courts' decisions to be pre-

served, making it difficult for political actors to override it. Second, and as a result of an increase in the number of power holders, bicameralism increases checks on the political actors. With more individuals to monitor each other's actions, political actors attempt to arbitrarily influence courts and judges is difficult at best. Consequently, courts and judges are more likely to act independently.

These hypotheses are supported by Tsebelis' (1995) idea of political institutions and their effect on government structures. In comparing different political institutions, i.e., parliamentarism, presidentialism, two-party, multi-party systems, unicameral, and bicameral legislatures, Tsebelis argues that these institutions should be assessed based on their effect on the *status quo* and their capacity to bring about policy change (Tsebelis 1995: 292). Thus, Tsebelis (1995) asserts that "it seems reasonable to assume that those who dislike the *status quo* will prefer a political system with the capacity to make changes quickly, while advocates of the *status quo* will prefer a system that produces policy stability" (294). The easiness or difficulties in changing the *status quo* has considerable consequence to courts judicial independence. Consider what courts do. They interpret the law and make decisions that impact government structure. Dissatisfaction among political actors can initiate a process to overrule these decisions, change the composition of the courts, or remove judges with different ideological position. Political institutions that make it difficult for political actors to influence courts in any way possible increase their *de facto* judicial independence.

This overview of the literature on each of these key features—federalism, electoral system, and bicameralism—details their capacity to produce changes in economic, political and social structures and thus it is only logical to analyze their effect on the judicial system. This paper seeks to fill the gap in the literature by modeling the effect of those constitutional provisions regarding government frameworks on the level of *de facto* judicial independence courts and judges exercise.

Model and Analysis

This paper develops and tests three hypotheses relating to these constitutional provisions. First, a constitutional provision that creates a bicameral system--two chambers in the federal legis-

lature – increases the level of *de facto* judicial independence courts exercise. This is because there are more checks and balances in bicameral systems and the danger of influences by a single chamber on the courts decreases. For instance, in bicameral systems, as Riker argues, the policy-making process is complex and requires a longer time to occur in comparison to unicameral systems. This characteristic affects the courts because it delay or limits a possible attempt by the political branch to overturn courts decisions. It delays because it requires that for the law to be approved, the law pass through both houses. However, it can also limit any interference against courts' decision because the legislative branch might only have partial success in overturning the decision.

The second hypothesis posits that a constitutional provision that creates a proportional electoral system increases the level of *de facto* judicial independence. This is because proportional systems encourage the creation of multi-party systems, increasing the number of political actors (Duverger 1954). Chances are that the higher the number of political parties the harder it is to make changes, since coalitions are often needed. In this case, courts would be protected because of possible delays in the political process. Moreover, a multi-party system can also protect courts from arbitrary changes in their structure, organization, and scope. In multi-party systems, a supermajority is usually needed to nominate, or to remove, justices, requiring creating coalitions and more consensus-building. In contrast, strong majoritarian electoral system could easily stack courts or punish judges who do not go along with the government party's wishes. Thus, I expect that, in proportional systems, courts are more likely to act independently from political influences than in non-proportional systems.

Finally, my third hypothesis conceives that, in federalist countries, courts have a higher level of *de facto* judicial independence. There are two ways in which federalism fosters judicial independence. First, because federalism accommodates regional diversity, incentivizes political participation, and increases accountability, it creates an environment in which political actors might have difficulties in manipulating and influencing courts' decisions, or changing their structure and organ-

ization. In other words, federal systems create more checks and balances between federal and local and subnational governments thus courts are less likely to be arbitrarily influenced. Second, in federal system, tensions between federal and subnational governments often occur. Federal and subnational governments are often in conflict with each other. These conflicts are likely regarding the separation of power among layer of the government. There are many instances in which subnational governments claim that the national government has overstep their functions, and vise-versa. Since matters of separation of power dispute is likely a constitutional issue, courts are asked to decide on these conflicts. I argue that as courts are asked to decide on these conflicts they gain independence since both layers, national and subnational governments are checking on each other to make sure the courts decide independently.

I test the influence of federalism, bicameralism, and electoral system on the level of *de facto* judicial independence courts and judges exercise in nineteen countries in Latin America.[7] First, I replicate my previous findings on the effect of constitutional provisions related to judicial independence on *de facto* judicial independence. The first analysis is a parameter estimates of the variables used in my previous study. It shows that the three governmental structures investigated in the current study are statistically significant. Following the parameter estimates I show the predicted probabilities of each governmental structure and their respective effect on all three *de facto* levels of judicial independence.

For this paper, Latin American countries possess relevant variations in their political and judicial structure to test this paper's hypotheses. Within Latin American region, there are federal and unitary countries, bicameral and unicameral legislatures, and a variety of electoral systems. The presence or absence of these provisions in the constitution plays a role in the level of judicial independence courts and judges exercise in practice. Thus, Latin American countries provide a useful laboratory for finding answers for the differing levels of *de facto* judicial independence.

[7] The countries included in this analysis are: Argentina, Brazil, Bolivia, Uruguay, Paraguay, Peru, Venezuela, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Haiti, Honduras, Mexico, Nicaragua, Panama, and Guatemala.

Dependent Variable

The dependent variable is a country's level of *de facto* judicial independence. Specifically, I utilize the same measure of judicial independence as Cingranelli and Richards's (2008). Their measure is based on the United States State Department's country reports. This measure is ordinal and contains three categories: countries coded 0 are considered dependent, countries coded 1 are partially independent, and countries coded 2 are fully independent.[8] The data ranges from 1981 to 2009.

The Cingranelli and Richard's measure (CIRI) defines a judicial system as fully independent when the following parameters exist: 1) judicial review; 2) length of judgeship is seven years for the highest level courts; 3) judges cannot be removed by the president or ministers of justice; 4) the other two branches can be checked through courts proceedings; 5) all proceedings are public; and 6) professional judgeships.

According to Ríos-Figueroa and Staton's (2009) examination of eight distinct measures, the CIRI is one of the most reliable existing measures of judicial independence.[9] Although this measure relies on United States State Department country reports, all existing measures of judicial independence with country-year as the unit of analysis are constructed from two sources: expert or survey reports and the U.S. State Department reports. Despite the shortcomings existing in both sources, the U.S. State Department reports are more reliable and less problematic than country experts (Ríos-Figueroa and Staton 2009). In addition, Poe, Carey, and Vazquez (2001) argue that the bias that affected the reports during the 1970s and 1980s have been corrected and are not apparent in more recent years.

Explanatory Variables

Federalism, type of electoral system, and bicameralism are all coded as dichotomous varia-

[8] The data is readily available on their website: http://ciri.binghamton.edu
[9] The other one is Howard and Carey's measure. This measure, however, is highly collinear with my other variables. I have tested it as well.

bles. For federalist countries I coded 1 for federal and 0 for unitary. I use the Institutions and Elections Project's (IAEP) (Regan and Clark 2010) measure of government system. Bicameral countries are coded 1 and countries with only one federal chamber of legislature are coded 0. I use data available from Beck et al. (2000) for this variable. In the case of the electoral system, I also use the IAEP's measure. This variable is coded 1 for proportional system and 0 for all other types of electoral systems.

Other Explanatory Variables

The following variables are also recognized in the literature to affect *de facto* judicial independence. Thus, the addition of these variables may tell us variance in the degree of *de facto* judicial independence is due to other influences.

De facto judicial independence variance, according to my previous study, is a function of *de jure* judicial independence. According to this previous study, constitutional provisions of judicial independence affect the level of *de facto* judicial independence courts and judges exercise. Thus, the higher the number of constitutional provisions in the constitutions, the higher the level of independence courts exercise in practice. I constructed this variable using 19 Latin American countries constitutions from 1984 to 2009. It is an additive scale ranging from 0 to 9.

An additional explanatory variable to the level of *de facto* judicial independence is the number of veto players. Veto players are power holders who have the ability to bring about change. This ability of bringing about change is inversely proportional to the number of veto players. This is because a high number of power holders can create obstacles to change the *status quo* (Tsebelis 1995). For the courts, this creates incentive for them to freely exercise their functions. Veto players will need to convince a larger number of other players to bring about any change, rending the process slow and less efficient. I assume that the higher the number of veto players, the higher *de facto* judicial independence will be, since the cost to interfere with courts and judges functions is higher as well. This variable is operationalized using the number of veto players in a political system. The

idea is that the higher the number of actors to check on other actors, the lower the number of constitutional violations, particularly against courts and judges. I use Beck, Clarke, Groff, Keefer, & Walsh (2000) measure. The variable is measured in a scale from 1 to 6.

Another possible determinant in the variance of *de facto* judicial independence is the age of constitution. The longer institutions are in place, the more likely rules are to be implemented, observed, and followed. According to Carey (2000), institutions can generate shared expectations about how others will behave. These expectations exist when formal institutions are embedded in the actions of power holders. The embedment process takes time thus I expect to find that younger constitutions have not been fully institutionalized to create sufficient expectation to enhancing judicial independence. I create a variable of the years all the constitutions from 1984 to 2009.

All those variables exist in different government regimes. Moreover, it is important to include in which type of regime those features take place. I then expect that judicial independence will be higher in democratic regimes. Here, political institutions are more likely to obey the rule of the game under democracy. In democratic regimes, the constitution is the rule of the game and political actors who decide to violate it can have reduced his or her chances to be reelected. It is also under democratic regimes that procedures are followed, therefore, political actors are more likely to follow the process of judicial appointment and removal, guarantee the judiciary's budget and refrain from diminish judges and courts protections. I use here a measure that combines average values of the Freedom House scores and Polity. Scale ranges from 0-10 where 0 is least democratic and 10 most democratic. Hadenius and Teorell (2005) show that this average index performs better both in terms of validity and reliability than its constituent parts. Also say that democracy here is not measured whether it is democratic or not, but degree of democracy.

