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The Puzzling Judicial Politics of Latin America

A *Theory of Litigation, Judicial Decisions, and Interbranch Conflict*

Gretchen Helmke and Jeffrey K. Staton

Two decades ago, it was common to claim that though much was understood about legislatures, presidents, and even bureaucratic agencies in comparative politics, judiciaries remained relatively understudied (e.g., Gibson et al. 1998; Epstein and Knight 2000). Fortunately, this claim can no longer be sustained, particularly in Latin America (Kapiszewski and Taylor 2008). Beginning in the mid-1990s, a wave of judicial scholarship has addressed courts across the region. Building on this literature, this chapter takes up three core questions:

- Why does political conflict become judicialized?
- Why do judges challenge or support the government?
- How do politicians react to the choices judges make?

Each of these questions refers to an essential choke point in the legalization process, and just as critically, we argue, each is related to the other (cf. Gauri and Brinks 2008).

The point of departure for our chapter lies in the following observations. Insofar as these three elements of the legalization process are interdependent, existing theories often fail to explain the particular configuration of empirical regularities that marks judicial politics in developing democracies. First, off-the-shelf strategic models wildly underpredict one of the most salient features of interbranch relations in Latin America: the sheer number of politically motivated attacks against the judiciary across the region. Second, for precisely the same reasons, standard theories tend to overpredict judicial prudence and have little to say about the multiple counterexamples of judges who engage in risky and downright bold decision making.

Third, if Latin America's judges are subservient when faced with the threat of attack, conventional strategic accounts have a hard time explaining rising litigation rates in such environments.

In taking stock of where our current theories fall short, we are led to develop an alternative strategic account. We use the results of that account to consider two further questions, which themselves are connected importantly to the core behaviors around which we frame the chapter:

- How do formal institutions influence interbranch conflict?
- What challenges do new courts face as they attempt to build their power?

In so doing, we not only expand our understanding of the interactions among litigants, judges, and politicians but also derive a series of novel implications that speak to fundamental issues of institutional design and the rule of law.

The remainder of the chapter unfolds as follows. We begin by highlighting the gaps between our current theories and a series of stylized facts about judicial politics in Latin America. Next, we recombine many of the standard assumptions into a new game-theoretic model that makes sense of these facts. We then discuss the multiple implications that flow from this new approach and chart a direction for future research on courts in Latin America.

WHAT WE (THINK WE) KNOW ABOUT COURTS IN LATIN AMERICA

Several important theses emerge out of the comparative judicial politics literature. First, scholars have shown that effective courts matter in Latin America and elsewhere. Such institutions are crucial for ensuring state solvency (e.g., North and Weingast 1989; Stasavage 2007), encouraging growth and development (e.g., Acemoglu et al. 2001; Barro 1997), sustaining democratic order (e.g., North et al. 2001), and protecting human rights (e.g., Keith 2002; Hathaway 2007; Powell and Staton 2009). Second, the reigning wisdom continues to emphasize the importance of institutional design. Following Hamilton (1961 [1787]), academics and policy makers around the world contend that judicial independence hinges on installing constitutional protections for judges' tenure, salary, and jurisdiction. Third, and most important for our purposes here, much of the comparative judicial politics literature converges on the view that the key actors – be they politicians, judges, or litigants – are fundamentally strategic.

Consider three key choke points in the legalization process suggested by Gauri and Brinks (2008): individual decisions to file legal complaints, judicial decisions, and government responses. The key lesson is that these choices are not made in isolation; they reflect actors' expectations about each other's reactions. The separation of powers theory, which tends to focus exclusively on the last two choke points, contends that judges are loath to rule against governments whenever they anticipate sanctions for doing so. The central hypothesis from this approach, which has found support

in the literature on Latin American courts, is that judges refrain from handing down antigovernmental decisions when power is unified across the executive and legislative branches (e.g., Ríos-Figueroa 2007; Chávez 2004; see also Chapters 3, 8, and 9). Turning to the first choke point, we might also expect that litigants will act in anticipation of judges' and politicians' behavior. When judges are unreceptive to rights claims or politicians are unwilling to comply, legalization is less likely (Gauri and Brinks 2008, 17; Epp 1998, 11, 23).

Taken together, the conventional wisdom about courts thus implies two idealized worlds. In the first, judges enjoy independence, in the sense that their decisions are respected and political actors are not able to impose sanctions. What would we expect judicial politics to look like in such a scenario? Although we might expect fewer constitutional violations overall (in anticipation of judicial censure), in the event that rights are occasionally violated and judges are receptive to rights claims, we should certainly anticipate that litigants will be more likely to seek relief,[1] that judges will challenge governments, and that legal remedies will be respected.

Now consider an alternative world in which judges lack independence. In such an environment, our theories tell us that judges should be prudent, if not entirely subservient, before the government. And for the very reason that judges are willing to bend to political pressure, the dual implication is that litigants should not seek relief from judges but also that politicians should have little need to carry out punishments. In short, existing theories lead us to expect that litigation should largely be the province of independent judiciaries. They also tell us, however, that sanctions against courts under either scenario will remain essentially unobserved. When governments are incapable of punishing judges, the latter will rule as they see fit. When governments are capable of carrying out punishments, judges will be strategically deferential ex ante, and thus politicians should have little need to sanction them ex post.

But in Latin America (and elsewhere), judicial politics do not always fit so neatly with these expectations. Perhaps most obviously, sanctions against courts abound in the region (Helmke 2005; see also Chapters 8 and 10). All but a handful of countries in the region have entirely escaped judicial crises. In Argentina, Bolivia, and Ecuador, courts have been targeted by nearly every recent democratic government. From Carlos Menem's infamous court-packing scheme in 1990 to Lucio Gutierrez's ill-fated attempt to remove all thirty-one judges on the Ecuadorian Supreme Court in 2005 to Evo Morales's nearly constant harassment of the Bolivian judiciary since his election in 2006, executives routinely concentrate their energies on attacking judges.

In other well-known instances, from Alberto Fujimori's self-coup in Peru in 1992 to Jorge Serrano's unsuccessful effort to stage a *Fujimorazo* the next year in Guatemala

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[1] Whether they are successful in marshaling a challenge is no doubt related to the state's legal support network (e.g., Epp 1998; see also Chapter 6). We do not focus on that problem. Instead we evaluate how litigants might learn about judicial independence and rights-receptive judicial preferences, which commonly operate as necessary conditions for a rights expansion.

to Hugo Chávez's attempts to consolidate his power through constitutional change in 1999, courts have often been the casualty of broader institutional battles. Even in relatively stable countries, judges have come under repeated and highly public threat, if not actual attack. In Chile, Presidents Alywin and Frei both attempted several times to remove Pinochet-era judges from power. In Uruguay, long a bastion of judicial independence in the region, one of the leading presidential candidates in 2009, Jose Mujica, recently had this to say about the court's handling of amnesty: "I want to know the truth, but the judiciary doesn't care a damn. It carries the stench of vengeance from the slut that gave birth to it."[2] Meanwhile, in present-day Honduras, the judiciary has landed at the center of one of the country's worst institutional crises in memory. So far, the court remains intact, but perhaps only because it chose to come down on the winning side of Zelaya's battle with the legislature over this reelection.

Drawing on the Institutional Crises in Latin America data set (Helmke 2009),[3] Figure 11.1a shows the overall distribution of combined threats and attacks against courts by country between 1985 and 2008. Countries with the highest frequency of crises include the usual suspects: Ecuador, Bolivia, Argentina, Venezuela, and Peru (e.g., see Hagopian and Mainwaring 2005). But Chile, which attempted to get rid of Pinochet-era judges, also scores relatively high. In addition, the figure also hints at a kind of bimodality: with very few exceptions, most countries in the region either experience multiple attacks (>2) against their courts or none at all.

