The Politics of Amendment Processes: Supreme Court Influence in the Design of Judicial Councils

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This Article studies amendment processes, their specific characteristics, and how these characteristics shape institutional design outcomes. Amendment processes are in between the extraordinary creation of new constitutions and the ordinary process of lawmaking. Our central claim is that the design of institutions through amendments is influenced by variables that do not regularly figure in the analysis of constitution making because of their bias toward new constitutions and the "politics of the extraordinary." In particular, we argue that the design of the existing institutions and the political leverage of actors that do not participate directly in constitutional reform may exert an important influence in the design of institutions created by amendments. In other words, the more institutional power and political leverage actors have, the more likely the amendment will reflect their interests, even if they do not partake of the constituent body. To explore this hypothesis, we analyze the leverage that supreme courts have to shape the amendment processes that adopt or reform judicial councils. We claim that the more powerful supreme court judges are, the more likely they will successfully influence amendments that shape the composition and functions of judicial councils in a way that serves their interests. We offer empirical evidence from all the cases of amendments that created or reformed judicial councils in Latin America.

> We are to recollect that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the ancient government; and whilst no spirit of party connected with the changes to be made, or the abuses to be reformed, could mingle its leaven in the operation. The future situations in which we must expect to be usually placed do not present any equivalent security against the danger which is apprehended.[1]

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1. THE FEDERALIST NO. 49, at 315 (James Madison) (Clinton Rossiter ed., 1961).

I. Introduction

A nearly ubiquitous assumption of constitutional thought is that constitution-making processes are and must be extraordinary—that the circumstances and motivations that shape the framers' decisions are and must be unrelated to those that characterize ordinary politics.[2] Thus, the intromission of ordinary politics in constituent processes has been approached as an unusual and undesirable phenomenon.

Jon Elster has discussed the biases that result "when some of those who write the constitution also expect to act within it" by analyzing four episodes of French constitutional history.[3] "In this situation," Elster tells us, the constitution makers "have a clear incentive to write a large role for themselves into the document and a correspondingly weak role for their rivals."[4] Ginsburg, Elkins, and Blount tested this "self-dealing" hypothesis and found support for biases resulting from executive-centered constitution-making processes, which amount to 9% of their 460 observations.[5] Because the involvement of ordinary politics in constitution making is regularly considered marginal, the normative and positive conclusions of these studies do not seem particularly consequential. But is constitution making largely an extraordinary process?

We believe that the role of ordinary politics in constitution-making processes has been underestimated by the focus on the enactment of new constitutions and the neglect of amendment processes. This inattention to amendment processes is probably a consequence of the central role that the American constitutional tradition plays in constitutional studies, and of the extreme rigidity of the American Constitution that makes amendment processes rare events.[6] In any case, as soon as amendment processes are

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2. *See, e.g.*, JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 120 (1962) (distinguishing "operational" decision making from "constitutional" decision making by claiming the individual's interest is "more readily identifiable and more sharply distinguishable" from colleagues in operational decision making); THE FEDERALIST NO. 49, *supra* note 1, at 315 (noting that prior constitutions were formed in the context of danger that unified normally diverse public opinions); Tom Ginsburg et al., *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. L. & SOC. SCI. 201, 209 (2009) (explaining the conventional view that "constitution-making is coincident with a cataclysmic event of some kind").

3. Jon Elster, Authors and Actors: Executive–Legislative Relations in Four French Constitution-Making Moments 4 (Apr. 11–13, 2003) (conference paper), http://www.yale.edu/coic/elster.doc.

4. *Id.* *See also* JON ELSTER, ULYSSES UNBOUND 132 (2000) (stating that "[t]he interest of the legislature is to carve out the largest possible place for itself in the machinery of government"); Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 380 (1995) (asserting that "[i]nstitutional interest in the constitution-making process operates when a body that participates in that process writes an important role for itself into the constitution," such as when a constituent assembly also serves as an ordinary legislature and gives "preponderant importance to the legislative branch at the expense of [the other branches]").

5. Ginsburg et al., *supra* note 2, at 205 & tbl.1.

6. *See, e.g.*, Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 YALE L.J. 2003, 2004–07 (1999) (explicating how changes in American attitudes toward slavery, from the

included in the picture, the extraordinary character of constitutional politics is called into question, and the study of the role that ordinary political actors and their ordinary motivations play in constitutional design gains importance.[7]

In this Article, we focus on amendment processes and their characteristics. We argue that because amendment processes lie between constitution-making processes and ordinary lawmaking, to give account of them we need to introduce variables that have not figured in the analyses of the creation of new constitutions. We claim that the specific nature of the derived constituent power (i.e., the body that carries out amendments) makes these processes susceptible to the intromission of "ordinary politics." Specifically, the constituent power in amendment processes has a double identity. On the one hand, it is a supermajoritarian force that ought to embody the constituent popular will. On the other hand, it is an aggregate of constituted actors whose political identity and functions are defined by the constitution, who act within the constitutional frame, and who are therefore susceptible to the pressures of ordinary politics. Hence, our argument applies to the amending processes where the constituent power is comprised of constituted organs. This is the case for the vast majority of amending procedures, but there are some constitutions, like the 1994 constitution of Argentina, that prescribe an amending process where governmental organs are not involved in the constitutional changes.[8]

To study the consequences of this double identity, we focus on whether powerful supreme court judges are able to influence the choices of judicial institutions in amendment processes. We focus on the judges' capacity to shape judicial institutions for three reasons. First, supreme court judges are not members of the derived constituent power yet are important political actors. Second, there is a clear way to assess their power vis-à-vis the constituted powers that do belong to the amending body—the judges' institutional power is defined by the constitution in place at the time of

abolitionist movement to the Civil War to Reconstruction, informed the Thirteenth, Fourteenth, and Fifteenth Amendments).