In addition to the alternative explanations, I control for population size and GDP per capita. I use the Unites Nations country population report to measure population size. For GDP per capita, I use the IMF country year report.

Assessing the Impact of Political Institutions

I hypothesize that the type of electoral system, the number of chambers in the federal legislature, and the type of government system provide an additional stimuli to the level of independence courts and judges exercise in practice. In this section, I first replicate my previous findings on the influence of constitutional provisions on the *de facto* judicial independence. I use an Ordered Probit Model since the dependent variable, *de facto* judicial independence, is an ordered, trichotomous variable. Following the Ordered Probit Model, I use SPost. SPost (Long and Freese 2001) are commands in STATA generated to help interpret categorical dependent variable models. I use predict probabilities, which models the probability of an event to occur. Thus, I look at the probability of these political institutions—federalism, bicameralism, and proportional system—to produce *de facto independent, partially independent* and *dependent* courts. In other words, what is the likelihood to find a *de facto independent* court in a federally divided, bicameral, proportional system?

Estimating the Model

The three hypotheses are tested using the model shown in table 2.1. This is the parameter estimates of the variables used for this model.

Table 2.1: Parameter Estimates for *de facto* Judicial Independence

Variables	Coefficient	Std. Errors	z	p-value
***De Jure* Judicial Independence**	.087	.033	2.61	.009
Age of Constitution	.002	.002	.90	.366
Number of Veto Players	-.215	.047	-4.58	.000
Level of Democracy	.363	.039	9.37	.000
Government System	-.306	.124	-2.46	.014
Bicameral	.363	.122	2.91	.004
Type of Electoral System	.354	.118	3.00	.003
Population	3.33e-09	1.65e-09	2.02	.043
GDP/pc	-.000	.000	-1.26	.206
Log Likelihood = -406.395				
Chi-Square (9) = 144.80				
N = 490				

As seen in Table 2, all independent variables are statistically significant except for Age of the Constitution and Gross Domestic Product per capita. Given the relative immaturity of Latin American constitutions (the average age is only 28.61 years), these results suggest that what really matters is the content of the constitution rather than its relative age. Alternatively, *de jure* judicial independence, the type of electoral system, the type of government system, and whether the legislature is bicameral are all constitutional provisions that affect the level of *de facto* judicial independence.

Do Constitutions Shape the Government?

The goal of this study is to assess whether constitutional provisions related to government framework matter. The conventional wisdom is that constitutional provisions affect the level of *de facto* judicial independence judges and courts exercise. Thus, my test is that federally arranged systems increase the level of *de facto* judicial independence. In federalist states, power is allocated to different layers of government, reducing political actors influences on courts. Second, I test the effect of two chambers in the federal legislature increase the level of *de facto* judicial independence exercised by the judiciary. Table 3 illustrates this hypothesis. Lastly, I posit that in proportional

electoral systems courts and judges have higher judicial independence than in any other electoral system, *i.e.*, majoritarian systems. Proportional electoral rules contribute to the creation of multiple parties, therefore creating more veto players. In these electoral systems, coalitions have to be formed in order to bring about any change.

The hypotheses test the impact of constitutional frameworks on courts and judges' *de facto* judicial independence. These constitutional frameworks—federalism, electoral design, and bicameralism –shape the way the three branches of the government will interact with each other. This paper posits that a federal government system, with two legislative chambers, and a proportional electoral system allow courts to freely exercise their functions.

The hypotheses tests are illustrated in three separate tables. They provide the predicted probabilities of finding different levels of *de facto* judicial independence given each of those institutional features – federalism, bicameralism, and electoral system. In other words, they demonstrate how likely we are to find, for instance, *de facto* judicial independent court in countries with federalist systems.

To interpret the three tables, I use the 95% confidence interval to assess the significance of the predicted probabilities. If the 95% confidence interval crosses zero, more specifically, the parameter value specified in the null hypothesis is within the 95% interval, then the effect is not significant at the 0.05 level. Conversely, if zero is not within the interval, the null hypothesis can be rejected. These tables also show the predicted probabilities of *de facto* judicial independence as changes in the explanatory variables occur. Thus, the results show change in predicting *de facto* judicial independence as the explanatory variables change from 0 to 1.

Table 2.2 illustrates this claim, looking at the effect of federalism on all three levels of *de facto* judicial independence.

Table 2.2: Predicted Probabilities of *de jure* Judicial Independence using Change in the Government System from Unitary to Federal*

Categories	Federal	Unitary	Change	Conf. Interval
Dependent	0.2110	0.1331	0.0779	[0.0200, 0.1358]
Partially	0.6558	0.6557	0.0001	[-0.0137, 0.0138]
Independent	0.1332	0.2112	-0.0780	[-0.1432, 0.0127]

*All other variables are kept at their mean.

The findings presented above provide the impact of federalism on *de facto* judicial independence. According to table 2.2, a change in the government system from unitary to federal is likely to predict *dependent* and *fully independent* courts, but not *partially independent* courts.

This result also shows a different impact than the one initially hypothesized. Federalism is likely to predict *de facto dependent* courts, but less likely to predict *de facto fully independent* courts. The data show that changing from unitary to federalist system increased the likelihood to find a *dependent* court 7.8% of the time but less likely to equally find *fully independent* courts. Thus, in Latin America countries, changing from unitary to federalist systems, increased the chance to find *de facto dependent* courts.

Here is the reason for this finding. It is likely that in these countries with *partially independent* and *fully independent* courts what we really observe is what I call *pseudo-federalism*. By pseudo-federalism, I mean their constitutions provide a government framework of a federal system, therefore the constitution allocates power to federal and local levels of government; however, they function *de facto* as centralized governments. Thus, the federal level of government is very strong and usually has the power over local and subnational government's economic and political structures. In developing countries, particularly in Latin American countries, local and subnational governments rely on fiscal redistribution (Bahl 2000; Stein 1999; Castro 1993). This fiscal dependency allows the federal government to control local government interests. So the question is, what is the impact of this *pseudo-federalism* on courts and judges' judicial independence?

If it is true that a federalist system expands interests therefore making it difficult to maintain the *status quo* (Tsebelis 1995: 313-314) then a *pseudo-federalist* system where the federal gov-

ernment has more power and controls policy change, courts will have lower levels of judicial independence. This is clear in Latin American countries where the federal government has control over the economic and political agenda of local and subnational government (Bahl 2000), decreasing considerably the number of power holders who could initiate any conflict. Thus, what we see is courts that are susceptible to political influence, particularly by a centralized federal government.

This result does not deny my initial hypothesis that federalism increases the level of judicial independence. However, it may suggest that the type of federalism existing in Latin American countries – a pseudo-federalism – has the same impact on courts' judicial independence as unitary systems. Courts are more likely to have their budget manipulated, their decisions overturned, and their structured shaped by few power holders in a unitary system where we see centralized power and less veto players.

This finding is particularly important to countries that are building or rebuilding their government structure. The conventional recommended structure is the use of federalism (Linz 1997; Meyerson 2009). Violations of such separation create tensions between the federal and the local governments. This tension has a positive impact on courts. As suggested by Tsebelis (1995, p. 323), political systems with "multiple incongruent and cohesive veto players political systems" in overruling court decision, thereby enhancing their independence. The findings of this study, however, caution that federalism should be fully implemented in order to work as desired. Latin American countries are an example of *pseudo-federalism* because what we really see is a strong central government and weak and fiscally dependent local and subnational governments.

Table 2.3 depicts the effect of bicameral systems on *de facto* judicial independence.

Table 2.3: Predicted Probabilities of *de jure* Judicial Independence using Change on the Number of Federal Chambers from Unicameral to Bicameral*

Categories	Bicameral	Unicameral	Change	Conf. Interval
Dependent	0.1517	0.2336	-0.0819	[-0.1477, -0.0162]
Partially	0.6603	0.6488	0.0114	[-0.0021, 0.0249]
Independent	0.1881	0.1176	0.0705	[0.0154, 0.1256]

*All other variables are kept at their mean.

The findings presented above provide the impact of bicameralism on *de facto* judicial independence courts. According to table 2.3, a change in the number of chambers from unicameral to bicameral has a positive impact on courts that are *dependent* and *fully independent*, but not those that are *partially independent*. In other words, if we were to add another chamber to a federal legislature of a country where courts are *de facto partially independent*, we would not see a significant impact on the level of independence.

To understand this impact on courts, we return to the idea posited by Tsebelis (1995: 294) about the capability of institutional frameworks' capability to create policy change. According to the literature, in unicameral legislatures the political process of policy change has less conflict in unicameral legislatures. Unicameral legislatures are more likely to operate under simple majority rule, making the process of policy-making more cost-effective (Riker 1992). Conversely, in a bicameral system, checks occur in two places, making the process of policy change slower, balanced and with more conflict due to diverse interests. So how does this impact the courts?

More issues in the political process have consequences on the level of judicial independence; for instance, the selection process which involves the legislature in most countries. A more diverse and less arbitrary process decreases the likelihood of court packing, thus creating less political and more impartial courts. This is more likely in bicameralism than in unicameralism. Courts and judges' judicial independence is also higher when their decisions are not easily susceptible to political influence. Thus, in bicameral systems because of the difficulties in their capability to change policies, courts' decisions are less likely to overruled, guaranteeing some level of independence.

Table 2.4 shows the predicted probability of *de facto* judicial independence when electoral rules change from non-proportional to proportional system.

Table 2.4: Predicted Probabilities of *de jure* Judicial Independence using Change on the Electoral System Non-Proportional to Proportional*

Categories	Proportional	Non-proportional	Change	Conf. Interval
Dependent	0.1423	0.2282	-0.0859	[-0.1458, -0.0260]
Partially	0.6584	0.6488	0.0077	[-0.0068, 0.0223]
Independent	0.1992	0.1211	0.0781	[0.0223, 0.1340]

*All other variables are kept at their mean.

