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978-1-107-00828-1 - High Courts and Economic Governance in Argentina and Brazil
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1

High Court–Elected Branch Interactions in Latin America

"Don't fool yourselves, thinking you can go to the bank and get your money."[1]
– Reaction of Argentine President Eduardo Duhalde to a Supreme Court decision in 2002 declaring unconstitutional a freeze on bank deposits

"Supreme Court decisions are not discussed, they are obeyed."[2]
– Common refrain of Brazilian presidents coined by Ulysses Guimarães

1.1. INTRODUCTION

High court justices across Latin America serve as the final arbiters of controversies crucial to society and the state. They do so in volatile contexts marked by resurgent popular participation, domineering executives, and recurrent economic crisis. Justices thus routinely face complex trade-offs between sanctioning short-term policy fixes and encouraging constitutional entrenchment, between satisfying popular and political pressures and building a commitment to the rule of law, between ensuring their survival on the bench and constructing judicial power. When high courts issue rulings that place them in conflict with elected leaders, those leaders face their own difficult choices: Should they continue to pursue important but constitutionally questionable policies, or comply with high court dictates even at the risk of political or economic turmoil? This book describes and explains the different ways in which Latin American high courts and elected authorities approach these decisions, and explores the implications of their interactions for democratic governance, the role of courts, and the rule of law.

Consider the quandary faced by Brazil's high court, the Supreme Federal Tribunal (*Supremo Tribunal Federal*, STF) in April 1990. The Court had before it a case concerning the constitutionality of a presidential decree freezing bank

[1] Original quote: "*No se dejen engañar, suponiendo que podrán ir a los bancos a buscar su dinero,*" *La Nación*, February 2, 2002, "Declaran inconstitucional el corralito."
[2] Original quote: "*Decisão do STF não se discute, cumpre-se.*"

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accounts, part of a broad structural reform program introduced to address devastating hyperinflation.[3] President Fernando Collor de Mello had issued the decree just weeks after his inauguration as the first directly elected president after a 20-year period of authoritarian rule. Brought to power with a mandate to defeat inflation, Collor remained quite popular despite the bank freeze, boasting a public approval rating of over 70 percent when the high court received the case.

The STF confronted a critical choice. The legal merits of the case recommended declaring the policy unconstitutional as it blatantly violated property rights. Yet doing so would place the high court in the unenviable position of defying a very popular transitional president, and leave it vulnerable to accusations of being overly legalistic and impeding economic recovery. Moreover, President Collor might draw on his broad political support to simply ignore such a challenge. Alternatively, the STF could uphold the policy. Doing so could facilitate the success of the new economic program and could even bolster democracy, given the corrosive effects of crisis on political stability. Endorsing the policy would also obviate the need for compliance, mitigating the justices' concern that elected leaders might disregard their ruling. Yet sanctioning a seemingly unconstitutional exercise of government power would open the high court to criticism that it lacked independence and was undermining the rule of law. The STF weighed these factors for more than a year, and ultimately decided not to decide, dismissing the case on a technicality. Yet to the frustration of elected leaders, the high court emphasized that its decision in no way prevented *lower courts* from ruling the bank freeze unconstitutional. The STF's ruling thus sidestepped direct interbranch conflict but encouraged battles at the trial-court level.

High courts are not the only institution that must make challenging decisions when politics are judicialized. When Courts issue rulings to limit the exercise of government power in high-salience cases, elected leaders face their own quandary. Consider the situation in Argentina just over a decade later. In December 2001, in an effort to address dramatic economic crisis, President Fernando De la Rúa also declared a freeze on bank accounts. De la Rúa fled office shortly thereafter, and the presidency subsequently changed hands four times in less than two weeks. Under the second interim leader, Argentina defaulted on most of its US$ 141 billion debt. Yet on the first day of the judicial term in February 2002, amidst the continuing turmoil, the Supreme Court (*Corte Suprema de Justicia de la Nación*, CSJN) emphatically declared the bank freeze unconstitutional.

In deciding how to respond to the high court's ruling, President Duhalde (appointed by the Argentine Congress in early January 2002) faced a difficult dilemma. On the one hand, defying the ruling was a tempting option. Given growing animosity between the CSJN and the executive, abiding by the

[3] Inflation had reached an annualized rate of 6,821 percent by 1990 (Reinhart and Savastano 2003: 21).