7. For comparative works that consider amendment rates in the Latin American region, see generally Gabriel L. Negretto, Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America (Nov. 25–26, 2010) (conference paper) (on file with authors) and Detlef Nolte, The Latin American Experiences with Constitutional Reforms Since the Transitions to Democracy (Nov. 25–26, 2010) (conference paper) (on file with authors).

8. The Argentinian constitution requires a constitutional convention to enact an amendment. Art. 30, CONSTITUCIÓN NACIONAL [CONST. NAC.]. Other constitutions, for instance the 1991 Colombian constitution, provide various amendment procedures to which our argument applies (such as amendments that involve constituted actors like the legislature) as well as others where it does not (like an amendment via referendum). *See, e.g.*, CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] arts. 374, 378 (Colom.) (providing for the amendment of the constitution by the congress, by a constituent assembly, or by the people through referendum).

amendment,[9] and their political leverage depends on the fragmentation of political power.[10] Third, there is a clear way to assess the judges' preferences regarding the design of judicial institutions, particularly regarding the design of the judicial councils.[11]

We focus on amendment processes that adopt or reform judicial councils. In particular, we are interested in the councils' functions and composition. Judicial councils were first adopted in Europe in order to take away from the executive (e.g., the ministry of justice) control over the appointment and career of lower court judges.[12] In this Article, our empirical arena is the Latin American region where, unlike Europe, before the adoption of judicial councils, most supreme courts had the power to appoint lower court judges and to manage their careers.[13] While in Europe the central motivation behind the creation of autonomous and powerful judicial councils was to increase judicial independence vis-à-vis the executive, in Latin America the motivation was to block clientelistic relations between supreme court judges and lower court judges, and to promote a judicial career with clear and objective promotion and disciplinary standards.[14] Because of this particular status quo, the adoption and reform of judicial councils in the region has produced interesting political battles where the supreme courts have fought to shape the functions of the council and even to control a majority of its seats.[15] Our hypothesis is that the more institutional power and political leverage supreme court judges have, the more likely it is that the design of judicial councils adopted or modified through amendment processes will reflect the judges' preferences.

This Article is divided into four additional Parts. In Part II, we discuss why amendment processes are susceptible to the intromission of ordinary politics. In Part III, we analyze the supreme courts' influence in shaping the design of judicial councils as an instructive instance of ordinary politics in constitution-making processes and discuss the concrete causal mechanisms behind our hypothesis. Part IV offers an empirical analysis of our theoretical

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9. *See* John N. Drobak & Douglass C. North, *Understanding Judicial Decision-Making: The Importance of Constraints on Non-rational Deliberations*, 26 WASH. U. J.L. & POL'Y 131, 133 (2008) (noting that judges are limited by constitutional provisions, among other things).

10. *See* Mark A. Graber, *James Buchanan as Savior? Judicial Power, Political Fragmentation, and the Failed 1831 Repeal of Section 25*, 88 OR. L. REV. 95, 97 (2009) (noting that judicial power increases when "control over electoral institutions is divided").

11. *See infra* Part III.

12. LINN HAMMERGREN, ENVISIONING REFORM: IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA 116 (2007).

13. Linn Hammergren, *Do Judicial Councils Further Judicial Reform? Lessons from Latin America* 4–5 (Carnegie Endowment for Int'l Peace Working Paper No. 28, 2002), *available at* http://www.carnegieendowment.org/files/wp28.pdf.

14. *Id.* at 5–7.

15. *See id.* at 15 (explaining that the Latin American courts often strongly resisted efforts to create judicial councils, and in some cases "succeed[ed] in shaping the councils to their own advantage").

claims in all the amending processes that adopted or altered judicial councils in Latin American countries from 1961 to 2010. Part V concludes and states two implications of the argument of this Article for future research.