The findings presented above provide the impact of the type of electoral system on *de facto* judicial independence courts. According to table 2.4, a change from non-proportional to proportional systems has a positive impact on courts that are *dependent* and *fully independent*, but not those that are *partially independent*. In other words, if we were to change the type of electoral system of a country where courts are *de facto partially independent*, we would not see a significant impact on the level of independence.

The table also shows that proportional systems are more likely to predict *de facto fully independent* courts. This finding is in agreement with the literature with regard to government capacity to bring about changes in systems with an increasing number of veto players (Tsebelis 1995). In party systems where there are a high number of parties, changes can only occur by building coalitions. Proportional systems are more likely to protect courts from arbitrary political decisions, thus increasing courts independence.

Conclusion

This paper seeks to explore the impact of three constitutional frameworks–federalism, electoral system and bicameralism—on courts and judges' judicial independence. The findings suggest that proportional electoral systems with bicameral legislatures are more likely to produce independent courts. With regard to federalism, the findings do not conform my hypothesis. This may be because of the particular characteristic of Latin American countries federalist structure. In these countries, what we see is a form of *pseudo-federalism* in which sometimes local and subnational governments have some power, but often times they heavily rely on the federal government to function. This dynamic has an impact on courts and judges judicial independence. Courts are more

likely to survive in systems where the *status quo* is not easily changed (Tsebelis 1995). The reason being in a structure where there is a higher number of veto players, more check points lower arbitrary influences on the court.

This paper contributes to the literature by expanding on the impact of constitutional government frameworks on courts and judges' judicial independence. Previous literature has focused on the effect of these provisions on economic and political areas. However, they have fallen short in explaining the impact on courts. This study brings the courts to the forefront of academic study, since they are a fundamental player in the political structure. It shows that political structures affect courts independence, shaping their structure, organizations, and outcomes.

Furthermore, the contribution of this paper goes beyond the theoretical understanding of constitutional provisions and judicial independence. It suggests that we need to think thorough on what types of government structures should be build to create independent courts. In countries where constitutions are still being drafted or revised, it is important to create an environment that fosters the rule of law. To do that, independent courts should exist so they can freely exercise their functions. This paper suggests that considering the countries social, economic, and legal characteristics, a proportional electoral system with bicameral legislature foster judicial independence. Moreover, in looking at Latin American countries, their *pseudo-federalism* and unitary systems create *de facto dependent* courts. This suggests that constitutional arrangements should be in place to create a more decentralized power, building true federal systems. In sum, this paper provides to promoters of democracy and constitutional designers an outline of governmental frameworks that create more independent courts.

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Appendix A

	Government System	Electoral System	Number of Chambers
Argentina	Federal	Proportional	Bicameral
Bolivia	Unitary (1984-1994) Federal (1995-2009)	Non-proportional	Bicameral
Brazil	Federal	Non-proportional	Bicameral
Chile	Unitary (1984-1991) Federal (1992-2009)	Non-proportional	Bicameral
Colombia	Unitary (1984-1991) Federal (1992-2009)	Proportional	Bicameral
Costa Rica	Unitary	Proportional	Unicameral
Dominican Republic	Federal (1984-1994) Unitary (1995-2009)	Non-proportional	Bicameral
Ecuador	Federal	Proportional	Unicameral
El Salvador	Unitary (1984-1994) Federal (1995-2009)	Proportional	Unicameral
Guatemala	Unitary (1984-1986) Federal (1987-2009)	Non-proportional	Unicameral
Haiti	Unitary (1984-1994) Federal (1995-2009)	Non-proportional	Bicameral
Honduras	Unitary (1984-1994) Federal (1995-2009)	Non-proportional	Unicameral
Mexico	Federal	Non-proportional	Bicameral
Nicaragua	Unitary	Proportional	Unicameral
Panama	Unitary (1984-1994) Federal (1995-2009)	Non-proportional	Unicameral
Paraguay	Federal	Proportional	Bicameral
Peru	Unitary (1984-1993) Federal (1994-2009)	Non-proportional	Bicameral (1984-1994) Unicameral (1995-2009)
Uruguay	Unitary (1984-1985) Federal (1986-2009)	Proportional	Bicameral
Venezuela	Federal	Non-proportional	Bicameral (1984-1999) Unicameral (2000-2009)

*Non-proportional includes all other electoral rules, such as plurality, majority, and mixed rules.

Essay 3: The Constitutionalization of Judicial Independence: Exploring the Impact of the 1988 Constitution on Brazilian Courts' Level of Judicial Independence

Abstract

This paper explores the 1988 Brazilian Constitution, focusing on its role in protecting the Brazilian judiciary, and creating independent courts. Studies show that there is a relationship between constitutional provisions and judicial independence (Elster 2000; Ferejohn, Rakove and Riley 2001; Ferehohn 1997; Lijphart and Waisman 1996). In these studies, constitutions shield the judiciary by providing provisions related to judicial independence. My study enters this investigation and seeks to further the existing literature on judicial independence. Drawing on the case of Brazil, I explore *how* the 1988 Brazilian constitution protects the judiciary, allowing courts to freely exercise their functions. This paper argues that key provisions in the 1988 Constitution ensure Brazilian courts independence. Specifically, constitutional provisions related to fiscal autonomy, length of judgeship, removal procedures, separation of power, accessibility to the courts, and judicial review seem to play a remarkable role in ensuring the Brazilian courts' independence. This argument supports my previous study finding that the relatively level of independence Brazilian courts enjoy is a function of certain constitutional provisions.

Introduction

During the democratization process in Latin American countries, the first step in the transition from authoritarianism to democracy was to draft a new constitution. These constitutions were supposed to outline the structures of the government, their functions, and limitations and to safeguard emerging democratic regimes. As a result, many of the constitutions of Latin American countries are long, detailed, and complex prescriptions for how to operate a democratic country. Brazil is a prototypical example. The 1988 Brazilian constitution covers almost everything and everybody. It specifies extensive constitutional rights, including individual, social, and cultural rights; and it reallocates a number of powers to Congress, removing them from the President. In addition, it provides numerous provisions intended to safeguard the independence of the federal judiciary.

This paper explores the 1988 Brazilian Constitution, focusing on its role in protecting the Brazilian judiciary, and creating independent courts. Studies show that there is a relationship between constitutional provisions and judicial independence (Elster 2000; Ferejohn, Rakove and Riley 2001; Ferehohn 1997; Lijphart and Waisman 1996). In these studies, constitutions shield the judiciary by providing provisions related to judicial independence. My study enters this investigation and seeks to further the existing literature on judicial independence. Drawing on the case of Brazil, I explore *how* the 1988 Brazilian constitution protects the judiciary, allowing courts to freely exercise their functions.

The investigation involves using my recent study on the effect of constitutional provisions related to judicial independence on the *de facto* level of judicial independence in 19 Latin American countries. Overall, I found that constitutional provisions related to judicial independence have a positive impact on the courts' level of *de facto* judicial independence. I used two different models to investigate the impact of such *de jure* provisions: the first assessed the provisions in combination using an additive index, while the second looked at each provision independently. First, I find that the more provisions related to judicial independence contained in a country's constitution, the

higher the degree of independence courts and judges exercise in practice. And, I also find that certain thresholds in terms of numbers of provisions work to guarantee that courts are either *partially* or *fully* independent.

Second, looking at the individual provisions concerning judicial independence, I found that certain provisions were necessary to minimally guarantee *partially independent* courts. Specifically, I found that tenure, removal, fiscal autonomy, accessibility, separation of power, and judicial review provisions are necessary to keep courts from becoming *dependent* in practice. I also suggested that courts are more likely to be *fully independent* if two of these provisions are in place – accessibility and removal procedures.

This paper extends the analysis conducted in my study by offering a single-country case study of Brazil. It explores the link between Brazilian constitutional provisions and judicial independence. In my previous, the goal was to explore whether there was a relationship between constitutional provisions and judicial independence. Here, I investigate *how* this link happens. In other words, what it is specifically provided in these constitutional texts that protect courts against external influences.

To investigate how the text of constitutional provisions contributes to the judiciary independence, the 1988 Brazilian constitution. I specifically investigate how six constitutional provisions - fiscal autonomy, the power of judicial review, accessibility to the courts, separation of power, and removal procedures and length of judgeship – operate in Brazil to ensure that courts can function without undue political influence. These particular provisions are investigated here for two reasons. First, a number of previous studies of Brazilian courts (Taylor 2008; Castro 1993; Arantes 2005; Santiso 2003; Rios-Figueroa and Taylor 2006) have pointed out their importance in the protection of Brazilian courts. These studies suggest that the 1998 Constitution provided great protection to Brazilian courts. Second, as noted above, these provisions were those found by Dias (2013) to significantly influence the likelihood of a country's courts being considered at least par-

tially independent. Second, as noted above, these provisions were those found by my previous study to significantly influence the likelihood of a country's courts being considered at least partially independent.

This paper is divided into three sections. First, I define judicial independence and discuss the importance of studying of judicial independence. Moreover, I examine previous studies of the effect of constitutional provisions of judicial independence on courts and judges' independence, including Dias (2013). The second section focuses on my previous study, linking my previous findings about the impact of constitutional provisions of judicial independence on the level of *de facto* judicial independence to the Brazilian case. To do that, the paper will use elite interviews as well as other sources to give context to these findings. I explore how the provisions related to judicial independence in the 1988 Constitution guarantee independence to Brazilian courts. Section three concludes and provides suggestions for future research

Defining Judicial Independence

At the outset, a definition of judicial independence is important before exploring the link between judicial independence and constitutional provisions. What exactly is judicial independence? What does it mean for a judiciary to be independent? Constitutional provisions protect courts from interfering by other branches of government and public opinion; however, this is rarely static. Therefore, there are times when the courts are fully independent. At other times, despite constitutional provisions, courts my act less independently. Because of this relativism and variations in structural and institutional design, judicial independence has been difficult to conceptualize. Despite its difficulties, judicial independence can be understood in relation to two dimensions: impartiality and autonomy or political insularity (Fiss, 1993; Rios-Figueroa and Taylor, 2006; Larkins, 1996; Keith, Tate, and Poe 2009). Although some scholars have defined judicial independence using only one of those components, others have suggested that a more accurate definition of judicial independence should assess both (Rios-Figueroa and Taylor, 2006; Larkins, 1996).