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decision could be seen as an embarrassing "defeat" at the hands of the high court. Also, the high court was at the time extremely unpopular, reducing the political cost of defying it. And lifting the freeze could ignite a massive run on the banks (precisely the outcome the policy had sought to prevent), resulting in economic panic that could exacerbate political instability. On the other hand, Duhalde faced strong incentives to comply with the CSJN's ruling and lift the freeze. Ignoring the decision would represent a significant affront to the rule of law and would be viewed as such by the international community and some Argentines. Disregarding the decision would also antagonize the high court, perhaps encouraging it to invalidate the policy in the thousands of identical cases that were rising through the judiciary – and to rule against the government on other crucial cases in the future. In the end, Duhalde made a choice that aggravated simmering interbranch tensions: He called on congress to accelerate impeachment hearings against every justice on the high court, and largely ignored its ruling.

These examples are hardly anomalous. Latin America's high courts and elected officials have repeatedly confronted choices similar to these as the region's courts have been called to the center of the political stage more often in the postauthoritarian period. The way in which the elected and judicial branches interact as they address such dilemmas has critical implications for Latin America's political and legal development. How they do so thus raises questions of empirical interest and normative concern. First, how have Latin American high courts and elected leaders interacted over politically crucial cases over the last twenty-five years – have those interactions tended to be collaborative and cooperative, conflictual and confrontational, or a mix of both? Second, if the nature of those interactions has differed across countries, what explains that variation?

Drawing on both rational choice and historical institutionalism, this book advances the Court character thesis to account for the tenor of interbranch relations.[4] I argue that a high court's character shapes the way it decides cases of crucial political significance and conditions the way elected leaders respond to its rulings, channeling their interactions into relatively enduring patterns. The informal institutional features that compose a Court's character can contribute to producing lasting patterns of interaction because they are comparatively stable themselves, with roots in the politics of Court crafting that political authorities have traditionally employed, public opinion, and the high court's internal culture. Of course, contextual political factors – elected leaders' attacks on the judiciary, economic crisis, political divisions, and many other dynamics – also influence how elected leaders and high courts interact. But the *way* such factors affect interbranch interactions is mediated by the character of the high court. In short, the study highlights the historical and institutional foundations of interbranch relations.

[4] The terms "high court" and "Court" (with a capital "C") are used interchangeably.

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To illustrate the Court character thesis, the book examines high court–elected branch struggles over economic policy in Argentina and Brazil during the two decades following regime transition. Focusing on a single policy realm over time represents a departure from other studies of high court politics and interbranch relations in Latin America, yet doing so has significant substantive and methodological advantages. Most Latin American polities transitioned to democracy in economic disarray, and the economic policy arena was a crucial – and controversial – one for society and the state following regime change. Facing substantial international and domestic pressure for reform, elected leaders sought to adopt a more neoliberal, open-market economic model. In many countries, some elements of economic reform programs and the process that elected leaders employed to legislate and implement them seemed to violate the constitution. In these newly democratic contexts, citizens, civil society, and the political opposition were quite sensitive to elected officials' disregard for legal and constitutional constraints on their power, and they increasingly turned to the region's newly empowered courts to challenge economic policies, producing a judicialization of economic governance.[5] Indeed, although Latin American judiciaries became involved in a diverse range of politically important conflicts after regime transition, in many countries it was their involvement in economic policy making – their decisions on cases concerning privatizations, salaries, pensions, and the like – that drew them definitively into politics and the popular consciousness.

Further, high courts and elected leaders cannot be assumed to interact in the same way across policy arenas or areas of law: High courts are selectively assertive vis-à-vis national political authorities, and compliance with judicial rulings, at least in less-institutionalized settings such as those of many Latin American countries, likely exhibits similar variation.[6] Evaluating patterns of interbranch interaction in a particular issue area removes "policy arena" as a potential cause of cross-case and cross-national variation in those interactions, facilitating assessment of the effect of institutions. In addition, cases concerning economic policy were decided throughout most of the period under study in both Argentina and Brazil, and the two countries' Courts heard cases concerning very similar types of economic policies. Finally, while economic reform and policy making are often viewed as developed and managed exclusively by government technocrats and international financial institutions, showcasing the interbranch struggles that can ensue when constitutions and economic policy appear to be at odds reveals the roles that high courts have played in neoliberal restructuring – arguably the most significant socioeconomic transformation Latin American countries have undergone in recent decades.

[5] Economic governance refers to efforts to manage the economy, control economic crisis, and encourage economic growth and development.

[6] High courts probably also interact differently with different powerful actors, recommending that interactions between high courts and particular types of political actors also be studied separately.