Figure 11.1b further reveals that judicial crises continue to occur even as democracies otherwise consolidate. Indeed, the number of crises involving courts jumped nearly three times from just five attacks in the late 1980s to fourteen in the early 1990s. Since 1995, the average number of attempted attacks has been roughly stable at eleven every five years. More worrisome, if we look closer at whether the attack succeeded or failed (not shown in Figure 11.1b), we find that the success rate against courts has actually risen over the last decade. Judicial attacks succeeded just 40 percent of the time from 1995 to 1999; their success rate rose to 57 percent in the first five years of the new millennium, and hit 83 percent from 2005 to 2008. With respect to different types of attacks waged against judiciaries in the region, there is a relatively even split overall in the data between the frequency of individual-centered attacks

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[2] *La Nacion*, September 13, 2009, as reported in the *Latin American Weekly Report*, September 17, 2009.

[3] The Institutional Crises in Latin America data set covers eighteen Latin American countries (Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela) from 1985 (or from the year of the country's most recent transition to democracy) through 2008. Using the *Latin American Weekly Report* and a variety of other sources, the data set identifies and codes systematically all events that meet the following basic criterion: one or more branches of government (executive, legislature, or judiciary) attempted to dissolve, replace, or reduce the powers of another branch of government (executive, legislature, judiciary). With respect to courts, such threats or attacks included all recorded attempts, successful or otherwise, by executives and/or legislatures to impeach, pack, dissolve, or strip the jurisdiction of a country's high court or courts.
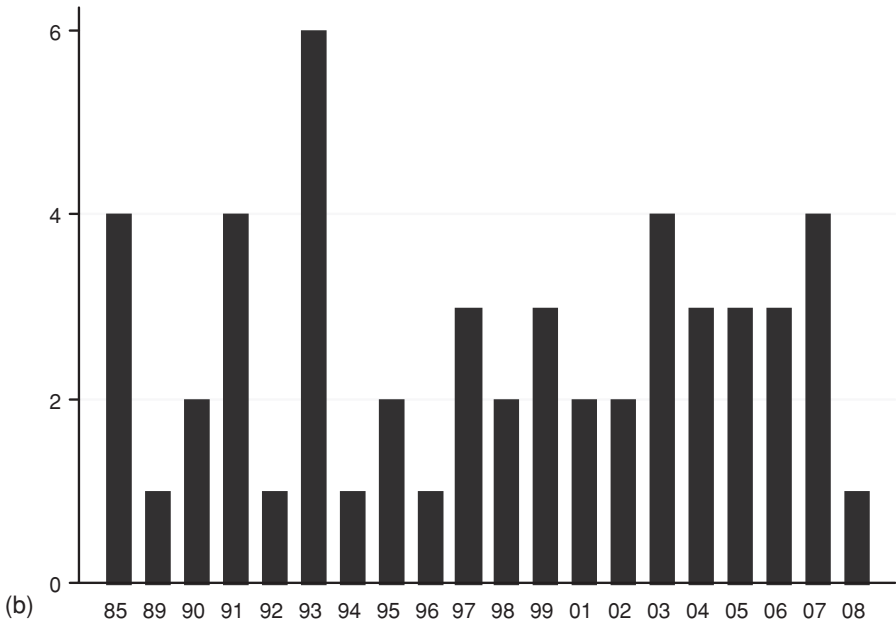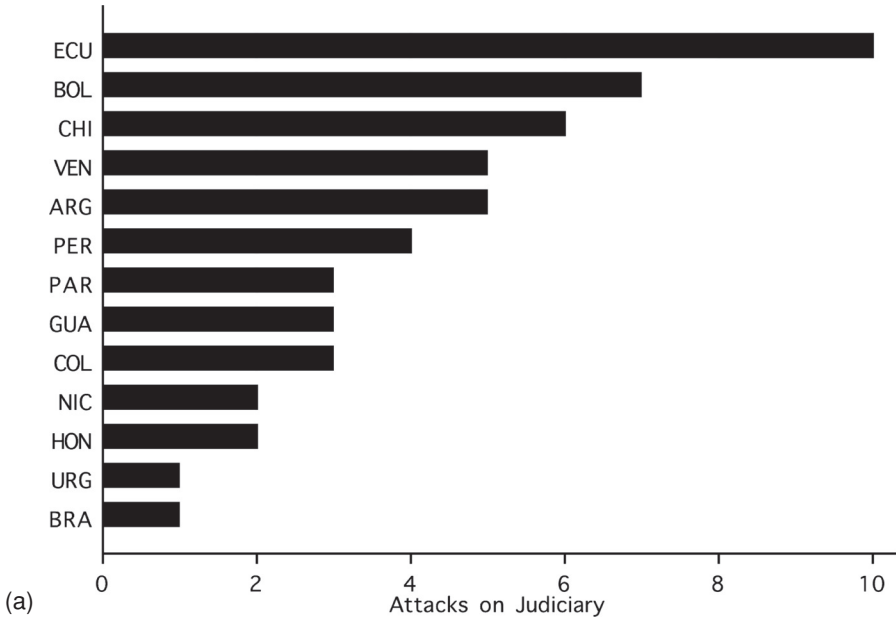
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(a)

(b)

FIGURE 11.1. Political Attacks Against Courts by Country and by Year.

(impeachments or individual resignations under the shadow of impeachment; $n = 22$) and institutional attacks (packing or dissolution; $n = 19$). Although individual attacks against justices have somewhat abated since 2000, institutional attacks have remained relatively constant over the last two decades.

From our current theoretical vantage point, we would expect that whether or not judges are considered independent, such crises should simply not occur. In the world of pure theory, we should not observe Chilean politicians threatening judges with sanctions they cannot carry out. Just as important, Ecuadorian, Bolivian, or Venezuelan politicians should not have to waste their time revamping courts, provided that judges are strategically deferential. This last observation, however, brings us to the next puzzle. Though certainly there is no shortage of compliant judges in Latin America (e.g., see Verner 1984; Larkins 1998; Hilbink 2007), numerous counterexamples suggest that this hardly captures the full story of judicial behavior in the region.

Witness the following examples: five years after the 1992 *autogolpe* in Peru, which leveled the legislature and the judiciary, the majority of justices on the newly reconstituted constitutional tribunal refused to allow Alberto Fujimori to change the constitution to run for a third term. Turning to Paraguay, in 1999, the supreme court willingly stepped into the middle of a political firestorm with newly elected president Raul Cubas over his decision to commute the sentence of his political mentor, General Oviedo, held on charges of sedition (Pérez-Liñán 2007, 30). Or recall the executive-judicial battle that ensued following Chávez's quick return to power after the 2002 coup attempt. In that instance, the Venezuelan Supreme Tribunal openly defied the government by dropping charges against the military officers allegedly involved in the failed coup, inviting numerous recriminations from the government and its allies. More recently still, President Correa's efforts to reform the Ecuadorian constitution in 2007 set him on a collision course with congress. Later that year, the constitutional tribunal blatantly defied Correa and demanded that the majority of legislators be reinstated.

As one might expect, in most of these instances, judges did not fare particularly well. Although Cubas backed down in Paraguay and the court remained intact through the battle (only to come under attack again in 2003), in each of the other instances, judges paid a heavy price. Judicial impeachments were immediately carried out in Peru in 1997, and the constitutional tribunal was left inquorate.[4] In Venezuela, the government harassed individual judges, such as Justice Arrieche, whom the government claimed had presented false credentials during his judicial appointment hearings (Taylor 2009). In 2004, facing an important referendum, the Chávez government both passed a law that expanded the size of the court and moved to impeach several sitting justices (Taylor 2009). In Ecuador, Correa's Constituent

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[4] Although, interestingly, several of the judges who were impeached in 1997 were later reinstated after Fujimori fled the country in 2000.

Assembly, which concluded its work in July 2008, gave the government a green light to remake the courts.

Again, from a theoretical standpoint, what is striking is not that judges were punished for their defiance of the government but that they were willing to engage in such risky behavior at all. Were such events playing out in Costa Rica, Uruguay, or even present-day Mexico, we might imagine that otherwise independent judges had simply gone too far. Were they taking place in environments where executive-judicial relations were untested, such as Russia under Yeltsin, we might imagine that judges did not understand the rules of the game. But these risky decisions took place in contexts where judges faced clear threats – indeed, sometimes in places where judges had already been punished for similar transgressions – and thus where existing theories tell us that judges should have been the most likely to act prudently.