For the purpose of this paper, I will adopt a definition of judicial independence proposed by Larkins:

> *Judicial independence refers to the existence of judges who are not manipulated for political gain, who are impartial toward the parties of a dispute, and who form a judicial branch which has the power as an institution to regulate the legality of government behavior, enact "neutral" justice, and determine significant constitutional and legal values* (Larkins, 1996, 611).

For the purpose of this research, Larkins's definition of judicial independence is the most appropriate because the definition gives a comprehensive explanation of what judicial independence means and how constitutional provisions foster judicial independence.

Larkins definition is comprehensive because it refers to judges' behavior (impartiality), third parties' behavior toward the judges (autonomy), and courts as an institution (political insularity). Thus, 'the existence of judges who are not manipulated for political gains' is related to judges' autonomy and the level of influence political branches have over their decisions. Insularity requires that the judiciary be independent from the other political branches and the public in general. Political insularity protects judges so they can hand in unpopular decisions. It also shields the courts from threats that might compromise impartiality (Fiss 1993: 58). Whereas impartiality is related to a judge's independence ability to resolve disputes in accordance with the law (Becker 1970, 1-8), political insularity requires that the judiciary be free from any political influence. Moreover, political insularity is related to the power of courts to have their decision implemented (Fiss 1993; Rios-Figueroa & Staton 2009). Therefore, judicial independence requires that judicial decisions are respected and implemented and that courts are free from government constraints and constitutional encroachments.

Moreover, Larkins' definition hints at the role constitutions play in guaranteeing judges' impartiality. Constitutional provisions that intend to create impartial judges will not allow dominant members of society to manipulate the judicial system to serve their own interests. Additionally, judicial independence plays a critical role when the government is a party in the case. Constitu-

tional provisions should protect courts from fear manipulation, threats, or punishment for not ruling in the government's favor. Therefore, impartiality is essential to the concept of judicial independence because it captures the idea that judges will make their decision based on the law and that the courts will not be unduly influenced by the government or parties involved (Despouy, 2009; Ferejohn, 1998; Fiss, 1993).

Finally, Larkins' definition is instrumental to this research because it includes the judicial branch as an institution of government, which 'has the power to regulate the legality of government behavior, enact 'neutral' justice, and determine significant constitutional and legal values.' It emphasizes the position of the courts within the larger political system and their functional relationship with the other branches of government. It is only by taking courts as a whole that we can include indicators such as institutional legitimacy or separation of powers to measure judicial independence.

Theoretical Framework

This study investigates whether constitutional provisions of judicial independence can shield the judiciary from other political influences, using the 1988 Brazilian Constitution as its focus. Previous studies established a relationship between judicial independence and provisions regarding courts and judicial independence, i.e., removal and appointment procedures (Verner 1984; Dahl 1958). Independent courts are free to protect individuals' rights. Judicial independence allows for the safeguarding of the constitution against government abuses. The importance of studying judicial independence increases as the judicialization of politics in developing countries and overreliance on the courts increase.

In order to exercise rule of law there must be judicial independence. In an evaluation report for the United States Agency for International Development, Blue (1999) explains the rule of law "embodies the basic principles of equal treatment of all people before the law, fairness, and both constitutional and actual guarantees of basic human rights; it is founded on a predictable, transpar-

ent legal system with fair and effective judicial institutions to protect citizens against the arbitrary use of state authority and lawless acts of both organizations and individuals" (13). Thus, independent courts are insulated from the other branches of the government and use the law to adjudicate cases.

The biggest threats to courts are the existing executive, legislative and bureaucratic structures. As regulators and controllers of government power, only independent courts can restrain potentially tyrannical actions. Moreover, it is in the interest of the rule of law that judges are impartial. The principle of "equal treatment of all people before the law" requires independent judiciaries. Independent judges adjudicate cases by adhering to or overthrowing precedent rather than considering personal interests in the outcome of the case. In practice, judicial independence means courts and judges function free from outside influences.

A final reason for investigating the determinants of judicial independence is the recent increase in the judicialization of politics. The increasing role of courts in the political system has raised the question of whether such involvement is due to an increasing independence. Judicialization of politics involves the reliance on the courts to resolve conflicts that were historically the role of the other branches of the government, i.e., executive and legislative (Sieder, Schjolden, and Angell 2005). It is the displacement of policy-making process from politics to the legal system (Taylor 2008; Iaryczower, Spiller, & Tommasi 2002; Rios-Figureroa & Taylor 2006; Santiso 2003). This phenomenon is likely due to the mistrust of these emerging countries on their political system, coupled with and increased perception that courts are more independent thus more likely to hand fair decisions (Carvalho 2009). Thus, the examination of judicial independence helps understand the increasing judicialization of politics.

In Latin America, the increasing reliance on courts makes an examination of judicial independence pertinent. If courts are to interpret the laws and participate more frequently in the pro-

cess of policy-making, it is important that they are free from political interferences. Over the last few decades, the democratization process in Latin American countries involved the creation of new constitutions (Hirschl 2006). This trend required more participation of the judiciary. More constitutional rights, more political issues, more accessibility to courts expanded the role of judicial review. In this new scenario, judicial independence brings about the rule of law, to prevent arbitrary actions by the government, and to foster the democratization process (Rios-Figueroa and Taylor 2006).

The question now is how can independent courts be created? This study argues that judicial independence comes from constitutions. Through constitutional provisions related to judicial independence, courts are isolated from external influences.

Do Constitutions Matter?

Conventional wisdom holds that constitutional arrangement are automatically enforced, denoting that formal institutions, such as written constitutions, can shape the way others behave (Carey 2000). While in developed countries constitutions are often enforced, the same cannot be said of developing countries (Larkins 1996; Pozas-Loyo and Ríos-Figueroa 2010; de Vanssay and Spindler 1994). In developing countries, scholars suggest, these formal institutions are rarely adhered to and, instead, are often violated (Levitsky and Murillo 2009). Hence, the question arises, can some formal institutional conditions, i.e., constitutional provisions, ensure the protection of judicial independence in new democracies more effectively than other conditions?

In Latin America constitutional guarantees are readily available. The courts' independence, however, is not always guaranteed due to repeated violations of these constitutions. Political actors have been known to fill the courts (court packing) with ideologically similar justices, to remove sitting justices who decide against government actions, and to force the resignation of justices through political pressure (Helmke 2005; Chavez 2004; O'Donnell 1993, 1994).

All these threats to judicial independence raise questions about discrepancies between formal rules and judges' and courts' exercise of judicial independence. Formal judicial structures provide guarantees for judicial independence. This study proposes that courts with high levels of formal guarantees of independence should have more opportunities to act in an independent manner. Yet significant debate remains over how constitutions protect courts and isolate them from political influences.

Scholars maintain that constitutions matter for many reasons. They claim that constitutions shape the economic structure of a country (Hayek 1978: Gwartney and Wagner 1988). They suggest that constitutions are the source of human liberty and freedom. Moreover, these rights are the foundation for individuals' fulfillment of their other wants through economic activity. Similarly, in discussing the role constitutional reform plays in strengthening government, Dressel (2005) argues that "a constitution defines and protects citizens' rights from governmental abuse. It also limits and balances government powers vis-à-vis other players and institutions, thereby safeguarding minority rights. The constitution is the touchstone for the legality of all other laws and the basis for reviewing executive and legislative actions" (1).

Moreover, promoters of democracy in authoritarian countries argue that constitutions set the standard for the new political regime. According to constitutionalists (Buchanan 1983; Epstein 1988; George 1979; Gwartney, Wagner, and Program 1988; Hayek 1978; Barros 2002; Olson 1982; Pilon 1988), constitutions control arbitrary takings by the state, set individuals' human rights, create systems of property ownership and limit transaction costs in order to promote efficiency, and maintain the "social contract" established between politicians and citizens. Thus, it is indispensable to explore the relationship between *de jure* and *de facto* judicial independence and the impact constitutions have in a country transitioning from a dictatorship. If constitutions are important for the survival of new democracies, then they must also guarantee that judges and courts can independently perform their functions. Constitutionalists and political experts suggest constitutional

reforms to achieve structural changes. However, if constitutional provisions are insufficient to ensure judicial independence, promoters of democracy and constitutionalist should focus on restructuring social, economic, and political structures (Herron and Randazzo 2003).

However, as some scholars argue, there are shortcomings of constitutional provisions and what happens in practice. Some describe how constitutional provisions may not isolate courts and judges from external influences. Herron and Randazzo's (2003) study of formal institutions (i.e., written constitutions and statutes) explores the impact of constitutional provisions on courts after Communism. In their study the authors conclude that in post-Communist countries constitutional provisions of judicial independence did not capture the realities of courts exercise of their power. They found that formal institutions very often were unable to protect courts and guarantee their judicial independence. Similarly, Rosenn (1987), discussing judicial independence in Latin America, argues that constitutional provisions of judicial independence are rarely enforced. According to Rosenn,

> most Latin American courts are staffed by career judges with no independent political base or contracts and with relatively narrow experience. Asking them to perform this function (particularly in the context of exercising the power to declare statutes unconstitutional *erga omnes*) is to plunge them into a political role for which they are ill-prepared by both temperament and experience (1987: 32)

In my study, I expanded on existing literature of judicial independence by revisiting the role and impact of formal constitutional provisions on *de facto* judicial independence. Previous studies focus on individual provisions or a combination of a few provisions related to judicial independence. My study combines these provisions. The reason is these provisions work in unison. Thus, constitutions can only bring about changes when all those provisions are provided in the constitution.