II. Ordinary Politics in Amending Processes

The superiority of constitutional law vis-à-vis ordinary law is theoretically grounded in the dichotomy between constituent and constituted powers. Who is the author of the constitutions, or in other words, who is the constituent power? The answer to this question is one of the normative pillars of modern constitutionalism. Sieyès's answer is paradigmatic: it proceeds from the old idea that the hierarchy of laws signals the hierarchy of their authors.[16] Constitutional laws, Sieyès tells us, have the first order of precedence since they create the government, i.e., they establish the government's organization and functions.[17] Because the government is a constituted power, i.e., because its existence derives from the constitution and its actions are delimited by it, the government cannot make or change the constitution. Therefore, constitutional law is defined vis-à-vis ordinary law, and what makes it "constitutional" is that its author is the *constituent* power and not a constituted one.[18]

Now, for concrete constitution-making processes, the constituent power—the people—needs to be instantiated in a particular form. In other words, a constitution-making body needs to become the "operational form of the sovereignty of the people."[19] While the identity, legitimacy, and democratic credentials of the constitution makers vary greatly across time and space, they can all be grouped into two subsets: those whose task is to write a whole new constitution, and those whose task is to amend it. These are the original and the derived constituent powers, respectively.[20]

Given the foundational character of codified constitutions, it is not uncommon for original constitution-making processes to be presented as extraordinary events that answer to extraordinary political circumstances.[21]

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16. *See* EMMANUEL JOSEPH SIEYÈS, WHAT IS THE THIRD ESTATE? 134 (S. E. Finer ed., M. Blondel trans., 1963) (positing that while "[a] body subjected to constitutional forms cannot . . . give itself another [constitution]," a nation, which "is independent of any procedure and any qualifications," may do so).

17. *Id.* at 123–26.

18. *Id.* at 124.

19. Stephen M. Griffin, *Constituent Power and Constitutional Change in American Constitutionalism*, *in* THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM 49, 49 (Martin Loughlin & Neil Walker eds., 2007).

20. *See* SIEYÈS, *supra* note 16, at 131–32 (distinguishing between extraordinary representatives, whose "common will has the same value as the common will of the nation itself," and ordinary representatives, who "can move only according to prescribed forms and conditions").

21. It is worth noting that the conventional wisdom that links original constitution-making processes to great changes has been proven false: only about half of new constitutions are promulgated within three years of military conflict, economic or domestic crisis, regime change, territorial change, or coup d'état. *See* ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL

The uniqueness of the processes can then be used to legitimize the outcome. In this connection, the paradigmatic example is the American Constitution. As Wood notes, "[o]nly 'a Convention of Delegates chosen by the people for that express purpose and no other' . . . could establish or alter [the] constitution."[22] According to Wood, the American Constitutional Convention was an "extraordinary invention" because "[i]t not only enabled the constitution to rest on an authority different from the legislature's, but it actually seemed to have legitimized revolution."[23]

In contrast, constitutional amendments are not vested with a halo of uniqueness. Their task is much less impressive and the identity of their authors has a somehow paradoxical nature: the identity of amendment authors is derived from the constitutional text itself, as is the identity of the constituted branches of government. However, to preserve the distinction between constituent and constituted powers, codified constitutions resort to an institutional maneuver: through supermajoritarian norms, they create a body out of constituted powers that has a new and distinct identity, but that inherits the capacity to represent the people from its constituted components.

An important consequence of such a paradoxical identity is that each individual participant in a derived constitution-making process has a double institutional identity. On the one hand, it is a member of the constituent body representing the popular will. On the other hand, it belongs to a constituted organ inserted in ordinary politics. Such a double identity makes derived constitution-making processes vulnerable to the infiltration of ordinary political motivations corresponding to an actor's constituted identity and that are exogenous to the constituent process per se.

It is noteworthy that we are not arguing that original constitution-making processes are never open to the infiltration of ordinary political motivations. As Ginsburg, Elkins, and Blount have shown, the composition of original constitution-making processes varies greatly, from a popularly elected constituent assembly with the unique purpose of drafting a new constitution, all the way to executive-led processes.[24] If, as we have argued, derived constitution-making processes are vulnerable to ordinary politics because individual constitution makers have a constituted identity, then we can expect original constitution-making processes to be infiltrated by ordinary political motivations because constitution makers may have ambitions of acquiring such a role in the postconstituent period.[25] In other words, the

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CONSTITUTIONS 134–39 (2009) (calculating that constitutional replacement is only 33% more likely in years surrounding a domestic crisis than in other years).

22. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 342 (1998) (citation omitted).

23. *Id.*

24. Ginsburg et al., *supra* note 2, at 204–05.

25. *See* Elster, *supra* note 3, at 2–4 (comparing a politician who shapes the constitution while favored to later win the presidency to a playwright that expects to act in her own play and thus writes a large role for herself).

self-serving hypothesis makes sense when there actually is a "self" that will be present both in the constituent moment and in the posterior constituted moment.[26] Thus, in original constitution-making processes, the self-serving hypothesis should work only in cases where the individuals in the constituent moment have a low level of uncertainty about their institutional identity in the ensuing constituted moment, and where they actually have the power to shape the institution in question.[27]

III. Supreme Court Judges and the Design of Judicial Councils

The concrete question this Article addresses is whether powerful supreme court judges have the capacity to shape the design of judicial councils through their political influence over the derived constituent power. We believe this question illuminates the specificities of amendment processes vis-à-vis original constitution-making processes. To support this belief, we note that while fifty years ago the judicial branch was an obscure and unfamiliar actor, today it is a central player of everyday politics in most democracies. As Hirschl claims, paraphrasing de Tocqueville, "[T]here is now hardly any moral or political controversy in these [democratic] countries that does not sooner or later turn into a judicial one."[28] Judges with constitutional adjudication power are indispensable to understanding the political dynamics of most democracies. They are political actors that the representative branches of those countries need to take, and do take, into consideration when making decisions.