Finally, what about the initial choices made by litigants to bring cases to court? Unfortunately, we lack systematic cross-national data on legal mobilization to be able to offer any comprehensive overview, though it appears that litigation is generally increasing in Latin America (Stotzky 1993), as in many other parts of the world (Tate and Vallinder 1995; also see Gauri and Brinks 2008). According to reports produced by the World Bank, USAID, and other nongovernmental agencies, there is substantial and growing demand for judicial services throughout the region (e.g., see Dakolias 1996; Hammergren 2007).[5] Certainly Bruce M. Wilson (Chapter 2) provides evidence that litigation has risen in Costa Rica just along the lines that current theories would predict; that is, the judicialization of politics occurs as long as courts are both relatively independent and receptive to rights-based claims. Brazil, it would seem, offers another case in point. Since the transition to democracy, the number of cases in the judiciary overall has gone from 339,000 in 1989 to 2.1 million in 2001, although there is some evidence that the trend is now being reversed (cited in Taylor 2008, 38). Yet more problematic from the standpoint of extant strategic theories is that the explosion of litigation has not been solely confined to relatively independent judiciaries. To cite just one example, between 1974 and 1984, the average number of cases entering the Argentinean Supreme Court was roughly four thousand. By 1997, following numerous attacks on the courts, the figure had skyrocketed to thirty-six thousand cases (Foro de Estudios sobre la Administracion de Justicia 1988; Molinelli et al., as cited in Helmke 2005).

Taken one by one, each set of facts – on attacks, litigation, or even on decision making – is not particularly surprising. That Latin American politicians manipulate courts is hardly news, though certainly documenting the scope and frequency of

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[5] Hammergren (2007, 72) acknowledges that this is the leading wisdom of the policy community, but she goes on to argue that despite the problems of access to justice and the case backlogs that plague the region, demands placed on Latin American judges are not particularly egregious. Compared to advanced industrial democracies, average annual filings per judge are relatively low (ranging from 136 in Honduras up to 1,357 in Brazil, as compared to 1,992 in the U.S. District of Columbia). Still, she does not dispute the basic point that demands on Latin American courts are generally increasing.

attacks is. Problems of access to justice and a growing case backlog that suggest rising demand for judicial services are widely discussed in policy-making circles. Likewise, the imperfect but also sometimes surprising nature of checks and balances in the region has been fodder for a growing number of judicial politics scholars over the last decade.

Yet, if we put the facts together and try to interpret them through the lens of existing theories, the picture is suddenly much less clear. Judicial crises in Latin America may be relatively commonplace, but as we have argued, most strategic models of interbranch relations tell us that such attacks should remain strictly off the equilibrium path. Likewise, to the extent that ruling against the government is often highly risky for judges, most existing theories cannot explain why – short of martyrdom, misinformation, or the downfall of the government – any Latin American judge under the shadow of attack would ever check politicians. Finally, if judges are routinely attacked and thus prone to bend to the government of the day, how can we account for the growing demand for judicial relief that appears to be occurring throughout the region? How, in short, can we make sense of yet a third possible scenario in which politically motivated attacks against the judiciary neither seem to dissuade judges from handing down bold decisions nor keep litigants from demanding their day in court?

A THEORY OF INTERBRANCH CLASHES

Motivated by these empirical puzzles, the remainder of the chapter is devoted to developing a unified theory of these behaviors. In so doing, we make use of the tools of game theory, which allows us to capture clearly the conditions under which interbranch clashes are likely to occur. At the same time, we also gain a much richer understanding of why and when the particular clusters of litigant and judicial behaviors that we identify earlier emerge.

Our theory recombines four critical features of previous arguments that have advanced the literature on interbranch relations and the rule of law. First, similar to other formal models of judicial politics (e.g., Carrubba 2009; Stephenson 2004), we explore interbranch conflict within the context of strategic interaction in an uncertain world. Second, we take seriously the idea that judges might trade off control over immediate policy outcomes to benefit a long-run strategy of institution building (e.g. Carrubba 2009; Ginsburg 2003), but we also consider how actors might reduce uncertainty via repeat play and how this process influences the incentives of actors to reveal private information about their preferences. Third, following the standard approach in judicial politics, we assume that judges are guided by preferences over public policy outcomes (e.g., Segal and Spaeth 2002) but also care about institutional interests (Baum 1997). There are (at least) two ways in which this might be so. The first, which we believe is relatively uncontroversial, is that judges value their seats (Helmke 2005). This assumption can be motivated in

Government adopts agenda	Litigant 1 moves	(To court)	Court issues decision	(Vetoes)	Government responds	(Defies)	Public reaction

(Avoids court)　　　　　　　(Upholds)　　　　　　　(Accepts)

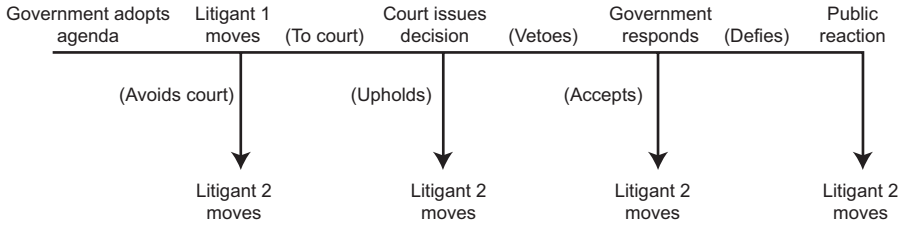| Litigant 2 moves	Litigant 2 moves	Litigant 2 moves	Litigant 2 moves

FIGURE 11.2. Sequence of Actions.

a number of ways, including the obvious interest in their salaries and other perks, prestige (Ginsburg 2003), or interest in policy (Epstein and Knight 1998). The second institutional interest involves simply being accessed. Again, judges might value being on a prestigious court or making policy, but it is hard to imagine how a court could be prestigious or affect policy outcomes if it is never used (Staton 2007).

Players and Actions

Our theory builds on Vanberg's (2005) model of interbranch relations, and we use his notation where appropriate. As we discuss subsequently, however, we make three critical additions to the Vanberg model: (1) litigants must file complaints to trigger judicial review, (2) judicial preferences are expanded, and (3) play is repeated. There are four players: a government, a court, and two potential litigants. Figure 11.2 summarizes the sequence of play. The government moves first by implementing an agenda (p_1, p_2), which includes a pair of public policies.[6] If it does not, the game ends. Each policy in the agenda imposes a burden on the two potential litigants, against which we assume there is a colorable constitutional argument. Litigants bear these burdens if the policy continues to be implemented, whether they do not seek judicial relief, or if they seek relief but their petition is denied, or if their petition is accepted but governments refuse to implement a decision voiding the policy.[7]

Having observed the government's agenda, the first litigant may seek a court order enjoining the government from implementing the policy. If asked, the court reviews the litigant's claim and may find the policy constitutional or not. If the court declares the policy unconstitutional, it requests a return to the status quo. In this case, the government must choose whether to accept the decision. If it does, it gives

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[6] In a parliamentary system, we might alternatively say that the government enacts its legislative agenda. In a presidential system, we might imagine two executive orders, or frankly, its own legislative agenda, which is adopted.

[7] To simplify only slightly, we match policies and burdens with litigants so that the burden of the first policy falls on the first litigant exclusively and the burden of the second policy falls on the second litigant exclusively. Furthermore, we assume that there is a temporal order to these policies such that the first litigant may seek legal redress prior to the second.

up its policy, p_1, and the first litigant's burden is removed. If the government does not accept the decision, it continues to implement its policy and seeks to replace the court with partisans – judges whom it knows share its preferences perfectly.[8] Next, as in Vanberg (2005) and Stephenson (2004), in the event that the government defies the court, it may confront a public backlash, in which case the government will accept the court's decision. The probability that such a backlash emerges is q.[9] Finally, the second litigant may decide to go to court after the first policy conflict is fully resolved. The sequence then repeats, and play ends when the second policy has been fully resolved.