To assess the link between constitutional guarantees and *de facto* judicial independence, I first created a variable of *de jure* judicial independence comprised of nine constitutional provisions

of judicial independence.[10] To determine the level of *de facto* judicial independence in each Latin American country, I utilized the measure developed by Cingranelli and Richards (2008).[11] The results were twofold. First, I found that constitutional provisions of judicial independence do affect the level of judicial independence courts and judges exercise in practice, at least with regard to *partially independent* and *fully independent* courts. In other words, I found that *partially independent* and *fully independent courts* were more likely to exist in countries with all these nine constitutional provisions of judicial independence.

This study also investigated which constitutional provisions are necessary to create these *partially independent* and *fully independent* courts. In assessing the effect of individual provisions on the *de facto* level of judicial independence, the results show that, to create *partially independent* courts, provisions about tenure, removal procedure, budget, accessibility, separation of power, and judicial review must be included in the constitution. Moreover, constitutional provisions that increase accessibility to the courts and provide removal procedures are indispensable to create *fully independent* courts. It should be noted that these provisions must all be included in the constitution. In other words, they are necessary provisions, but each alone is not sufficient to create *partially* or *fully* independent courts. This paper contextualizes these findings through the use of a single-country case study. Establishing which provisions aid in creating independent courts tells us only part of the story. We also need to understand *how* these constitutional provisions related to judicial independence protect courts from political interference.

The Brazilian Case

This paper uses the case of Brazil to assess the effect of constitutional provisions of judicial independence on *de facto* judicial independence. Case studies provide a rich understanding of the processes in which the interactions between dependent and independent variables occur. The

[10] Length of judgeship, budget, removal procedure, selection process, accessibility, separation of power, judicial review, number of justices in the highest courts, and qualifications.
[11] The data are readily available on their website: http://ciri.binghamton.edu

quantitative testing of the effect of *de jure* on *de facto* judicial independence tells us only part of the story. It explains the effect but it does not show how this effect transpires. I investigate the relationship between constitutional provisions and *de facto* judicial independence in Brazil using three sources: the constitutional text, elite interviews, and example of court decisions. In the summer of 2011, I conducted 20 semi-structured and structured interviews with lawyers, federal and state judges, political scientists, and legal experts in Brazil. My interviews used open-ended questions regarding judicial independence, the Brazilian constitution, the role of the 1988 constitution on courts' independence, and the level of perceived independence of Brazilian courts (see Appendix A). The subjects were chosen in various ways. My initial pool of interviewees (8 subjects) was federal and state judges whom I called and asked if they were willing to participate in my interview. Their numbers and addresses are readily available in the federal and state courts websites. Five other subjects were political scientist and law professors from a federal university. The remaining participants were legal experts, civil servants, and lawyers who I encountered during my interviews and were willing to participate and share their opinions. The total number of participants was 20 subjects. In addition to the interviews, I examine examples of court cases. The sample of court cases was chosen based on elite interviews results. Many of the subjects used these cases to show how constitutional provisions related to judicial independence contributed to protect the independence of the Brazilian judiciary. Using them further illustrates the role of constitutional provisions on *de facto* judicial independence in Brazil.

The case of Brazil is used in this study for two reasons. First, Brazil is among the countries that created a constitution to foster its democratization process. The 1988 Brazilian constitution covers almost everything and everybody. It specifies extensive constitutional rights, including individual, social, and cultural rights; it reallocates a number of powers to Congress, removing them from the President, and it included numerous provisions intended to safeguard the independence of the federal judiciary.

Second, Brazil is a useful place to test my previous findings. The 1988 Brazilian constitution provides all the nine provisions related to judicial independence. In this study, however, I particularly focus on six provisions – removal process, length of judgeship, fiscal autonomy, accessibility to courts, separation of power, and the power of judicial review. These six constitutional provisions were were overwhelmingly mentioned by my interviewees. All my 20 subjects point out the role of these provisions in ensuring the independence of the Brazilian judiciary (see Table 1). Furthermore, scholars of Brazilian courts link these particular provisions to the independence of the judiciary in Brazil (Castro 1997; Santiso 2003; Rios-Figueroa and Taylor 2006; Barbosa 2007). The reason is these provisions have created more tension between courts and the other branches of the government whereas the other three provisions are more settled. In the case of number of justices from higher courts, for instance, there is no case in Brazil of arbitrary attempt or even through constitutional amendment to alter the number of justices in the higher courts to influence their decisions. Conversely, the guarantee of financial autonomy has created constant tension between the judiciary and the executive. The latter has in some instances tried to change or even determine the Brazilian judiciary's budget.

Table 3.1: Interviewee Responses Concerning the Type of Constitutional Provisions they Believed are Relevant to Protect the Judiciary

	Removal Procedure	Length of judgeship	Separation of Power	Fiscal Autonomy	Accessibility to courts	Judicial Review
Judges (federal and state levels)	7	7	4	10	10	8
Scholars	1	1	3	5	4	5
Civil Servants	1		1	1		1
Lawyers	2	3	1	4	1	6
Total	11	11	9	20	15	20

This paper enters the aforementioned debate and seeks to further the existing studies of judicial independence in Brazil and Latin America. It adds to the existing literature by exploring the impact of institutional factors on the Brazilian judiciary. More specifically, it investigates the 1988

Brazilian Constitution, focusing on its role in creating a relatively independent judiciary in Brazil. I argue that due to the 1988 Brazilian Constitution, Brazilian courts are relatively independent, and that their independence is the result of provisions in the 1988 Constitution. Furthermore, this study helps understand how these constitutional provisions play a role in creating independent courts. To promoters of democracy and constitutional designers, it helps them not only to acknowledge the inclusion of these provision in the constitution, but also understand how to draft these provisions so they can have the intended goal: create independent courts.

Understanding the Independence of Brazilian Courts

Adopted in 1988, the Brazilian Constitution provides courts and judges with a range of judicial independence protections. *Inamovibilidade,* or removal procedures, protects judges against removal from their post without due process (Art. 95, II). The Brazilian Constitution of 1988 also mandates a vital provision, *vitaliciedade*, or length of judgeship. This provision provides to judges once appointed, the right to unlimited tenure, unless a crime is committed, until they reach a mandatory retirement age. For the Brazilian Superior Tribunals the mandatory retirement age is 70 years old (compulsory retirement) (Art. 95, I). *Irredutibilidade de vencimentos*, or irreducible salary, is also guaranteed to judges (Art. 95, III). The salary of the Supreme Court Justices is tied to the salary of civil servants. Finally, the other five constitutional provisions related to judicial independence provided by the 1988 Constitution are the power of judicial review (Art. 97), full autonomy to administer and draw their budget proposals (art.100), the number of justices in the highest courts (art 101, art. 104, art. 107, art. 115, art. 119, and art. 123), the selection procedure (art. 101, I), qualifications (art. 94), and separation of power (art. 2).

The enumeration of these provisions demonstrates that, by any standard, Brazilian courts were given high levels of protection. Following Dias's findings, these constitutional provisions protect courts from external interference. The following sections will show *how* provisions of length of judgeship, removal procedures, fiscal autonomy, accessibility to courts, separation of power, and

judicial review play a particular role in protecting the courts in Brazil and foster judicial independence.

Judicial Independence through Length of Judgeship and Removal Procedures

To understand how both the length of the judicial term and removal procedures foster judicial independence, it is useful to look at the definition of judicial independence used in this two of its components, impartiality and autonomy. According to Larkins (1996), judicial independence refers to *existence of judges who are not manipulated for political gain*, and *who are impartial towards the parties of dispute*. Provisions of the constitution that guarantees impartially and autonomy create independent judiciaries.

Impartial judges treat all citizens equally before the law and are able to protect their rights and secure them against encroachment by the government (Kaufman 1979). Impartiality is essential in cases when the government is a party in the case. Impartial courts should not feel compelled to side in favor of the government because fear of retaliation. In this regard, the removal and length of judgeship provisions play a role to protect courts from these influences.

The removal procedures and length of judgeship provisions ensure that judges and courts are insulated from political pressures. Setting the length of judgeship protects judges from being removed before their term has ended or through appropriate removal procedures (Keith 2002). Additionally, certain types of tenure limits foster independence. Conventional wisdom holds that a relative longevity of judgeship protects judges from political pressure (Ginsburg 2003). This is because they tend to outlast the exchanges of political power (Rios-Figueroa and Taylor 2006). This is particular pertinent among superior courts, where judges are appointed. Here, political actors have more stacks in the judicial decisions. Therefore, judges are more likely to be independent when their length of judgeship is not linked with the length of their appointers' position (Helmke 2005).

Furthermore, coupled with the considerable length of judgeship, judges are protected from threats of removal if appropriate procedures are in place. The process of removal is crucial to judi-

cial independence. A constitutional provision that provides a removal process has two goals. First, the constitutional process binds political actors, prohibiting them from removing judges without the appropriate due process. Second, it shields judges from eschewing their decisions for fear of arbitrary removal. The harder it is to remove justices that are in charge to decide political questions, the freer they are to decide these cases. Thus, tough removal process for higher courts is likely to give more protection to the courts (Rios-Figueroa and Taylor 2006), guaranteeing that judges will make their decisions based on the law and that they will not be unduly influenced by the government or parties involved (Despoy 2009; Ferejohn 1998; Fiss 1993).

In Brazil, my interviewees suggested that work well to guarantee impartial judges. Starting with the length of judgeship, the constitution, under article 95, II provides to judges the right to unlimited tenure, and only removed unless they are convicted of a crime, or they voluntarily retire. It is does not come as a surprise that seven out of 11 who mentioned this provision were judges. According to them, this provision provides security to courts 'to decide according to the law.' One of my interviewees explains the importance of this provision stating

> with regard to *vitalicidade* [or unlimited tenure] this is a guarantee that [a judge] will not be removed or fired because someone does not like you. It is a guarantee that the Constitution gives you so you can go after anybody, decide against anyone, without losing your job. This is really important because if a person could be fired to reduce expenses [for instance], can you imagine?... good judges, honest judges would be threaten and they would be influenced in some cases to decide differently than they initially would.