When supreme court judges may impose political costs on the other constituted organs of government, those organs will take the judges into

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26. In another article, we have shown that the partisan identity of, and the bargaining among, constitution makers matters for the creation of power-diffusing institutions such as constitutional tribunals. Andrea Pozas-Loyo & Julio Ríos-Figueroa, *Enacting Constitutionalism: The Origins of Independent Judicial Institutions in Latin America*, 42 COMP. POL. 293, 296–97, 302 (2010). On the crafting of constitutional rules for selecting presidents, see generally Gabriel L. Negretto, *Choosing How to Choose Presidents: Parties, Military Rulers and Presidential Elections in Latin America*, 68 J. POL. 421, 421–33 (2006).

27. This point may seem trivial but it has interesting implications. For instance, the self-dealing hypothesis can be easily applied to executive-led constitution making but not to legislative-led processes, even if all the individuals that are part of a constituent body know that they will be members of the legislature, because it is not automatic that the individual decision-making weight of the constitution-making body will be the same as that of the future legislative body. This condition is not satisfied when the constitution-making rule is supermajoritarian, as it is in amendment processes, or when for political reasons the minority in the constituent assembly has a de facto veto over some provisions. To make this point clear, it is possible to say that while in an executive-led constitution-making process the institutional and individual identity coincide, in the legislative-led case this equivalence is lost for those individuals that will be part of the minority in the constituted legislature. In other words, the institutional self who gets the legislative power is the *majority* of the legislature, not the totality of individual legislators. So it makes sense for the individuals who will be part of the minority in the future legislature to block majoritarian self-serving decisions when they can.

28. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 169 (2004).

consideration. The power of the judges vis-à-vis the representative organs of government is determined by two central factors: (1) their constitutional powers to adjudicate conflicts involving the representative organs, and (2) the political context in which they make decisions. Notice that while the first factor is an institutional power established de jure, the second factor is a qualifier that makes us expect those powers to be effective if there is fragmentation of power in the political system.[29] In other words, if political power is not monopolized by a single group, then we can reasonably expect that the judge's influence over the other constituted organs correlates positively with her de jure constitutional review powers, given a healthy degree of independence from those political actors. For instance, the judge's influence enables us to understand why certain laws that reflect the preferences of the legislative majority do not even make it to the floor of congress: anticipation of a judicial decision declaring those laws unconstitutional.

Now, by which mechanism are our independent and dependent variables linked? In other words, how can supreme court judges with judicial review powers infiltrate their preferences into the amendment processes that create judicial councils? As we have already suggested, the answer to this question lies in the double identity of the individual members of the derived constituent power. We distinguish three concrete mechanisms: (1) In amendment processes, constitution makers belong to constituted organs, and they are (or can expect to be) parties in conflicts that the supreme court will adjudicate. Through this mechanism, supreme court judges can signal that they will impose stricter standards on those who are amending the constitution in ways the judges consider unfavorable. Thus, the judges exert influence before and during the process of constitutional reform. (2) After a successful amendment process, judges with the power of judicial review can decide that the amendment itself is unconstitutional, either because of vices during the process of reform or because of the amendment's content. Through this mechanism, judges would nullify an amendment that is contrary to their interests after the amendment was formally passed.[30] The previous two mechanisms work better in a politically fragmented context, when supreme court judges adjudicate conflicts among governmental organs with different political identities, and thus the coordination of political branches to

29. *Cf.* John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263, 278 (postulating that courts may only act contrary to congressional preferences "if their decisions are protected from immediate reaction by internal structural impediments within Congress").

30. This mechanism is not as rare as one might think. *See* Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT'L J. CONST. L. 460, 462 (2006) (recognizing cases from India and Peru in which the supreme courts have asserted the power to review the constitutionality of constitutional amendments). In Latin America, there are many examples. The one that is most interesting for our purposes is the decision by the Colombian supreme court in 1981 to declare unconstitutional the amendment of 1979 that, among other things, created a judicial council. *See infra* notes 89–90 and accompanying text.

challenge unfavorable judicial decisions is limited.[31] Hence, in fragmented political contexts, supreme court judges have political leverage vis-à-vis the members of the derived constituent body, and they are able to influence the decisions of the members of the derived constituent body via their power of constitutional review.[32] (3) In addition, supreme court judges can also influence the outcomes of amendment processes through informal mechanisms that depend on shared social networks between members of the derived constituent body and the supreme court judges. These informal mechanisms are relative to a particular political context and thus they become evident in the study of concrete cases. For instance, as we will discuss later, in Mexico's 1994 amendment processes, the supreme court was able to introduce a last-minute, obscure (but important) modification to the constitutional provision that established the judicial council.[33] The supreme court was able to secure this amendment thanks to two very influential senators who had been members of the supreme court and who were close to the current court's members and their institutional interests.[34]

The design of judicial institutions is of particular interest to supreme court judges, and thus they will have an interest in seeing their preferences enacted when constitutional amendments deal with those institutions. As we have already mentioned, in Latin America, the motivation behind the creation of judicial councils was to block clientelistic relations between supreme court judges and lower court judges, and to promote a judicial career with clear and objective promotion and disciplinary standards.[35] Thus, judicial councils are of particular importance in many Latin American countries because their adoption altered the judges' power by diminishing their administrative control over the judiciary, over the judicial careers of lower court judges, and over the judicial budget.[36] Hence, it is reasonable to