Preferences and Information Structure

The government derives value out of the implementation of its agenda, $\alpha > 0$, though it can value differently each element of the agenda. Specifically, the government places a weight ϕ on p_1, where $0 < \phi < 1$, so that the value of the first policy in the agenda is $\alpha\phi$ and the value of the second is $\alpha(1 - \phi)$. It pays costs for all other actions. Thus to enact its agenda, the government pays $\underline{\varepsilon}_g : \alpha > \underline{\varepsilon}_g > 0$, which can reflect the opportunity costs of pursuing the agenda or simply the transaction costs associated with governing. The cost of attempting to purge the court is $\bar{\varepsilon}_g > 0$, where $\bar{\varepsilon}_g > \underline{\varepsilon}_g$.[10] From the government's perspective, this parameter can reflect a host of factors developed in the literature that increase the costs of purging a court, including, most naturally, the fragmentation of government or formal institutions that increase the difficulty of removing judges. Finally, the cost of a public backlash against its attack is $\beta > 0$. The government knows the probability of a public backlash and the probability that the court's preferences are limited or expansive, as we define later. If the court is what we will call partisan, again, as defined later, the government knows it for sure.

Litigant preferences depend on the burdens they ultimately bear and on the costs they pay to access the legal system. We assume that each litigant's utility is independent of the other. The burdens associated with each policy in the

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[8] We collapse simple noncompliance and a judicial purge into one choice. An extension of this model might distinguish between the two choices. The obvious advantage of that setup is that it would allow us to consider why a government might choose noncompliance over a purge. Insofar as there might be judicial incentive to avoid either, the central tension that we analyze subsequently would remain.

[9] In particular, there are two states of the world, one in which a backlash will emerge and one in which it will not. For each policy, there is an independent draw from a Bernoulli distribution over the set of states, where the probability of drawing a public backlash is q_i for policies $i = 1, 2$. Allowing q to vary across policies highlights that we do not necessarily assume that the backlash is a mere function of diffuse public support (or legitimacy).

[10] This ensures that the transaction costs of packing a court are larger than the costs of implementing the policy agenda. Substantively, the logic is that if it is costly to implement an agenda, it must be costly to purge a court.

government's agenda impose a cost on litigants, $b_{ij} > 0$ for $i \in \{H, L\}$, $j = 1, 2$, where $b_{Hj} > b_{Lj}$, so that some burdens are worse than others for each litigant.[11] Litigants bear these costs if the policy continues to be implemented. Litigants also must pay an access cost $\varepsilon_I > 0$ to get into court. The litigants know the probability of a public backlash, and they know the probability that a court is of a certain type.

The last building block involves specifying three types of courts: expansive, limited, and partisan. With probability n, the court has expansive preferences, by which we mean that it shares the litigants' costs associated with the policy burdens. Such a court will pay b_{ij} if the policy is upheld or if the decision invalidating it is successfully defied.[12] With probability λ, the court's preferences are limited such that it will pay b_{Hj} only if a high burden is imposed and implemented; otherwise, it pays zero. Finally, it is possible that the court is simply an extension of the sitting government, a partisan court. The probability that a partisan court is drawn is $1 - \eta - \lambda$. A partisan court shares the policy preferences of the government precisely.

As does Vanberg, we further assume that all court types pay a cost $c > 0$ in the event that they are successfully purged. This parameter may be interpreted to represent the value judges lose from removal, both in terms of lost salary and in terms of other less quantifiable benefits associated with being a member of the court. We depart from Vanberg, however, in further assuming that the expansive and limited court types derive some additional value, $\upsilon > 0$, from being accessed by litigants. This final assumption reflects our effort to model a judicial interest in being relevant to the political landscape of its country – that is, being able to play a meaningful role in the control over the constitutional order.

CLASHING EQUILIBRIUM

There are a number of substantively interesting cases in the model; however, in this chapter, we will focus on characterizing the equilibrium in which the profile of strategies matches the puzzling combination of behavior around which our discussion has been framed (please see appendix for the proof). In short, we provide an answer to the question, what has to be true about the various parameters we lay out in the preceding discussion for judges to invite political conflict, for governments to enter into such conflict, and for litigants to nevertheless use courts in such

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[11] Importantly, though $b_{Hj} > b_{Lj}$, we do not make any assumption about the actual value of b_{Lj} to the litigants – low and high cost burdens are only low and high relative to each other. It may be that a low cost burden is quite high. The function of the ordering is to help us identify differences between court types, as we discuss later.

[12] This need not be the case precisely. The key is that some court type needs to have preferences that converge with the government or not so that there is some tension between judges and politicians.

environments? We begin by stating formally the conditions under which this combination of behavior can be part of an equilibrium.[13]

Proposition 1: *Under conditions of uncertainty about judicial preferences and successful public backlashes, specifically, for*

$$q_2: \max\left\{\frac{\varepsilon_l}{b_L}, \frac{c}{c+b_L}\right\} < q_2 < \frac{\alpha(1-\phi)-\bar{\varepsilon}_g}{\alpha+\beta+\phi},$$

$$q_1: \frac{c-b_L}{q_2(c+b_L)+\upsilon} < q_1 < \min\left\{\frac{\alpha\,\phi-\bar{\varepsilon}_g}{\alpha\,\phi+\beta}, \frac{c}{c+\upsilon}\right\}, \quad \text{and}$$

$$\eta: \frac{\varepsilon_l}{q_1 b_L} < \eta < \frac{\alpha-_g}{\bar{\varepsilon}_g+q_1(\bar{\varepsilon}_g+\alpha\,\phi+\beta)+q_1 q_2(\alpha-\alpha\,\phi-\beta)},$$

the following profile of strategies are part of a Perfect Bayesian equilibrium (PBE):

Government:	Enact policy agenda; Attack court if policy is struck down
Litigant₁:	Go to court
Litigant₂:	Go to court if court strikes p_1 and survives; Avoid court if court upholds p_1 or court is purged
Court:	
Partisan:	Uphold both policies
Limited:	Uphold both policies
Expansive:	Strike both policies

Here we lay out in ordinary language the basic logic behind the equilibrium and the conditions that support it. The essential idea is that governments and litigants learn critical information about the court's type from observing its decisions. This

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[13] Our solution concept is a Perfect Bayesian equilibrium (PBE), which requires a profile of sequentially rational strategies and a profile of beliefs that are consistent with those strategies and determined via Bayes's rule whenever possible (Osborne and Rubenstein 1994, 233). We have elected to keep the model as flexible as possible in terms of the burdens the policies induce; however, in the present case, we assume that each policy in the agenda imposes b_L on the litigants. This assumption influences the precise learning that transpires along the equilibrium path but does not affect materially the empirical implications we discuss later. Assuming that both burdens are high places the limited court type in the same position as the expansive court in the current case. This can influence the inferences litigants draw if a policy is struck down. They may still be uncertain about the precise court type after such a decision; however, there is no impact on the comparative statics we discuss subsequently. An interesting alternative case involves a policy that induces a low burden that is followed by a policy that carries a high burden. In this case, governments might be willing to attack a limited court that has just upheld its policy, in the expectation that it might strike down the more burdensome policy on the future docket. A limited court in this circumstance cannot gain by strategically challenging the policy, so its behavior is unaffected. We assume that beliefs are formed from information sets that should not be reached in equilibrium via passive conjecture (Rasmusen 2001, 142–145).

learning process creates a difficult trade-off for the court, the resolution of which can induce precisely the puzzling set of behaviors under analysis.

Starting with the government enacting its policy agenda and the litigant challenging, if the court is either the limited or partisan type, it will uphold the policy. Having observed this decision, the second litigant concludes that the court is not the expansive type, and as long as the burden in the second period is relatively low, b_L, he or she knows that neither of the possible court types would support his or her claim. Consequently, the second litigant does not challenge the second policy and play ends. In contrast, if the court strikes down the first policy, that decision reveals it to be the expansive type, and both the government and the second litigant observe this. Knowing the court's type and knowing that such a court would challenge the second policy, the government attacks, seeking to pack the court with partisans. In the event that the court is successfully purged, the second litigant, having learned that the court is now partisan, again refuses to file a complaint. If, however, the court survives the first attack, the second litigant will file, realizing that the court is expansive, that it will support his or her claim, and that it will risk being attacked for doing so.