Similarly, a judge pointed out the importance of this provision to political actors like the President. The judge points out that

> Once they assume the position, he or she cannot leave, the president cannot come and say get out once he is automatically sworn for life. Thus, the guarantee of life tenure gives the judges to make sure that it will not be removed/dismissed from office because the President did not like his decision.

Moreover, all my interviewees (eleven subjects) who responded that unlimited tenure protects courts also pointed out the significance of those removal procedures were important for inde-

pendence. Assuming that the constitution sets the term judges can serve in the courts, only through the appropriate process they can be removed. In the Brazilian constitution, the removal procedure has two goals. First, it guarantees *inamovibilidade*. That means, judges are to stay in the location (city, municipality, state) they passed the examination process. Thus, judges are not to be arbitrarily removed from their position and be allocated to another location (different court, city, municipality, state). Second, it means that judges cannot be terminated from their function unless they have been convicted or a crime or a removal process has decided that they should be removed. Although both have the same goal – create impartial judges – they fit two different purposes.

The first purpose is to make sure that judges who are allocated to a city, for instance, don't fear that they will be removed and relocated to another city, or even state, because they have decided against powerful local individuals or groups. One of my interviewees mentioned that prior to the 1988 constitution, especially in small cities and municipalities, judges who attempted to defy powerful individuals, were removed and relocated to remote areas, as a form of punishment. An interviewee stated:

> the *inamovibilidade* is important because it guarantees that [they] are not going to send an individual [judge] to a remote area just because he convicted a powerful banker. This guarantee is not afforded to federal or state investigators, for instance, and because of that the federal investigator who was investigating the Banestado case was relocated and now works at the São Paulo airport. If he were a judge he could have said: 'hey, I cannot be removed, you can take me from here.

This provision has also another protection purpose. It protects judges in the first instance against their superiors. Not only it gives external independence against political influences, it also protects them from superior judges who might have stake in the decisions of lower courts judges. Thus, as one federal judge points out to me,

> before the *inamovibilidade* provision, federal judges had their post determined by their superiors, and very often, they were subjected to judges with tenure, who could 'choose' who their substitute was. This practice violated the *inamovibilidade* provision and let judges fearful to be relocated due to a mere administrative decision, especially if they acted in a manner that it was

> against with what some people thought. Now, all judges are allocated and their removal process obeys a seniority process, which turned the process more transparent and fair. Judges act with independence and security.

Moreover, judges can be removed under the appropriate process. The body responsible for this process is the Conselho Nacional de Justice (CNJ). The National Council, between 2007 and 2010, removed a total of 36 judges were removed from their functions (CNJ 2010: 31). Among them are the Superior Tribunal de Justiça (STJ), Paulo Geraldo de Oliveria Medina, and a Second Instance judge from the Tribunal Regional Federal da Segunda Região (TRF2), José Eduardo Carreira Alvim. These judges received compulsory retirement in an administrative procedure. They committed crimes involving giving decisions in favor of specific decisions, violating the impartiality principle. This is the first time a justice is tried and sentenced administratively. Meaning, members of the highest court and the court of last resort in Brazil, can be also impeached with a tough 2/3 majority in the Senate. That, as I have mentioned earlier, makes it difficult to remove superior courts justices arbitrarily, at least by a political branch[12], particularly in Brazil where a coalition is necessary to pass anything. This is why, according to a political scientist scholar, "in the history of Brazil, political parties have never initiated an attempted to impeach a member of the Supreme Court."

In this section, I show how tenure and removal procedures paly a role in creating independent courts by providing them with protections to isolate them from political influences. Without fear of being removed and placed in a remote area or fired without due process, these provisions allow courts to act impartially.

Judicial Independence through Separation of Power

This provision provides to the courts judicial autonomy and political insularity. An autonomous judiciary will be granted power to self-regulate itself. Its administration, budget and personnel are self-regulated, and clearly delineated in the constitution, limiting to a minimum any inter-

[12] It is important to note that the Conselho National de Justiça is an organ under the Judiciary Branch thus with no relationship between the executive or legislative branches.

ference from the other branches of government. Moreover, the clearer the limits of each branch, the more likely it is that they will refrain from interfering in the functions of the other branches. The separation of power provision does not only come in the form of a statement providing for it, as for example article 2 of Brazilian Constitution. It can come in many forms. In the case of Brazil, the separation of power provision is articulated through provisions of fiscal, administrative and structural autonomy.

In my interviews, when asked which constitutional provisions you believe are best able to protect judges and courts from external influences, nine of my subjects mentioned separation of power. But among the nine, only three specifically mentioned Article 2 of the constitution. For the others, some form of separation of powers served to illustrate how the importance of these provisions for judicial independence. For instance, according to one interviewee, "judges in Brazil were the biggest beneficiaries in the 1988 Constitution. Their budget can never be reduced by any other branch of the government. It is unconstitutional." That means, any interference to the budget proposal is a violation of the separation of power provision. Another interviewee, in explaining the importance of separation of power, refers to the provision about the irreducibility of salary. He stated

> during the dictatorship, the judiciary salary was low, and almost nobody would like to be judges. [After the 1988 constitution], with financial autonomy and professionalization of judgeship, being a judge gained status, respect and independence. Instead of waiting on the executive to pay us, now this is all under the judiciary power.

Moreover, for one of my interviewee, a political science scholar, judicial independence meant separation of power. According to my interviewee, "in my understanding, independence is linked with the separation of power provision." Following this idea, a lawyer points out how broad the separation of power provision is, encompassing other article to protect courts from external influence.

> the constitution protects the judiciary when it provides independence and autonomy among the branches. There are provisions against other branches of government if they coerce the judicial power, article 36, I, if the President

> tries to influence the functions of the judiciary, article 85, II, and the administrative and fiscal autonomy, article 99.

Despite pointing out that provisions of separation of powers are relevant to the independence of the judiciary, one interviewee mentioned his skepticism about this idea. He pointed out that the new trend of judicialization of politics has "subverted" the idea of separation of power. According to him, "started with Montesquieu, and then the federalists, and today [separation of power provision] gains a unclear dimension from a theoretical point of view. The independence that was mandated in the idea of Madison that the judiciary existed to stop power with power, interest with interest [does not exist]. However, today it looks like that the dynamic [among branches] gained a different connotation because it looks like that the three branches end up doing all the functions [legislate, decide, and administer] at the same time, the way they want." In other words, the executive, the legislature, and the judiciary all exercise the legislative, adjudicative, and administrative functions. When asked what that means for the importance of such provisions to the independence of the courts, this interviewee continued explaining, "that does not mean provisions about separation of power are irrelevant. That is not what I meant. On the contrary, they are instruments to constantly check the actions of the branches of the government. I would not envision a constitution without such provisions."

This section shows that separation of power is an important provision in the constitution and it comes in different forms. It protects courts against political interference. It delineates the functions of each branch. This is in accordance with Larkins' definition of judicial independence. Independent courts are able to exist without manipulation for political gains', therefore acting autonomously. As one of my interviewees, a state judge, explained:

> there are three branches of government in this country – executive, judiciary, and legislature. According to the constitution we are not to put our nose in each others' business. And what happens if we do? Well, we have all these articles in the constitutions [referring to remedies in the 1988 Constitution] that say no, no, no. You violate, I can punish you. That makes the courts secure.

Judicial Independence Though Fiscal Autonomy

According to Larkins, one of judicial independence components is autonomy. Autonomous courts are allowed to self-regulate themselves, with little or no influence from the political branches. Fiscal autonomy is a provision that guarantees courts' independence. By controlling their budget, courts are insulated from political interference. Political actors can undermine the role of the courts by making it difficult for the courts to operate on the daily basis and for individuals to access justice.

Decisions about the internal administration, not only limited to budget but including personnel and structure, is the completely autonomy of the Brazilian Judicial branch. In Brazil, the 1988 Constitution gave complete power to courts to set their budget. Despite the fact that the constitution does not provide a specific amount or percentage for the Judiciary's budget, the Brazilian judiciary has been able to set their budget without much threat to have it reduced (Rios-Figueroa and Taylor 2006). This protection has two sources. First, article 99 of the constitution provides that they have autonomy to do so. Second, the separation of power guarantees that the other branches will not interfere with the courts functions. More specifically, in Brazil, the President can be tried for crime against the Judiciary if he or she interferes with its functions (Article 85, I). Thus, the Brazilian constitution not only provides clear autonomy to the court's budget, but also punishes those who interfere with their functions.

This is clearly illustrated in one of my interviews. In pointing out the provisions that protect the courts, one of my interviewees stated

> The courts in Brazil were really protected after the 1988 constitution. Look at their right to set their own finances. Once they send it to the President to be approved by Congress, it is done. There has never been any instance in Brazil when the budget has been denied. It is against the constitution.

All my subjects in my interviews pointed out that "the 1988 Democratic Constitution of Brazil introduced this provision to give more independence to the courts, so they do not need to rely heavy on the government," as a lawyer in my interview stated.

Fiscal autonomy has also to do with how much the judiciary was able to grow since the 1988 Constitution. If judicial independence is the ability to autonomously invest in their structure, personnel, and administration the Brazilian judiciary has been able to do that with great autonomy. One of my interviewees point out that the Brazilian courts are "one of the highest financed courts in Latin America, probably only losing for the United States." According to a report in the *O Estado de São Paulo*, the Brazilian judiciary budget has grown nearly eight times over the past two decades (Sant'Anna 2005).

Despite protection by the constitution, the autonomy of the judiciary in determining its budget has become over the years a battle between the Executive, who wants to have more control over it, and the Judiciary, who points out that any interference in its budget is a violation of the separation of power clause.