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31. *See* REBECCA BILL CHAVEZ, THE RULE OF LAW IN NASCENT DEMOCRACIES: JUDICIAL POLITICS IN ARGENTINA 15 (2004) (contending that a competitive political environment enhances the rule of law and the power of judges as arbitrators of political conflict); GEORGE TSEBELIS, VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK 234 (2002) (concluding that judicial independence positively correlates with the number of "veto players," independent political actors whose agreement is required to alter policy); Matías Iaryczower et al., *Judicial Independence in Unstable Environments, Argentina 1935–1998*, 46 AM. J. POL. SCI. 699, 699 (2002) (theorizing that political fragmentation makes for a vigorous judiciary willing to assert itself against other government actors). *See generally* Ferejohn & Weingast, *supra* note 29, at 265–70 (modeling the strategic behavior of courts vis-à-vis legislatures).

32. To generalize our argument to other types of amendments, the influence of political actors' leverage vis-à-vis the amending body should be weighted by the costs and gains that the amendment in question is expected to bring to members of the amending body. Because the design of judicial councils in Latin American countries is not as important to the interests of the elected branches as, say, the design of the electoral system, the political leverage of supreme court judges can be expected to outweigh that of the other branches.

33. *See infra* notes 76–80 and accompanying text.

34. *See infra* note 78 and accompanying text.

35. *See supra* note 14 and accompanying text.

36. *See* HAMMERGREN, *supra* note 12, at 116 (discussing the tasks envisioned for judicial councils in Latin America).

assume that supreme court judges would try to influence the amendment processes that introduced or altered the competencies of those councils.

To analyze judicial councils, it is important to distinguish their composition and competencies. Regarding the latter, judicial councils' strengths vary depending on whether the council is capable of (1) administering the material resources of the judiciary, (2) participating in or controlling the appointment of judges at some or all levels in the judicial hierarchy, and (3) managing judicial careers through sanction and promotion mechanisms.[37] Regarding the composition of the councils, they can be dominated by judges from—or appointed by—the supreme court, by judges from all levels of the judiciary, or by persons who are external to the judiciary who can be either politicians from the elected branches or councilors nominated by other external actors such as the deans of the law schools or the members of the bar association.[38]

Tom Ginsburg and Nuno Garoupa combine both dimensions to create a typology of judicial councils.[39] At one extreme, they place councils dominated by supreme court judges that concentrate the three functions mentioned in the previous paragraph.[40] At the other extreme, they locate councils dominated by actors external to the judiciary that perform administrative tasks but do not participate in the appointment of judges or in the management of judicial careers.[41] In between, we find strong councils, in terms of competencies, that are dominated by actors external to the judiciary, councils controlled by judges from different levels of the judiciary with different levels of competencies, and so on.[42]

Judicial councils were first adopted in European countries as a means to take away from the executive branch (usually through the ministry of justice) the power to appoint judges and to influence and manage judicial careers.[43] In France, Italy, Portugal, and Spain, judicial councils are composed of judges and representatives of other branches of government and professional associations.[44] These councils' functions are to participate in judicial appointments and supervise judicial careers.[45] In contrast, Latin American

37. *See* Hammergren, *supra* note 13, at 9 tbl.1 (focusing on the same three factors in evaluating the power of Latin American judicial councils).

38. *See id.* (listing by country the composition and methods of selection for Latin American judicial councils).

39. Nuno Garoupa & Tom Ginsburg, *The Comparative Law and Economics of Judicial Councils*, 27 BERKELEY J. INT'L L. 53, 57–60 (2009).

40. *See id.* at 57–58 (enumerating the broad powers held by supreme court judges in the "French-Italian model" of judicial councils).

41. *See id.* at 59 (mentioning that the judicial councils in Austria and Costa Rica are confined to administrative tasks).

42. *See id.* at 59–60 (describing the idiosyncrasies of a plethora of national judicial councils).

43. HAMMERGREN, *supra* note 12, at 116.

44. Hammergren, *supra* note 13, at 2.

45. *See id.* (mentioning that the four nations' judicial councils are focused on appointments and career management rather than broad-based administration); *see also* CARLO GUARNIERI &

councils were adopted as a means to reduce the power of supreme court judges to appoint lower court judges and control their judicial careers in order to prevent clientelism, reduce corruption, and promote a judicial career with objective standards.[46]

Not only do the origins of the councils differ across the Atlantic Ocean, their composition and competencies also vary greatly. The composition of Latin American judicial councils varies considerably from country to country, to the extent that we can find examples of the three types of councils identified by Ginsburg and Garoupa.[47] Regarding competencies, Latin American councils tend to be stronger than their European counterparts because, in addition to controlling judicial appointments and managing judicial careers, councils also have control over the judiciary's material resources and, in some cases, even over the number and jurisdiction of the courts.[48]

Assuming that supreme court judges prefer to maximize their power over the judiciary's administration and over lower court judges—by controlling their careers and appointments—we can derive the following

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PATRIZIA PEDERZOLI, THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY 52–66 (C.A. Thomas ed., 2002) (describing the formation and organization of judiciary councils in Italy, Spain, Portugal, and France and noting that they were "designed to preserve the independence of the judiciary").