The logic of this equilibrium is consistent with existing theories but also sheds light on several novel aspects of judicial politics. As in the original Vanberg model, the players' imperfect beliefs about core features of the interaction are crucial to sustaining a clashing equilibrium. Consider first the conditions on the q_i, the probabilities of a public backlash following an attack on the court. Knowing that an expansive court will be attacked for its decision in support of the litigants' claims, the likelihood of a backlash must be *sufficiently high* to provide incentives for the expansive court to strike both policies[14] and for the second litigant to seek legal redress.[15] But at the same time, the likelihood of a backlash cannot be too high, lest the government would simply accept an unfavorable decision.[16] What is more, the first-period probability of a backlash cannot be too high or else the limited court

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[14] In the first period, a decision striking down the decision is, obviously, potentially costly for the expansive court, but it provides an opportunity to remove a distasteful policy in the first period, future litigant access, and the corresponding opportunity to fully dispose of the government's agenda. Specifically, the expansive court will strike if $q_1 > q_{1\min} \equiv \frac{c-b_L}{q_2(c+b_L)+v}$ $q_1 > q_{1\min} \equiv (c-b_L)/[q_2(c+b_L)+v]$. In the second period, the gain from striking down only relates to the policy benefits because there are no future litigants to attract. Thus, to strike down, we must have $q_2 > q_{2\min} \equiv c/(c+b_L)$.

[15] In the second period, if the court has survived an attack, the litigant knows its type. In this case, the litigant simply balances the costs of filing against those associated with the burden, weighted by the probability of a successful attack. Thus the litigant will file if and only if $q > q_{2\min'} \equiv \frac{\varepsilon_l}{b_L} q > q_{2\min'} \equiv \varepsilon_l/b_L$.

[16] In the first period, as long as $q_1 < q_{1\max} \equiv \frac{\alpha\phi - \bar\varepsilon_g}{\alpha\phi+\beta}$ $q_1 < q_{1\max} \equiv (\alpha\phi - \bar\varepsilon_g)/(\alpha\phi+\beta)$, the government will attack. Clearly this condition is harder to meet as the costs of purging and a backlash increase but is easier to meet as the value of (and the weight on) the first policy increases. In the second period, we need $q_2 < q_{2\max} \equiv [\alpha(1-\phi) - \bar\varepsilon_g]/(\alpha+\beta+\phi)$.

Probability Court has Expansive Preferences (η)
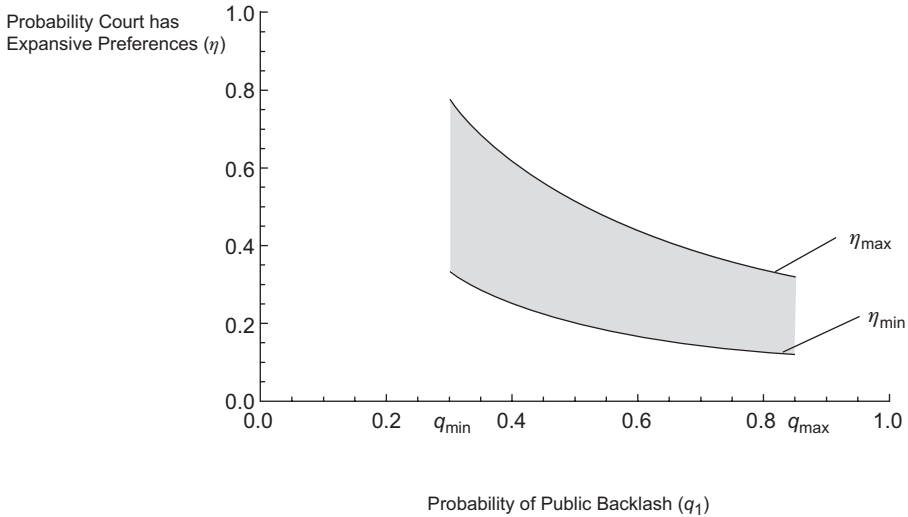
Probability of Public Backlash (q_1)

FIGURE 11.3. Location of Clashing Equilibrium. *Note:* Displays the location of the clashing equilibrium across values of q_1 and η. The equilibrium can be sustained only for probabilities of backlash that fall between critical values of q. If this probability is too low, courts are deferential. If it is too high, governments accept unfavorable decisions. Finally, we must also have a sufficiently high η to induce the first litigant to file a complaint, but it cannot be too high, lest the government will not enact its agenda in the first place.

type would have an incentive to strategically strike down the policy in the hope of inducing the second litigant to seek access in the second period.[17]

Uncertainty about the court's type also helps ensure the clash. Specifically, the probability that the court is the expansive type must be sufficiently large to induce the first litigant to seek redress; however, this probability cannot be too high or else the government will refuse to adopt its policy agenda, saving the transaction costs of enactment.[18] Figure 11.3, which depicts the clashing equilibrium for different values of the public backlash and expansive court probabilities, summarizes the role of uncertainty.[19] The main point is that clashing behavior is most likely to emerge under conditions of relatively high uncertainty, both about the court's preferences over policy outcomes and about the likely public reactions to government defiance.

[17] Specifically, we must have $q_1 < q_{1\min'} \equiv \frac{c}{c+\upsilon} q_1 < q_{1\min'} \equiv c/(c+\upsilon)$ to ensure that the limited court upholds the policy. Clearly this condition is harder to meet as the value of use increases.

[18] For the first litigant to file, we need $\eta > \eta_{\min} \equiv \varepsilon_l / q_1 b_L$. For the government to enact its agenda, we need $\eta < \eta_{\max} \equiv (\alpha - \underline{\varepsilon}_g)/[\bar{\varepsilon}_g + q_1(\bar{\varepsilon}_g + \alpha\phi + \beta) + q_1 q_2(\alpha - \alpha\beta - \beta)]$.

[19] For ease of presentation, we assume that Condition 1 is met. Precisely, the equilibrium resides in a kind of rhombohedron-shaped region in the center of the three-dimensional parameter space. We do not trace out the exact shape of this object.

As we alluded to earlier, one of the analytical advantages of adding a temporal dimension to the basic model is to show how players reduce their uncertainty as they observe each others' behavior. The court's decision in the first period provides essential information about its preferences, both to future litigants and to the government. Because only the expansive court would strike the first policy, a decision to do so provides a clear signal of its type. Yet a decision upholding the first policy provides highly useful information, as well. It suggests that the court is either partisan or limited, and because the limited court type does not view the burden associated with the second policy as sufficiently large to warrant a veto, future litigants can safely conclude that judicializing the conflict will only result in lost costs of access.

The way in which information is revealed in equilibrium thus induces a fundamental trade-off courts will confront insofar as their preferences differ materially from those of sitting governments. Consider the expansive court's challenge in the first period. If it upholds the policy, it will safely avoid the purge, but it will have to accept that the government's agenda will continue to be implemented. This is so because (1) the court explicitly endorses the first policy and (2) the decision communicates inaccurate information about its preferences, which causes the second litigant to avoid court, thereby leaving the second policy in effect. Furthermore, deference gives up whatever benefit the court obtains simply from being asked to resolve the conflict: its institutional value of being used.

As a result, the expansive court gives up a great deal via strategic deference. On the other hand, sincerely challenging the first policy communicates correct information about its preferences, which results in two consequences. It induces the litigant to activate its jurisdiction in the second period, a good end in and of itself, and by bringing the second litigant to court, the court crafts an opportunity to influence the second policy. In the clashing equilibrium, the court opts to challenge the government's agenda, which drives interbranch conflict. Needless to say, courts that diverge in preferences from governments need not always evaluate the core trade-off over their seats, policy, and prestige in the way the expansive court does in the clashing equilibrium. In some cases, strategic deference will be optimal, even for the expansive court, and in some cases, activism will be met by government acceptance. Of course, those are the very theoretical outcomes we understand well from existing models.