The battle between the Executive and the Judiciary and its budget illustrates this tension. In 2012, The President Dilma Rousseff altered the budget proposed by the judiciary in order to reduce expenses in 2013. According to the Ministério do Planejamento (Fiscal Minister) the budget proposed by the judiciary would have an impact of R$ 8.8 billion (close to US$ 4 billion) on the 2013 budget. The judges asked for a salary adjustment of 35% to adjust for the 2007 and 2008 inflation. However, the Ministério do Planejamento counter-proposition involved an adjustment of 15.8%, divided in 3 years until 2015. Considering the burden on the 2013 budget, the President amended the judiciary budget and sent it to Congress.

Claiming a violation of the separation of powers provision, the Associação dos Magistrados Brasileiros (Brazilian Magistrate Association), the Associação Nacional dos Magistrados da Justiça do Trabalho (Labor Tribunal Magistrate National Association), and Associação dos Juízes Federais

do Brasil (Brazilian Federal Judges Association) filed a *writ of mandamus* alleging that the President violated the constitutional provision that guarantees the courts financial autonomy.

In the decision of the *mandamus,* STF Justice Luiz Fux argued that any alteration done by the President, before sending it to Congress, is unconstitutional. According to the decision, "the executive cannot simply 'cut' part of the Judiciary budget" (Cristo 2012). Further, the decision orders the President to send the initial budget to Congress, without alteration stating that (Fux 2012)

> It is mandatory as part of the Federal Constitution (section X of artigo 37) and federal law (10.331/01) [for the President] to submitt to Congress [without alterations to the budget], which is why the act perpetrated sets undeniable breach of the Judiciary financial autonomy (p. 1)

The autonomy of courts in setting is budget clearly gives them independence to not depend on the other branches to functions accordingly. It also protects them to decide against the government without unduly influences. This section shows that by granting the Brazilian judiciary the autonomy to set its budget, the 1988 constitution create independent courts. And as a interviewee poetically states, "the harmony between the three powers [the three branches of government] requires that the executive don't touch in the proposal of the Judiciary's budget.

Judicial Independence through Accessibility to the Courts and Judicial Review

It is less immediately apparent how accessibility to courts and the power of judicial review are less obvious on how they create independent courts. This is because these two provisions are less related to the structure of the courts or their function in handing out impartial decision. However, these two provisions play a role in courts' independence by giving them a position in the political scenario. These provisions thus influence courts' independence by determining the extent to which courts participate in the political debate.

Larkins' definition notes an independent judiciary is one that "has the power as an institution to regulate the legality of government behavior, enact "neutral" justice, and determine significant constitutional and legal values (1996: 611). In this section, I illustrate how the constitutional

provisions related to accessibility and to power of judicial review have given Brazilian courts the independence described by Larkins. More specifically, how in exercising their role as an institution, courts have gained relevant position within the larger political system and their interactions with the other branches.

Constitutional design can influence how this 'power to regulate the legality of government behavior' and 'determine significant constitutional and legal values' before the courts. The vast number of constitutional rights provisions and the remedies created to protect these rights are fundamental to understand the role of constitutional provisions in creating independent courts. Notwithstanding impartial decisions and autonomy, courts are independent when they can affirm themselves within the larger political system and their functional relationship with the other branches. Thus, courts should be able to declare unconstitutional a law that violates the Constitution, stop executive and legislative actions that violate constitutional rights, and set constitutional standards. Moreover, courts' ability to have a wide scope of authority with regard to constitutional review may not by itself indicate judicial independence. Thus, in the end of this section I illustrate the extent of Brazilian courts' impact in the broader political scenario gives a better understanding of how constitutional provisions related to judicial independence creates independence courts. This will be clearer when looking at the provision regarding judicial review in the 1988 Constitution.

The accessibility to courts and judicial review provisions have been a factor in creating independent courts in Brazil. In fact, these two provisions were highly emphasized by most of my interviewees in Brazil. Further, many of my interviewees interviewees (15 out of 20 subjects) pointed to these two provisions to the reason why "Brazilian courts are the most powerful courts in the Latin America," a federal judge explained.

To understand how these provisions help in protecting courts in Brazil, I explore two arrangements in the constitution. The first, and related to accessibility to courts provision, is the expansion of the bill of rights in the 1988 Constitution. If rights as broad as the right to health care or

education are mandated in the constitution, it is likely that courts will be compelled to hear cases that allegedly violate these rights. Thus, the importance of the second arrangement to the independence of the Brazilian judiciary: the power of judicial review. If courts are to be more independent, as Larkins posits, by regulating the other branches actions and determining constitutional rights, then they need provisions that allow them to review those actions and set these rights.

The Expansion of the Bill of Rights and Accessibility to Courts

Part of the democratization process in Latin America involved an expansion of rights (O'Donnell 1992, 1994; Rios-Figueroa and Taylor 2006; Melton and Ginsburg 2012). One of my interviewees pointed out that the reason for such expansion was "rights would be more protected, if added in the constitution." This takes us back to the idea that holds formal institutions predict behavior (Carey 2000). As my interviewee continues in addressing the reason for such inclusion, " coming out from a military rule, the idea was that nobody would violate rights or try to suspend them without real consequences." And the design of the 1988 Brazilian Constitution clearly intended to guarantee such protection. It is likely that constitutional arrangements affect the role of courts. This is because they are the guardians of the constitutions. This makes more plausible that any violation of these constitutional protections will demand actions from the courts. So, the question becomes, how does an expansion in the number of constitutional rights affect the independence of the courts? Before answering this question, lets explore this expansion.

Title II of the 1988 Constitution is a detailed and extensive enumeration of Rights. Article 5 addresses a large number of individual and collective rights, such as freedom of religion, the right to privacy, right to life, right to own property, among others. Articles 6 and 7 declare that education, health, labor, leisure, social security, and security are social rights. In addition, these articles protect workers from being fired arbitrarily, create unemployment insurance, establish a minimum wage, and guarantee private property and free competition. Articles 14 to 17 are political rights, including voting.

The constitutional arrangement of these rights explains why they foster formerly independent courts. The rights listed above can come from two different types of provisions: *eficácia plena* and *meramente programáticos* provisions. The first type of provisions can be exercised any time, thus they do not need ordinary or complementary laws for the purpose of regulation. An example of these provisions is article 44 of the constitution that establishes that the "legislative power is exercised by the National Congress, which is composed by the Senate and the House of Representatives." Thus, provisions that have *eficácia plena* are enforceable immediately.

Conversely, the programmatic provisions, and what a federal judge who I interviewed called "constitucionalização de frustrações," (constitutionalization of frustrations), are the programmatic provisions, or non-self-executing norms. These provisions, in order to produce effect, need additional regulatory laws (also called *leis complementares*) to specify and limit the scope of the right to be implemented. An example of this provision is one that establishes the right to strike by civil servants (article 37, VII of the Constitution). According to the constitution, civil servants have the right to strike, in accordance to complementary law. This later type of provisions are, according to my interviewees, the main reason courts in Brazil exercise a relatively high independence. A federal judge I interviewed explained "because of this [programmatic rights] we have a strong judiciary who are called by every citizen to act in the absence of administrative actions."

In developing countries underperforming administrations often neglect to regulate programmatic provisions (O'Donnell 1996; Carvalho 2009; Castro 1993). Frustrated citizens, therefore, seek relief from the courts. The more the courts are asked to remedy omissions as well as violations, by the administration, the more they become an indispensable part of the political process. Thus, as Larkins stresses in his definition, an independent court is one that is able to "regulate the legality of government behavior" as well as "determine significant constitutional and legal values (1996: 611). In Brazil, legal accessibility allows courts to enter the political arena and assert themselves as an independent institution. This is what a legal expert called "a Casa das Mazelas," or the

House of Afflictions, "the house where everybody goes to cry, to complain about the political game." Moreover, a judge point out "the problem of Brazil is not the fragility of the constitution but the fact that constitutional rights are not guaranteed. The instruments that the constitution gave to safeguard those rights give a lot of power to regulate these rights." Thus, another judge pointed out "in a country like ours the weight that it is put in the judiciary is enormous, because of that [lack of complementary rights]. In developed countries, you do not see that much of activity [regulate rights], particularly before the highest courts."

Take for example a case cited by a judge I interviewed. The aforementioned article 37, VII, of the constitution disposes that with regard to civil servants and their right to strike, a complementary law should determine the limits and terms in which it can occur. Since the promulgation of the 1988, no complementary law was proposed. To show how the lack of administrative action has increase the role of the courts in regulating the other branches, he asserted "passed 20 years of the constitution, the law was never drafted. Thus, the Supreme Court started to understand like this. Do we have a law for the private sector that regulate strikes? Yes we do. Can we adapt it to the public servants? Yes we do. Therefore, the private sector regulation about strike now is applicable to the public sector until a regulatory law [regarding the public sector] comes."

He gives another example.

> An individual who works in a dangerous job [because of that] can retire young. The stress is huge. This [right] is determined in the private sector and it is prescribed in the law. In the public sector this law never came. Here, the judiciary [Supreme Court] did the same thing it did with the strike law. Let's apply the private sector one until a law regarding the public sector comes.

The elaborated Bill of Rights of 1988 Constitution and the lack of legislative actions allow the courts to exercise it 'regulatory role,' and act as legislators. In another interview, a judge gave the following example: In explaining the increasing number of constitutional rights in the constitution and the regulatory role the courts have increasingly played in Brazil, this state judge explained how courts have become the venue for the disadvantaged:

> A citizen has a serious health problem but he does not have the money to buy the medication. He goes to a public hospital; however, the health department tells the patient that the medication he needs is not in the list of the medications provided by the health department. So, what does the patient do? He goes to court and asks that the medication be provided by the health department. The court then tells the administration [state, municipalities, local government] to provide the medication.