46. *See* HÉCTOR FIX-ZAMUDIO & HÉCTOR FIX-FIERRO, EL CONSEJO DE LA JUDICATURA [THE JUDICIAL COUNCIL], 3 CUADERNOS PARA LA REFORMA DE LA JUSTICIA [HANDBOOKS FOR JUDICIAL REFORM] 34, 36, 38, 40, 42, 44–60, 67–69 (1996) (describing how judicial councils play a role in judicial disciplinary proceedings in Peru, Uruguay, Colombia, Venezuela, Panama, Costa Rica, Bolivia, Argentina, and Mexico; appointment or submission of potential judicial candidates in Peru, Colombia, Venezuela, El Salvador, Panama, Costa Rica, Paraguay, Bolivia, Argentina, and Mexico; and administration of the judicial career plan in Colombia and Costa Rica); Hammergren, *supra* note 13, at 4–5 (delineating various powers of Latin American supreme courts assumed by judicial councils). It is interesting to investigate further the reasons behind the decision to place such important powers in the supreme courts in the first place in the Latin American region. According to Linn Hammergren, "Only in Argentina and Colombia had the Ministry of Justice been responsible for judicial administration, and in both countries, the supreme court had already succeeded in reversing that practice." *Id.* at 4. Hammergren also notes that "[o]nly in Argentina and Peru did the ministry manage judicial appointments." *Id.* Hammergren continues: "Elsewhere in Latin America, the supreme court has traditionally exercised the role of governing body for the judiciary as well as that of court of last resort. . . . On the whole, Latin America's ministries of justice have been so weak that they have disappeared in a number of countries (Bolivia, Mexico, Nicaragua, and Panama)." *Id.* at 4–5 (footnote omitted); *see also* Jorge Carpizo, *Otra reforma constitucional: la subordinación del consejo de la judicatura federal* [*Another Constitutional Reform: The Subordination of the Federal Judicial Council*], CUESTIONES CONSTITUCIONALES [CONSTITUTIONAL QUESTIONS], Jan.–June 2000, at 209, 209–12 (noting that the main motivation for creation of the Mexican Federal Judicial Council was reduction of corruption and clientelism); Hammergren, *supra* note 13, at 6–7 (recognizing Latin American concern with judicial incompetence, patronage networks, and improper influence exercised via promotions).

47. *See infra* Part IV (presenting the empirical analysis used in this Article to analyze judicial councils); *supra* notes 39–42 and accompanying text.

48. *See, e.g.*, FIX-ZAMUDIO & FIX-FIERRO, *supra* note 46, at 52–53 (including in the powers of the judicial council of Costa Rica the power to handle the judicial budget and to regulate the distribution of work between courts); Hammergren, *supra* note 13, at 2 (asserting that "none [of the European councils] exercise the administrative responsibilities for the entire judiciary in the way that several Latin American councils do").

preference order for the design of judicial councils' composition and functions:

(1) A powerful council controlled by supreme court judges;

(2) A weak council controlled by supreme court judges;

(3) A weak council controlled by members of the judiciary;

(4) A powerful council controlled by members of the judiciary;

(5) A weak council controlled by politicians; or

(6) A powerful council controlled by politicians.

Powerful supreme court judges will try to influence amendment processes where judicial councils are either created or reformed in order to satisfy these preferences.

IV. The Constitutional Design of Judicial Councils in Latin America

The Venezuelan constitution of 1961 adopted the first Latin American judicial council consciously modeled on European trends (although the council was not actually formed until 1969), in the sense that it was created to manage judicial appointments, but it did not receive responsibility for judicial administration until 1988.[49] The second council in the region was adopted by the military government in Peru in 1969;[50] it was in charge of judicial appointments that had formerly been managed by the Ministry of Justice, an organ eliminated by the military.[51] It was nearly two decades until another Latin American country followed suit.[52]

Since the late 1980s, several countries have created judicial councils: Argentina, Bolivia, Brazil, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, and Paraguay.[53] The composition, functions, and constitutional status of these councils, however, vary considerably across time and space. For instance, whereas some councils were given considerable power, independence, and constitutional status from the moment of their creation (e.g., Mexico and Colombia),[54] other

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49. Hammergren, *supra* note 13, at 3. The Venezuelan constitution of 1947 actually mentioned that "the law could establish a Supreme Council of Judges with representatives from the Legislative, Executive, and Judicial branches in order to foster the independence, efficacy and discipline of the Judicial Power," but apparently such a council was not created until more than two decades later. CONSTITUCIÓN DE LOS ESTADOS UNIDOS DE VENEZUELA [E.U. VENEZ. CONST.] 1947, art. 213.

50. Hammergren, *supra* note 13, at 3. The military governments of Brazil and Uruguay also created judicial councils. *Id.* at 13.

51. *Id.* at 3.

52. *Id.* at 4.

53. *Id.* at 9–12 tbl.1.