Summary

So far, we have summarized a model that identifies conditions under which judges are not deferential in the face of certain conflict, in which governments attack these judges, and in which potential litigants nevertheless seek redress. Although fundamental uncertainties about judicial preferences and the likelihood of a successful public backlash are at the core of the explanation, the model also suggests that uncertainty is reduced greatly in equilibrium. It is the judicial interest in signaling accurately its preferences that both reduces uncertainty and ultimately drives the

interbranch clash. In short, maximizing control over future policy conflicts and enhancing judicial prestige can induce judges to invite conflict.

BROADER IMPLICATIONS: INSTITUTIONAL REFORM AND LEGITIMACY

We are now in a position to consider some broader counterintuitive implications that flow from our theoretical framework. The first concerns institutional reform, and the second revolves around the ability of judges to construct effective courts.

Institutional Reform

Whether the goal of judicial reform is to solve a credible commitment problem (e.g., North and Weingast 1989), to provide insurance against a loss in political power (e.g., Ginsburg 2003), or to create a mechanism for resolving interjurisdictional disputes in a federal system (e.g., Magaloni 2003), our reform models are predicated on knowing the effects of institutions on behavior. Typically, however, salient institutional effects are assumed, not analyzed, and our model questions whether all institutional influences are as straightforward as commonly assumed. What is more, the empirical literature has suggested highly mixed results testing the relationship between de jure and de facto judicial independence (Herron and Randazzo 2003; La Porta et al. 2004). We believe that our model can shed some light on these results.

Our model incorporates the idea that judges can have two kinds of institutional preferences. Naturally, they can value their seat, or otherwise put, they can pay a cost for being removed (c). But they can also value their relevance to the shaping of constitutional meaning, which we model as a benefit of being accessed (v). This suggests the following proposition:

Proposition 2: *Institutional preferences create competing pressures for interbranch conflict.*

Figure 11.4a replicates the information in Figure 11.3, locating the window within which the clashing equilibrium can be sustained. Observe what happens to the clashing equilibrium window as we increase the relevant parameters. As the court's cost of the purge increases, the expansive court's threshold (q_{min}) shifts to the right, as depicted in Figure 11.4b, so that the court must be increasingly certain that the public will successfully push back against the government to strike down the first policy. Thus, reflecting the logic of a standard separation of powers model, judges are prudent to avoid losing their seats, and they should be increasingly prudent as the seat itself becomes increasingly valuable. But now consider the effect of the other institutional parameter. Figure 11.4c, which depicts the implications of increasing the value of reviewing future cases, suggests precisely the opposite effect. As the value of resolving future cases increases (i.e., v gets larger) and the utility associated with inducing greater litigant demand for relief rises, the clashing equilibrium window expands.
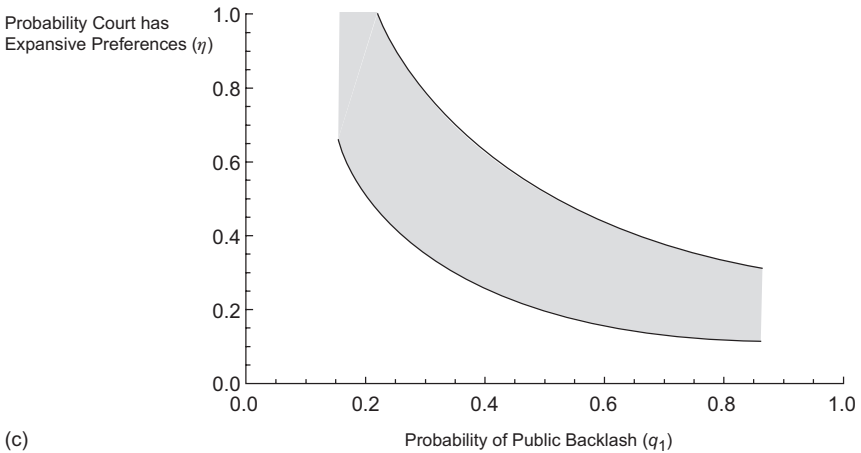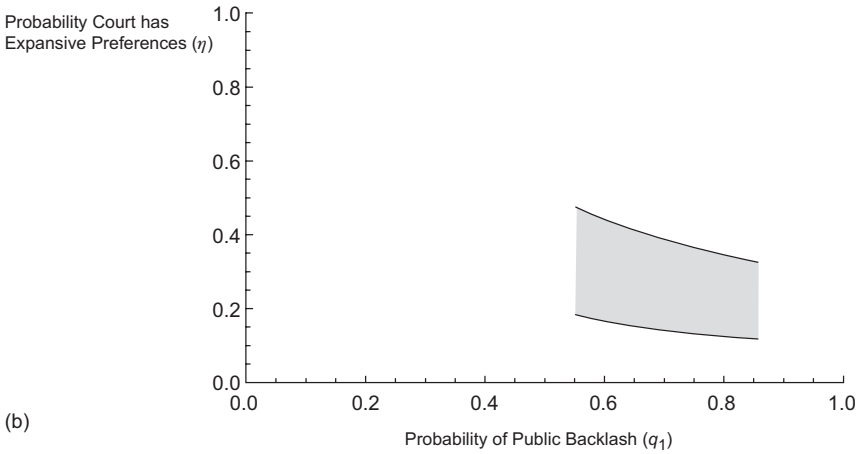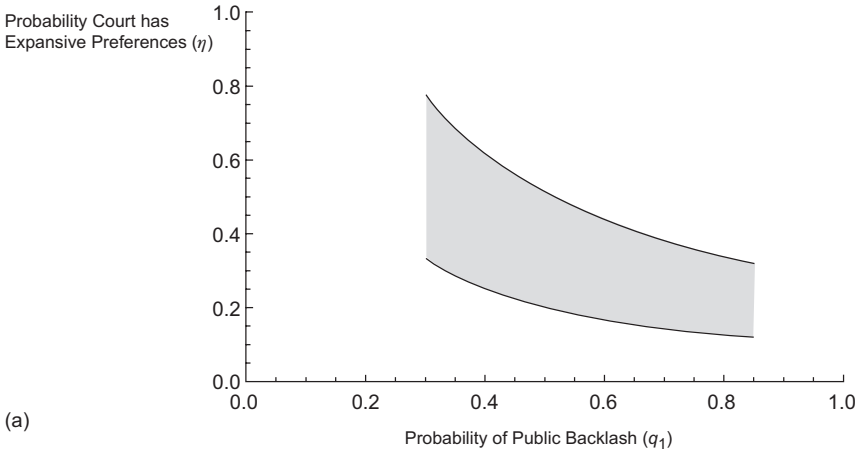
FIGURE 11.4. *a*, Location of Clashing Equilibrium; *b*, Location of Clashing Equilibrium: Increased Judicial Cost of Purge (c); *c*, Location of Clashing Equilibrium: Increased Value of Access (υ).

The court is willing to strike down the first policy for lower and lower probabilities of public backlash. Quite obviously, this change increases the possibility of conflict. It is worth, then, considering carefully the implications of this result for institutional design.

A standard approach to enhancing external judicial independence involves increasing judicial tenure and expanding jurisdiction (see Chapter 1). The logic appears transparent. By ensuring that judges enjoy their seats for longer periods, we insulate them from the need to curry favor with either parties who have control over their tenure or parties who might hire them once off the bench. But consider what our model implies about increased tenure. On the one hand, longer tenure can increase the value of a seat (i.e., increase the cost of a purge, c) by increasing the salary stream that will be lost and the years of prestige associated with the position. Yet increased tenure might also increase the value of hearing future cases (i.e., v). Insofar as being accessed influences the prestige of the court, access should be valued more by judges who will sit on the court longer. Like tenure, expanding jurisdiction or enhancing the legal effects of judicial decisions (e.g., creating *erga omnes* effects) may also induce two competing effects. By creating a court that is empowered to resolve ever more important questions in ways that have greater implications for future policy debates, reformers at once increase the value of a seat and the value of being accessed – and again, these changes have competing effects on interbranch conflict.