These examples illustrate the increasing role of the courts to 'regulate the legality of government behavior' and 'determine significant constitutional and legal values.' The "constitutionalization of frustrations" turned the courts into the "House of Afflictions," a place where all goes to resolve their problems. When constitutional arrangements of the 1988 Constitutional created means for the judiciary to be called upon constitutional rights issues, they gave courts independence trough their regulatory and constitutional interpretation roles. If judicial independence is then the power of courts in remedying the absence of programmatic laws or acts of violations of all these rights, then we can assume that the 1988 Brazilian constitution, through its expansion of constitutional rights, did just that.

The next section explains how the judiciary became the "House of Afflictions." It is through constitutional instruments to remedy violations of constitutional rights that the judiciary has been able to regulate the actions, or inactions, of the other branches of the government and set constitutional standards. It is through the power of judicial review provisions that courts have affirmed its independence.

The Power of Judicial Review

Independent courts, according to Larkins, 'has the power to regulate the legality of government behavior' and determine significant constitutional and legal values.' In the previous section, I argue that the increasing number of constitutional rights have increased the courts regulatory and constitutional role. In this section, I show how in addition to the expansion of rights, courts were given instruments to act in such regulatory and constitutional manner. These remedies allow courts to check on the other branches of the government and often create public policy by determining the

scope of the constitution. This increasing role is played through the power of judicial review. By *power* I do not mean strength or degree of power. Although certainly this is one component of a powerful act or act with power, in this paper I will limit the idea of *power* to the extant in which the 1988 Constitution provided tools so courts could exercise their judicial review.

For the Brazilian courts, and many other Latin American countries, the increasing role of the judiciary to interpret the law is the result of an obscure, complex, and prolix constitution. According to Silva (2004), the Brazilian constitution incentivizes the judicialization of politics because of its large number of provisions. Similarly, Rosenn (1990) argues that the 1988 Brazilian constitution lacks unity, specificity, and clarity. The judiciary must therefore step in to interpret it. In my interviews in Brazil, some lawyers suggested that active participation in interpreting the laws is due to Brazilian highly legalist structure. According to one interviewee, "in the search to find an article to protect us in the constitution, [legislators] are always making it [the constitution] grow bigger." Because of that, the courts are constantly asked to resolve disputes. They are asked to remedy violations by the political parties, omissions of the administration for not providing constitutional guaranteed rights and interpret the laws.

This authorization to review the acts of the executive and the legislative through innumerable remedies, at all levels, federal, state, and local levels is large in the 1988 constitution. These tools comprise *collective writ of security*, *habeas data*, *the direct action of unconstitutionality*, and *unconstitutionality for omission* and *the mandate of injunction*, and *the popular action*.

A close look at some of these remedies shows that the constitution was able to create independent courts through their review power. The use of the courts to resolve public policy concerns, non-enforcement of rights, and political controversies that were historically addressed through the political process are now part of the role of the courts due to constitutional remedies. Courts now become part of the political process, usually by ordering the other branches to act upon their responsibilities or creating public policies by interpreting the law. To understand the context in

which courts have been able to interpret the law in Brazil, I will illustrate with my interviews and courts cases.

All my interviewees stressed that the *direct action of unconstitutionality* has helped position the courts within the larger political system. A district attorney who I interviewed points out a great example of how this constitutional remedy increased the independence of the Brazilian courts. According to my interviewee, the *direct action of unconstitutionality* played a huge role during the former President Fernando Henrique Cardoso's (FHC) government. After Collor's impeachment and failure to recover Brazil's economy, FHC introduced programmatic economic reforms. It was a series of reforms that took an entire year to be developed. But, a number of *direct actions of unconstitutionality* affected more than half of them. My interviewee explains that

> 60% of the reform was considered unconstitutional and only 40% of the reform was considered partially constitutional. That is a lot of power, considering that a political program created after one year of laborious work was destroyed with one decision. Eleven people who were not democratically elected changed an entire economic reform.

Another interviewee also explained the importance of the power of judicial review stating "the power of judicial review has put the courts in the center of the political debate. In Brazil, the police function that courts received with the ability to be constantly telling what the law is is a huge gain for the judiciary." And she continued, "this gain gives courts great independence because the constitution says that they can do that [interpret the laws]. These actions are protected under the law."

Moreover, three of my interviewees explain the role of the judicial review provisions, particularly the *direct actions of unconstitutionality* citing a notorious case about the Public Employees' Pension case.

Although FHC failed to bring about all the desired economic reforms, in 2003, President Lula attempted to reform the Pension system again, enacting an amendment bringing the amount of public employees' pension down to the level of private sector. Prior to 2003, civil servants in Brazil

could retire at the age of 43 with a full salary. Contrary to what happened in the public sector, private sector employees were entitled to only a very limited pension and had to seek private funds to ensure sufficient funds when retired. These attempted reforms would thus greatly reduce the pensions received by public employees upon retirement.

Using the so-called *direct action of unconstitutionality*, national public employees' unions filed a suit challenging the amendment. The legal argument rested on the idea that public employees' had the right to irreversibility of their entitlements. Voting 7-4 to uphold the amendment, the Brazilian Supreme Court argued that "no citizen has such a strong constitutional right as to prohibit the government from imposing a tax on his or her pension that would benefit and maintain the whole pension system" (Babosa 2007).

According to my interviewees, this decision shows two things. First that, "the judiciary has been able to independently exercise its judicial review power, without much interference of the government," as explained by a lawyer. Second, it shows how the judiciary through its judicial review power has gained "a special position in the political scenario," another lawyer explained regarding this decision. But no more than the one of the justices involved in the decision to explain the role of this provisions on the independence of the Brazilian judiciary. Brazilian Supreme Court Chief Justice Joaquim Barbosa, in explaining the significance of this decision in a speech delivered at UCLA School of Law in 2007, acknowledges the courts' power and indispensable role in the political process, stating

> The Public Employees' Pension Case was of great significance. It shed light on the very nature of inequality in Brazil, which in many instances is created and legitimated by legal means. Moreover, the case set an important precedent that has paved the way for further measures to bridge the gap between the haves and the have-nots in my country. **Furthermore, the case shows how the abstract method of review** [*direct action of unconstitutionality*] **also furthers the Court's role in Brazilian politics** (emphasis, p. 192)

It is clear from Chief Justice Barbosa that the remedy prescribed by the Brazilian constitution to redress violations of protected rights is what authorized the Supreme Court to sustain an

entire administration policy and change the economic structure of an entire established system, the Public Employees' Pension system. This decision, only 10 years after the 1988 constitution was promulgated, reveals one thing about the role of the instruments to remedy violations of the vast number of rights addressed in the previous section. First, courts are independent when they gain power through judicial review provisions to regulate government actions and set constitutional standards. In Brazil, constitutional provisions related to judicial independence gave courts the ability to exercise these powers. At least with regard to formal judicial independence, the 1988 Brazilian constitution provides a number of constitutional provisions related to judicial independence. Formally speaking, Brazilian courts have a higher degree of independence. It is in through this provisions that courts have been able to gain independence.

Conclusion

This paper argues that key provisions in the 1988 Constitution ensure Brazilian courts independence. Specifically, constitutional provisions related to fiscal autonomy, length of judgeship, removal procedures, separation of power, accessibility to the courts, and judicial review seem to play a remarkable role in ensuring the Brazilian courts' independence. This argument supports my previous study finding that the relatively level of independence Brazilian courts enjoy is a function of certain constitutional provisions.

Bringing back the definition of judicial independence by Larkins (1996), this study suggests that the constitutional provisions ensure judicial independence in Brazil by doing three things. First, by providing provisions regarding length of judgeship, fiscal autonomy, separation of power, and removal procedures, Brazilian courts could be protected against political manipulation. Impartial judges exist without fear manipulation, threats, or punishment for not ruling in favor of the government or powerful individuals. The Brazilian constitution has created impartial judges by granting them the right to not be removed under arbitrary circumstances. It has also guaranteed impartiality by providing the length of judgeship. Moreover, autonomous courts exist when they

have the power to self-regulate themselves. Through the provision of fiscal autonomy, courts freed courts from any political influence. Finally, the provisions related to judicial review are instrumental to give courts the ability to regulate the legality of the other branches of the government and adjudicate in significant constitutional issues.

The study, however, does not answer one of my interviewees' own question: "who should say what medications to use? The courts?" Future studies are thus needed to understand fully where courts fit into a country's policy-making scheme. There is evidence to suggest that judicial decisions have impacted the other branches' functions. Exploring this reality might help shed light on the role judicial independence plays in emerging democracies, as well as the benefits and concerns of such a role.

The future of research on judicial independence in developing countries is bright. As new countries transition to democracy, studies using developing countries or democracy promotion should address whether the degree of independence and power the judiciary have bee actualized through formal institutions. I find that constitutional structure plays a significant role in determining the role courts will play in democracies. The Brazilian example shows clearly how certain constitutional provisions directly influence the power of courts and judges.

It is up to emerging democracies to decide what the role of their judiciary should play. This role is often times determined by the constitution. This study, for promoters of democracy and constitutional designers, helps them not only to acknowledge the inclusion of these provision in the constitution, but also understand how to draft these provisions so they can have the intended goal: create independent courts.

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Appendix A

1. Among constitutionalists, there is an idea that the constitution has an important role in protecting the judiciary against external influences. Do you believe that the 1988 Constitution play that role? Why or why not? If yes, how so?
2. Which constitutional provisions do you believe are best able to protect judges and courts from external influences? Which do you believe are least able to do so?
3. What forces do you think cause variance in the level of judicial independence judges in your country can exercise? Are there political causes? Economic? Social?
4. What do you think are the factors that guarantee compliance or the observance of formal rules by the other political institutions in your country?
5. Do you think that the overall number of constitutional provisions pertaining to the judiciary influences in the degree of judicial independence courts and judges in your country exercise?
6. Looking at the evolution of your country's constitution, would you say that judicial independence has increased, decreased, or not really changed? Why do you think this?
7. In your estimation, does your country's constitution and the specific provisions in it matter? Why or why not?
8. Why do you think there are discrepancies or variations on the degree of judicial independence judges' exercise?