54. *See* Mario Melgar Adalid, *The Supreme Courts and the Judiciary Councils*, 42 ST. LOUIS U. L.J. 1131, 1134 & n.22 (1998) (delineating the powers that the Mexican constitution bestows on the Mexican judicial council); Hammergren, *supra* note 13, at 13, 41–42 (recounting the constitutional creation of the Colombian judicial council, highlighting the Colombian judicial

councils were born as organs internal to the judiciary that received no constitutional status (e.g., Costa Rica, Guatemala, and Brazil (pre-2004)).[55] Still other councils are simply mentioned in the constitution but the details of their composition and functions are left to the organic laws of the judiciary (e.g., El Salvador, Argentina, Ecuador, and the Dominican Republic),[56] although, interestingly, in some of these cases, the details of the composition and functions of the council were later constitutionalized (e.g., El Salvador and the Dominican Republic).[57] Finally, in Venezuela, the council disappeared in the constitution of 1999.[58]

Table 1 shows the year of the constitutional adoption of judicial councils in Latin America, distinguishing between original and derived constitution-making processes. For instance, the first Colombian judicial council was created through a constitutional amendment in 1979,[59] and the new Colombian constitution of 1991 also included a judicial council.[60] Table 1 does not include the countries that have created a judicial council if the council lacks constitutional status (e.g., Costa Rica, Guatemala, and Panama), but it includes the countries where the council is mentioned in the constitution even though the details of its composition and functions are left to an organic law. The argument defended in this Article directly applies to the twelve observations in the right column of Table 1, which are the judicial councils either adopted or reformed through amendment processes.[61]

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council's powers, and characterizing the Colombian and Mexican judicial councils as external to the judiciary).

55. *See* Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103, 111 (2009) (recounting the independence from the judiciary enjoyed by the Brazilian judicial council that was created by a 2004 constitutional amendment); Hammergren, *supra* note 13, at 13 (describing the Costa Rican, Guatemalan, and first two Brazilian judicial councils as restricted and judicially dominated).

56. *See infra* Table 1.

57. *See* Margaret Popkin, *Efforts to Enhance Judicial Independence in Latin America: A Comparative Perspective*, *in* U.S. AGENCY FOR INT'L DEV., GUIDANCE FOR PROMOTING JUDICIAL INDEPENDENCE AND IMPARTIALITY 100, 105 (rev. ed. 2002) (discussing El Salvador's judicial council and noting its "greater independence from the [supreme] court and increased responsibilities, based on constitutional reforms agreed to during the 1991 peace negotiations"); Ingrid Suarez, *A Change for the Better: An Inside Look to the Judicial Reform of the Dominican Republic*, 9 ILSA J. INT'L & COMP. L. 541, 548 (2003) (heralding the Dominican Republic's creation of the National Magistrature Council by the 1994 constitution, which was charged with making rules to govern the judiciary).

58. Rogelio Pérez-Perdomo, *Venezuela, 1958–1999: The Legal System in an Impaired Democracy*, *in* LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICA AND LATIN EUROPE 414, 450 (Lawrence M. Friedman & Rogelio Pérez-Perdomo eds., 2003).

59. CONSTITUCIÓN DE LA REPÚBLICA DE COLOMBIA [C.R.C.] 1886, art. 148 (Colom.) (1979).

60. C.P. arts. 254–57 (Colom.).

61. Many of these amendment processes were devoted to judicial reform per se. If other political institutions were reformed during the same amendment process, it is possible that a bargain among the members of the derived constituent power had taken place. *See* Jonathan Hartlyn & Juan Pablo Luna, Constitutional Reform in Latin America: Intentions and Outcomes 9–10 (Sept. 5–9, 2007) (conference paper), http://cablemodem.fibertel.com.ar/seminario/hartlynluna.pdf (observing that Latin American constitutional reform packages can be created by politicians' negotiation with

Table 1. Constitutional Adoption of Judicial Councils in Latin America

Country	Original Constitution-Making Process	Derived Constitution-Making Process
Argentina		1994*
Brazil		2004
Bolivia	1995	2002, 2005
Colombia	1991	1979
Dominican Republic	2010	1994*
Ecuador	1998, 2008	1993*
El Salvador	1983*	1991*, 1996
Honduras		2000
Mexico		1994, 1999
Paraguay	1992	
Peru	1979, 1993	
Venezuela	1947*, 1961	

*Council mentioned in the constitution; details of its composition and functions found in the organic law of the judiciary.

The functions and composition of judicial councils vary considerably across time and space in the Latin American region. Following Garoupa and Ginsburg, we distinguish the councils' powers to participate in the administration of the judiciary's material resources and their powers to appoint lower court judges and manage judicial careers. Appendix A shows the rich regional variation in both composition and functions of all the judicial councils with constitutional status in Latin America. For instance, there are councils with high levels of appointment powers but low levels of administrative powers (e.g., the Dominican Republic (1994), Paraguay (1992)), councils with high levels of both types of powers (e.g., Mexico (1994)), and councils with lower levels of both (e.g., El Salvador (1983, 1991)). The composition of the councils also varies, with councils dominated by supreme court judges (e.g., Mexico (1999)), councils with a majority of judges from different courts (e.g., Brazil (2004)), and councils dominated by politicians from the elected branches (e.g., Bolivia (1995, 2002, 2005)).