The bottom line from an institutional design perspective is that unless reformers know how much potential appointees will value seats and litigant access, predicted behavioral changes associated with changes in judicial tenure, jurisdiction, or legal effects are indeterminate. What is worse, neither effect is unambiguously positive from the perspective of the rule of law. By increasing the value of the seat, we increase incentives for strategic judicial deference. By increasing the value of access, we increase the possibility of sincere judicial decision making but at the expense of risking interbranch conflict. For these reasons, even if tenure rules might reduce conflict, we surely cannot say that they necessarily advance the rule of law. The cost of a reduction in conflict is a lowered constraint on the state.

Of course, in our model, some institutional changes will continue to influence conflict in ways assumed by the reform literature. Consider Figure 11.5, which again shows the clashing equilibrium window. The shaded region shows how this window shrinks as the costs of purging the court increase. As the figure suggests, there are two consequences of this change. The first is to lower the government's public backlash threshold such that the government will accept an unfavorable decision for a smaller and smaller probability of a successful public backlash. Simultaneously, as the costs of a purge increase, and it becomes more difficult to ensure the continuation of its agenda, the government becomes less and less likely to enact the agenda in the first place. Institutions that make it necessary for governments to negotiate with minorities on the appointment or removal of judges induce precisely this effect
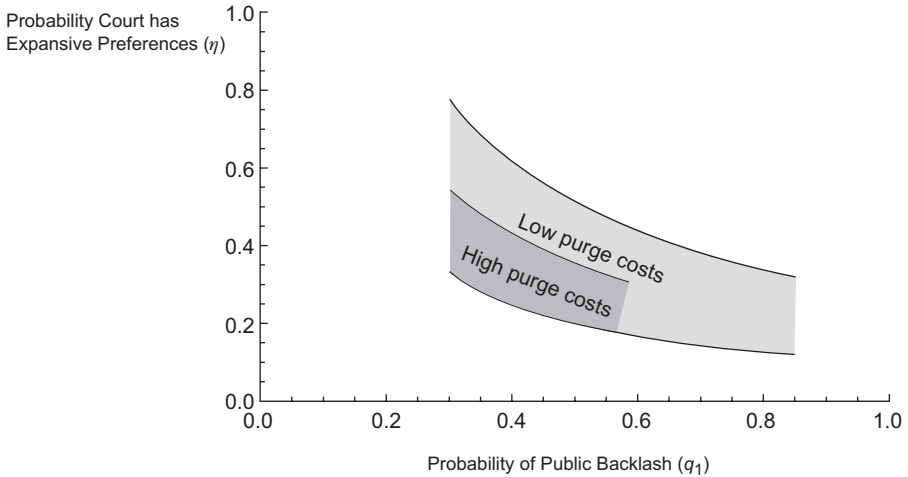
Probability Court has Expansive Preferences (η)

Probability of Public Backlash (q_1)

FIGURE 11.5. Clashing Equilibrium as Government Costs of Purge Increase. *Note*: Displays the location of the clashing equilibrium for low and high values of ε_g, the cost of purging the court. As these costs increase, the government will accept unfavorable decisions for ever lower backlash probabilities and will refuse to enact the agenda even as the probability of an expansive court decreases.

(again, see Chapter 8). Unlike reforms to jurisdiction, tenure, or legal effects, the consequences of removal or appointment reform unambiguously advance de facto judicial authority by making it more likely that governments will accept unfavorable resolutions and less likely that they will enact unconstitutional policies in the first place. For this reason, it may be advisable to offset jurisdictional or tenure changes with corresponding changes in appointment and removal powers. Reform along one institutional dimension can place pressure on other dimensions.

Our discussion carries over into how we conduct research in comparative law as well. Given these competing effects on behavior, we cannot be sure which of the two competing pressures will outweigh the other. For this reason, if we attempt to test claims about the effects of de jure institutions on behavior armed only with field data on formal rules and behavior, the model suggests that we might observe positive, negative, or null effects on both strategic judicial deference and interbranch conflict. Fortunately, we are also guided by a rough sense of how to evaluate what we do observe. Imagine that we observe judicial purges clustering around states with low levels of de jure judicial independence. If we are right, and there are competing yet unobserved influences on judicial behavior induced by increasing tenure, then we likely have underestimated the effects of both institutional preferences. We may have estimated a larger negative effect of tenure if we could be sure that courts care nothing about attracting future litigants, and we may have estimated a positive effect if we could be sure that judges care nothing for their future streams of income and other sorts of professional prestige unrelated to increasing demand for their services.

This would not necessarily mean that formal institutions are irrelevant to judicial behavior or to crises more generally. They can matter greatly. It is just that we may not pick up the right effects in field data because of the competing incentives problem. For this reason, we believe that the larger point is that our field needs to consider the applicability of lab experiments for the purpose of testing theoretical propositions. In the laboratory, we can get control over the competing incentives our institutions induce – and we may even begin to learn about how judges might evaluate these competing pressures on balance.

Endogenous Construction of Judicial Power

If a deep commitment to judicial review is critical to the ability of courts to command the respect of elected officials, then judges have a strong incentive to build public support (e.g., Carrubba 2009; Gibson et al. 1998). And we know that they engage in a number of activities designed, in principle at least, to build legitimacy (e.g., Staton, 2010). Yet, as our analysis suggests, in line with a key result of Vanberg (2005), the development of judicial legitimacy can have nonintuitive results on interbranch conflict. As Figure 11.3 suggests, the clashing equilibrium exists for middling beliefs in a successful public backlash. As long as these beliefs are correlated with judicial legitimacy, the immediate implication for nascent courts is that as legitimacy is built, the likelihood of a judicial purge increases as well. It is only at a relatively high probability of a backlash that the changes of a conflict are reduced again. This result suggests a daunting proposition for the construction of legitimacy and, ultimately, judicial power. It may be that as courts build public support, they create precisely the incentives that can ultimately undermine their authority. This result may have a lot to do with the relative lack of cases around the world in which scholars can definitely identify a court that has built its authority endogenously from the ground up.

In a similar vein, our model also casts doubt on the common contention about the ability of courts to build their authority in the long run through a short-run strategy of prudence. For both Carrubba (2009) and Ginsburg (2003), among many others, judges build public beliefs in the value of judicial review (per Carrubba) and construct a norm of compliance (per Ginsburg) precisely by avoiding overt political conflict over salient public policies, or at least by not asking governments to implement decisions that would impose significant costs. Over time, this strategy will expand judicial power considerably. In contrast, our analysis suggests that this kind of prudential strategy may, in fact, be quite costly for judges. The critical problem with prudence is that it risks constructing inaccurate beliefs about judicial preferences – essentially teaching future litigants that the court is either extremely partisan or unwilling to defend rights. In a broader sense, prudence suggests the same inference for current political minorities such that if and when they come to power, they will perceive every reason to reform significantly the judiciary.

The solution to this problem takes judges in constrained political contexts down a path of likely conflict. Judicial sincerity will communicate preferences accurately, but it does so at the risk of a purge. If this is true, then courts in their institutional infancies face a kind of political trap: be extremely careful and risk being written off as irrelevant, or be aggressive and risk a purge. The implication of this trap is relatively simple in the end. It may be necessary for judges to induce tears in the rule of law fabric to build it. Unfortunately, systematic rule of law failures are the likely result of this approach.

CONCLUSION

Scholars of judicial politics have developed an impressive array of theoretical arguments to account for why governments might ever create courts empowered to constrain the state and for why such courts might ever exercise their power in practice. There can be no question that we know a great deal more about how judicial power works than we did at the beginning of this process. There are good reasons to suspect that politicians empower courts to solve credible commitment problems and to insure themselves against future electoral losses. There is considerable evidence that fractionalized politics provides the political cover necessary for judges to constrain arbitrary state action, and there is evidence that public support empowers courts, that judges believe it, and that they care about influencing it. This work all suggests that democratization may have a powerful influence on judicial independence and the rule of law. Yet it also seems that courts can be quite constrained, even in a democracy. Indeed the Latin American experience not only suggests that courts under democracy can be constrained but also reminds us that courts under democracy can be openly attacked. Despite these attacks, litigants bring cases, and courts sometimes challenge powerful, potentially dangerous political officials.