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Argentina and Brazil, two of the region's largest democracies, are good cases in which to compare and contrast interbranch interactions over economic governance for several reasons. Their contextual and institutional similarities mean that a range of factors that might affect those interactions are held constant, helping me to evaluate the effect of the dynamics and variables of theoretical interest. Both countries transitioned to democracy at approximately the same moment (and have been democracies since),[7] and both have been governed by dominant presidents. Leaders in both countries sought to carry out programs of economic stabilization and neoliberal reform that raised significant constitutional questions. Further, the two countries' high courts are similar on a range of institutional dimensions. In both contexts, the high court sits atop a federally structured judicial system, and both high courts experienced empowering reform during the period of interest. Justices are appointed using similar processes and enjoy similar formal independence protections in the two countries, each high court is charged with constitutional review (although only the Brazilian Court can perform abstract review), and both stagger under huge case loads that skyrocketed during the time period under study due to the filing of hundreds of thousands of cases regarding national economic policy.[8]

Despite these similarities – and the filing of comparable court cases – strikingly different patterns of interbranch interaction over economic policy emerged in Argentina and Brazil during the first two postauthoritarian decades. I argue that the contrasting characters of the countries' high courts helped to produce that variation. In Argentina, interbranch interactions were more erratic. The CSJN, which had long been *politicized* by the country's leaders and had consequently assumed a *political* character, generally *submitted* to elected leaders when ruling on cases concerning critical economic policies. Yet the Court's political nature also contributed to generating tense bouts of interbranch *confrontation* in which the CSJN struck down major policies and elected leaders disregarded its dictates and threatened and attacked the Court. Brazilian leaders, by contrast, had long *professionalized* the STF, creating a *statesman* Court. Interbranch interactions over economic policy were correspondingly more stable and mutually *accommodating*: The high court was more centrist and even-handed in its rulings, and elected leaders obeyed its decisions as they could and rarely attacked the Court outright.

The book contributes to the public law and comparative politics literatures by examining and accounting for patterns in judicial decision making and elected branch responses to high court rulings *in tandem*. While the study is situated squarely in the realm of theory generation (like much of the scholarship in the young comparative judicial politics research program, e.g., Ginsburg 2003; Hilbink 2007; Trochev 2008), the argument builds on and augments

[7] Argentina was led by an authoritarian regime from 1966 to 1973 and from 1976 to 1983, and Brazil was ruled by a military dictatorship from 1964 to 1985.

[8] Web Appendices 2.1 and 2.4 contain case-load statistics for the two high courts. Web appendices at www.cambridge.org/9781107008281.

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extant strategic theories of interbranch relations as well as historical institutional accounts of judicial dynamics.

The book is based on 20 months of field research in Argentina and Brazil (2004–5). Data collection entailed conducting more than 250 interviews in Spanish and Portuguese with former and current high court justices, high court clerks, economists, constitutional scholars, law professors, political scientists, government personnel, civil society organizations, and journalists. With the assistance of a team of research assistants in each country, I also created a searchable electronic archive containing more than 14,000 newspaper articles about the Argentine and Brazilian Courts and their most important decisions, and collected many primary documents concerning the Courts and cases under study.

In the remainder of this chapter, I propose an integrated analytic framework for studying patterns of interbranch interaction, and discuss each element of the framework in theoretical context. I then further develop the argument at the heart of the book, the Court character thesis, explicating its connection to several bodies of literature – on judicial empowerment, the politics of judicial appointments, informal institutions, and interbranch relations. The chapter's final section outlines the structure of the book.

1.2. PATTERNS OF HIGH COURT–ELECTED BRANCH INTERACTION

Most studies of judicial politics in Latin America analyze and seek to account for variation in high court decision making (e.g., Scribner 2004; Helmke 2005; Hilbink 2007 among many others). This is a crucial area of study. In developing democracies such as those in Latin America in which courts traditionally have shied away from ruling assertively, judicial decisions that challenge powerful actors are an important development that warrants detailed analysis. Moreover, as discussed below, judicial assertiveness lies at the heart of judicial power: courts need not challenge political actors consistently in order to be considered powerful, but we would likely not think of courts that only rarely (or only weakly) challenge such actors as powerful.

Yet if a central goal of the judicial politics literature is to understand what roles courts play in political, economic, and legal development, evaluating and explaining judicial decision making on politically important cases is only one part of the enterprise. We must *also* examine and account for how powerful actors – and elected leaders in particular – respond when courts issue rulings that do not favor their interests (Miller and Barnes 2004). How often and to what extent do elected leaders comply – and retaliate – when courts issue challenging decisions on politically crucial cases? And why do they comply and retaliate as they do?

I propose an inductively generated framework for the integrated study of high court decision making *and* elected leaders' responses – for identifying, analyzing, and helping to explain the *patterns of interaction* that emerge between the judicial and elected branches of government. Table 1.1 outlines four possible

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TABLE 1.1. *Patterns of High Court–Elected Branch Interaction*

Pattern of Interaction	Tendencies in High Court Behavior				Tendencies in Elected Leaders' Behavior	
	Assertiveness			Approach to Decision Making	Compliance with High Court Rulings	Retaliation against High Court Rulings
	Direction of Rulings	Intensity of Endorsements	Intensity of Challenges			
Confrontation	Challenge	Weaker	Stronger	Various (*not* Deferential)	Non-/Partial	Frequent
Court submission	Endorse	Stronger	Weaker	Deferential	Partial	Infrequent
Accommodation	No clear tendency	No clear tendency	No clear tendency	Various (*not* Deferential)	Partial/Significant	Infrequent
Court domination	Challenge	Weaker	Stronger	Various (*not* Deferential)	Significant/Full	None

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patterns of interaction: *confrontation*, *Court submission*, *accommodation*, and *Court domination*. Each pattern reflects particular tendencies in high courts' assertiveness and approaches to decision making, and in elected leaders' compliance and retaliation.[9] The typology captures the essential range of variation on all three underlying dimensions: (1) Courts are minimally assertive in the Court submission pattern (row two) and maximally assertive in the confrontation and Court domination patterns (rows one and four, respectively); (2) they take only one factor into account when ruling in the Court submission pattern (row two) and might take a range of factors into account in the other patterns; and (3) elected leaders are minimally respectful of Courts and their dictates in the confrontation pattern (row one) and maximally respectful in the Court domination pattern (row four). Combining the first and the third dimensions but leaving out the second, Courts are probably most consequential in a pattern of Court domination (row four), and least relevant in a pattern of Court submission (row two). Of course, more than one pattern might exist in any polity over time, in different policy arenas, or in distinct areas of law.

Despite Argentina and Brazil's contextual and institutional similarities – and despite the filing of court cases concerning comparable types of economic policies – high court–elected branch interactions over economic governance in the two countries were strikingly different in the postauthoritarian period. In Argentina, the dominant pattern of interbranch interaction was *Court submission*: most often adopting a *deferential* approach to decision making (in which the elected branches' preferences are the dominant consideration), the CSJN tended to endorse the exercise of government power strongly while only rarely and weakly challenging elected leaders. Those leaders, for their part, complied only partially with the Court's weak challenges but rarely retaliated. Yet *Court submission* was interrupted by episodes of interbranch *confrontation* during which the CSJN challenged the exercise of government power more often than it endorsed, issued weaker endorsements and stronger challenges, and adopted a range of approaches to decision making (in particular, a *self-protective* approach in which justices' corporate or institutional interests were the dominant consideration). During those moments of interbranch confrontation, Argentine leaders tended to ignore or comply only partially with the Court's challenging decisions, and frequently retaliated.

In Brazil by contrast, interbranch interactions over economic governance followed a more stable pattern of *accommodation* during the 20 years after regime transition. The STF was somewhat more evenhanded than its Argentine counterpart, challenging and endorsing the exercise of government power with approximately the same frequency, and issuing both strong and weak challenges and endorsements. Moreover, it adopted a variety of approaches to decision making (especially a *pragmatic* approach, in which the potential political and economic consequences of its rulings weighed heavily).

[9] The framework does not consider the juridification of legislative debates or of statute writing (see, e.g., Tate and Vallinder 1995), as these do not entail active institutional interplay.

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Throughout the period, elected authorities tended to comply partially or significantly with the STF's rulings and rarely threatened or attacked it.[10] Thus, the first three patterns in the typology are illustrated in this book; the fourth might characterize contexts with a very well-established high court, for instance Germany (Kommers et al. 2004: 71), or in which a Court briefly wielded exceptional power, as in Hungary in the 1990s (Scheppele 2003: 222–3).

A number of additional points concerning the analytic framework bear noting. Although there is undoubtedly a relationship between high court assertiveness and elected branch responses, I do not mean to imply that the former is the main cause of the latter or vice versa. Courts' anticipation of elected branch compliance with their rulings may impact the direction or intensity of their decisions, but Courts balance a range of considerations when deciding politically important cases: Different considerations become salient at different moments, depending upon the case, the context, and Court character. Similarly, the way in which elected leaders respond to judicial rulings is shaped by a range of contextual and political factors – including, again, the character of the Court they are facing. The goal is simply to outline patterns that high court–elected branch interactions over a set of cases might follow. The relevant question is, why does one pattern or another emerge?