As we discussed in the second section of this chapter, existing theoretical models struggle to explain this behavior, but not because they are inherently misguided. Far from it. Our existing models have a number of admirable qualities. It is just that no model is able to put these behaviors together, and we believe that our field should have such an account, precisely because the issues of judicial independence, the rule of law, and the judicialization of politics are so central to our concerns – both in the region and around the world. We have presented a model of inter-branch conflict that takes a stab at putting these behaviors together. We do so by pulling together features of existing models and adding to them assumptions about institutional preferences, litigant choices, and time. The model suggests that judges confront a core trade-off in difficult cases, especially when people are watching: a strategy of deference can avoid direct political conflict, but it risks creating inaccurate beliefs about judicial preferences, whereas a strategy of aggressive constitutional control may communicate accurate beliefs about preferences, but it risks a purge.

The way in which judges evaluate this trade-off can have important implications for interbranch attacks, the construction of judicial institutions, and ultimately for beliefs about courts. Our model also suggests implications for institutional design and for institutional research. Increasing judicial tenure – really any institution that increases judicial time horizons – induces competing incentives for strategic judicial deference, which imply competing effects on conflict. We need to consider carefully our design recommendations, and we must consider alternative research designs, ones that take seriously how to identify the causal effect of the institutions.

Although we believe that the model raises some novel insights, we certainly do not believe this represents an end point in our collective research agenda. There are clearly alternative explanations for increasing caseloads (e.g., Epp 1998; see also Chapter 6). Jurisdictional changes, whether they emerge out of the legislature or doctrine, should obviously increase access, as do rules governing standing. And groups may push legal agendas simply for the political platforms high courts provide (e.g., McCann 1994). We have not attempted to model those features of the world. And surely there is room for ideas or institutional ideology (Hilbink 2007; see also Chapter 4), another source of judicial behavior that we exclude from the analysis. Further analysis also might consider how simple noncompliance might be accounted for in such a model. In other words, why purge a court when you can simply ignore a decision? Also, the current model does not explain how judges might build their institutions though the logic of strategic deference, that is, by maximizing compliance. Here such a strategy is deeply problematic. An extension might consider the conditions under which deference might be preferred to risk as a means of institution building. Finally, we have not modeled the institutional design stage, and it is surely worth investigating whether we can tie a logically consistent account of judicial reform to a model of interbranch conflict. We would welcome such additions to the framework we have constructed, and we would even welcome an entirely novel approach, one that turns our results on their head. Yet we believe that whatever changes are adopted, it is critical that we develop models that speak coherently to the full set of behaviors that constitute the legal process.

APPENDIX

The analysis in this appendix proves the results described in the text. In particular, it identifies the conditions that must hold for the strategy profile listed earlier to be a PBE, and it defines the corresponding beliefs that are consistent with the profile. Given the model's finite horizon, we proceed via backward induction, beginning with the government's choice over the second policy on the equilibrium path. We assume that players form beliefs via passive conjectures off-path. Specifically, if players are asked to move at an information set that should not be reached in equilibrium, they do not update beyond their beliefs beyond what they held prior to the deviation.

Second Policy

Given the equilibrium strategies, if the players observe that the court strikes the second policy, both the government and the litigant know for certain that the court is the expansive type. The expected value of accepting the decision is 0. The expected value of purging the court is $q_2(-\beta - \bar{\varepsilon}) + (1 - q_2)(\alpha - \alpha\phi - \bar{\varepsilon})$. Solving for q_2 yields the upper bound on q_2 in Condition 1. For the expansive court, the expected value of upholding is $-b_L$. Expecting defiance, the expected value of striking the policy is $-c - b_L + q_2(c + b_L)$. Solving for q_2 yields one of the two possible lower bounds on q_2 in Condition 1. Finally, the litigant pays $-b_L$ if he or she does not go to court, and the expected value of going to court is $q_2(-\varepsilon_l) + (1 - q_2)(-b_L - \varepsilon_l)$. Solving for q_2 yields the final threshold on q_2 in Condition 1.

If the litigant observes that the court upholds the policy, the probability that it is limited is $\frac{\lambda}{1-n}$, and because the court cannot be expansive, the probability that it is partisan is $1 - \frac{\lambda}{1-n}$. But because the burden is b_L, the litigant knows that both of the possible remaining court types will uphold it. For this reason, he or she does not go to court. If instead the litigant observes the court purged, he or she knows that the new court is partisan and again does not go to court.

First Policy

Given the players' strategies, the government will know for sure the court's type if it upholds. This is because it knows a partisan court for sure, and of the court types about which it was initially uncertain, only the limited court type will uphold. Suppose that the first policy was upheld. Having observed this decision, and because the government knows that neither of the possible court types will uphold the second policy, it does not waste its resources on attempting a purge. If instead the government observes the court strike the first policy, it knows for certain that it is the expansive type. If the government accepts this decision, it gains the continuation value of the second round, which we denote CV_2. If instead it attempts to purge the court, the government expects $q_1(CV_2 - \bar{\varepsilon}_g - \beta) + (1 - q_1)(CV_2 + \alpha\phi - \bar{\varepsilon}_g)$. Solving for q_1 yields one of the two upper bounds on q defined in Condition 2.

Given the partisan court's preferences, it obviously rejects the appeal. The limited court will obtain 0 if it upholds because the second litigant will not bring a case. If instead it strikes the policy, it expects $q_1 v + (1 - q_1)(-c)$. Thus, to ensure that the limited court upholds, q_1 must be smaller than the threshold defined in Condition 2. Finally, if the expansive court upholds the policy, it loses $-2b_L$ because it will give up the burden in both periods. If instead it strikes, it will gain the value of the second period interaction, discounted by the probability of surviving, plus the value of being purged, or $q_1[v + (1 - q_2)(-c - b_L)] + (1 - q_1)(-c - b_L)$. Solving for q_1 yields the lower bound on q_1 in Condition 2.

When the first litigant moves, his or her beliefs are identical to his or her priors. If he or she does not go to court, he or she pays $-b_L$. If the first litigant goes to court, he or she can expect $\eta\left[-q_1\varepsilon_l + (1-q_1)(-\varepsilon_l - b_L)\right] + (1-\eta)(-\varepsilon_l - b_L)$, and solving for η yields the lower bound in Condition 3. Finally, like the litigant, when the government moves first, its beliefs are defined in the text – they are the government's priors. If the government fails to enact the policy, it gains 0. If it enacts, it will expect the following:

$$(1-\eta)(\alpha - \underline{\varepsilon}_g) + (\eta - \eta q_1)(\alpha - \underline{\varepsilon}_g - \bar{\varepsilon}_g) + (\eta q_1 - \eta q_1 q_2)$$
$$\times (\alpha - \alpha\phi - \underline{\varepsilon}_g - 2\bar{\varepsilon}_g - \beta) + \eta q_1 q_2[-\underline{\varepsilon}_g - 2(\bar{\varepsilon}_g + \beta)].$$

Solving for η yields the final threshold in Condition 3.

Off-Path Behavior

The Limited Court, Partisan Court, or New Court Strikes p_2

Government beliefs do not update beyond where they were after the first policy was either upheld or struck, but those beliefs are irrelevant because this is the last period of the game. The government's calculus is identical to what it was on the equilibrium path.

The First Litigant Does Not Go to Court

If the first litigant does not go to court, the second litigant's beliefs are given by his or her priors. Given the equilibrium strategies, the calculus for the second litigant is precisely the same as the calculus for the first litigant, as described earlier.

The Government Does Not Attempt to Purge after p_1 Is Struck

The second litigant is certain that the court is the expansive type, and thus his or her calculus is unchanged.

All other information sets are reached in equilibrium.

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