The typology also illustrates the importance of analyzing high court decision making and elected leaders' responses to high court rulings *together*. For instance, if we only examined high court assertiveness, we might see no difference between Courts that are involved in very different relationships with the elected branches: confrontation and Court domination have the same scores on the variables in the first three columns of Table 1.1. Further, we can only accurately evaluate judicial power and impact if we examine judicial and political leaders' behavior in tandem. As noted previously, whereas a Court that only rarely and weakly challenges elected leaders would seem to be weaker than a Court that challenges frequently and aggressively, learning that the second Court's rulings are rarely obeyed would change our evaluation of the Courts' relative power. Likewise, even though we might automatically assume that Courts that valiantly defend the constitution are helping to entrench the rule of law, they may be doing little to achieve that end (and may in fact be undermining progress toward it) if leaders ignore their decisions.

Similarly, if one were to examine only the frequency of elected branch compliance and retaliation, Courts involved in an accommodation pattern of interaction with elected leaders would seem quite powerful. Yet the scores on the variables in the columns describing judicial assertiveness suggest that such Courts exhibit no tendency toward challenging elected leaders, let alone toward challenging them strongly. Moreover, whereas a Court that only elicits partial

[10] The scores for the accommodation pattern are somewhat vague because, as Chapter 6 discusses, high courts' rulings and elected leaders' responses can be mutually accommodating in two different ways.

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compliance with its strong challenges might seem to lack power, if its endorsements of the exercise of government power are routinely *weak* (meaning it often withholds legitimacy-granting support for leaders' policies), it might have more power than its ability to compel compliance suggests. In short, examining judicial assertiveness without simultaneously considering compliance, or vice versa, yields an incomplete and potentially misleading portrait of judicial power and of interbranch relations.[11]

Employing the analytic framework offered here has implications for case selection.[12] Most analyses of Latin American high courts are small-N[13] qualitative studies,[14] while a handful are large-N quantitative analyses of hundreds or thousands of opinions or individual votes by high court justices.[15] What we have learned through small-N analysis forms the bedrock of our knowledge about Courts in the region. Yet such studies' reliance on a small number of cases – which are infrequently systematically selected – raises questions about the internal validity of their claims; further, the complex, contingent hypotheses they often produce are difficult to test elsewhere. On the other hand, the large-N quantitative analyses have clear theoretical goals, pinpoint precise relationships among variables, and advance arguments that are falsifiable and whose generalizability can be determined. Also, most authors of large-N studies of Latin American Courts use systematic case-selection techniques. However, for practical reasons, such scholars can rarely scrutinize closely the context in which the cases they study were filed and decided, the details of the cases themselves, the content and intensity of Court rulings on those cases, or compliance with judicial dictates. Yet close analysis of these elements is often necessary to avoid misinterpretation – particularly when analyzing politically important cases, which can be complicated and can generate complex judicial rulings.

Given the multifaceted analytic framework employed here and the multiple features of high court rulings and interbranch interactions it requires studying, this book pursues a middle ground: examining an intermediate-N number of systematically selected cases.[16] Doing so allows me to capitalize on the strengths of both small-N and large-N analysis. Like scholars who engage in small-N analysis, I can closely examine multiple aspects of the cases under study including their content; the legal issues they raised; their policy and

[11] Of course, a complete assessment of judicial power would also include analysis of formal elements (for instance, jurisdiction, judicial review authority, standing). Yet particularly in institutionally insecure settings, there may be a large gap between a Court's formal power and the power it actually wields, and the latter is arguably what interests us.

[12] Political scientists have long argued the comparative advantages of small-N vs. large-N analysis; see, e.g., Lieberson (1991); Savolainen (1994); and Collier and Mahoney (1996).

[13] The size of the "N" refers to the number of court cases (not country cases) under study.

[14] For instance, Nino (1993) and Gargarella (2004) on Argentina; Uprimny (2004) on Colombia; Faro de Castro (1997a) and Arantes (2005) on Brazil; López-Ayllón and Fix-Fierro (2003) on Mexico; and Pérez Perdomo (2005) on Venezuela; see Kapiszewski and Taylor (2008).

[15] For instance, Helmke (2002, 2005); Scribner (2004).

[16] Appendix 1.1 describes the technique employed to select court cases for study.

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