The argument of this Article is that the more powerful supreme court judges are, the more likely it is that they will successfully shape the design of judicial councils in amendment processes in a way that serves their interests. To assess this argument, we use an index of judicial review powers of supreme court judges as established in the constitutions that antecede the

their opponents). For instance, one party may support a reform in presidential powers in exchange for support for a judicial council.

amendment process that created or reformed the judicial council. The index of judicial review powers that can be used to influence derived constitution-making processes considers whether the constitution specifies instruments of constitutional adjudication that are good for arbitrating political conflicts (e.g., instruments that are concentrated in the supreme court, abstract or concrete, and with access restricted only for political actors).[62] All the instances of adoption or reform of judicial councils through amendments analyzed in this Article took place in contexts where no single political party controlled all the organs required to amend the constitution, making this index a valid proxy of de facto power.[63]

To assess the influence that supreme court judges exerted on the design of judicial councils, we create an index that combines the councils' composition and functions. Essentially, we consider first whether a council controls or participates in (1) the preparation and administration of the judiciary's budget; (2) decisions regarding the jurisdiction and number of courts; (3) the appointment of judges from different levels of the judiciary; and (4) the administration of judicial careers and the mechanisms for disciplining judges. Based on this index of judicial councils' functions, which adds up to nine points, we distinguish between strong and weak councils (above or below the midpoint, respectively) and we match this with the council's composition (e.g., controlled by politicians from the elected branches, composed of a majority of judges from all levels of the judicial hierarchy, or composed of a majority of judges selected by the supreme court). The resulting values range from one to six, which align with the inverted order of supreme court judges' preferences over the council's design established at the end of Part III. For instance, the index assigns a value of six if the council is strong and dominated by supreme court judges, a value of five if it is a weak council controlled by supreme court judges, and so on.

The correlation between the indexes of judicial review powers of supreme court judges and their influence over the design of the council is 0.622 (statistically significant at the 95% confidence level). There are interesting cases in our small sample (n=12). For instance, in Bolivia, where the supreme court had very low powers of judicial review because a constitutional tribunal had been delegated those powers, the design of the council

62. *See* Julio Ríos-Figueroa, *Institutions for Constitutional Justice in Latin America*, *in* COURTS IN LATIN AMERICA 27, 31, 40–42 (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011) (describing the variety of instruments for constitutional adjudication contained in Latin American constitutions and categorizing the types of legal instruments according to their characteristics). In our index, if a constitutional tribunal has been created, then the judicial review powers of supreme court judges equal zero.

63. *See* Andrea Pozas-Loyo & Julio Ríos-Figueroa, *When and Why Do "Law" and "Reality" Coincide? De Jure and De Facto Judicial Independence in Chile and Mexico*, *in* EVALUATING ACCOUNTABILITY AND TRANSPARENCY IN MEXICO 127, 135–39 & fig.5 (Alejandra Ríos Cázares & David A. Shirk eds., 2007) (predicting a higher correlation between judicial independence in law and judicial independence in reality where no one party has the power to unilaterally amend the constitution).

was the worst for supreme court judges (i.e., a powerful council controlled by politicians). In contrast, in Mexico, where the supreme court enjoyed higher powers of judicial review after the reform of 1994, the design of the council is the best for supreme court judges (i.e., a powerful council with a majority of judges nominated by the supreme court).[64]

In the remainder of this Article, we illustrate the operation of the formal and informal mechanisms through which supreme court judges influenced the amendment processes that designed the Mexican judicial council. This is a story of supreme court judges using their powers of judicial review and their informal lobbying capacities to shape the outcome of a constitutional amendment in a way that served their interests.

The Mexican judicial system, as established in the constitution of 1917, has been reformed several times. During most of the twentieth century, these reforms had a primary objective of aligning the interests of the members of the judiciary with those of the hegemonic political party that was created in the aftermath of the revolution.[65] Once the supreme court and the rest of the judiciary were successfully incorporated into the corporatist logic of the *Partido Revolucionario Institucional* (PRI), there was another series of reforms aimed at improving the administrative efficiency of the judiciary both by concentrating administrative power in the supreme court and by expanding the number of lower federal courts to deal with the ever-increasing caseload.[66] Until 1994, the Mexican supreme court was thus a powerful administrative body very much involved with the hegemonic party

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64. A systematic analysis on a larger number of cases would be necessary to show more than a mere positive association.

65. *See* Beatriz Magaloni, *Authoritarianism, Democracy and the Supreme Court: Horizontal Exchange and the Rule of Law in Mexico*, *in* DEMOCRATIC ACCOUNTABILITY IN LATIN AMERICA 266, 282 (Scott Mainwaring & Christopher Welna eds., 2003) (noting that Mexican presidents between 1917 and 1988 used constitutional amendments to place many substantive issues beyond judicial review and to control the supreme court through modifications to the rules for appointing and dismissing judges). A 1934 constitutional amendment provided for a six-year tenure that coincided with the tenure of the president; in 1944, once the party had become hegemonic, another amendment restored life tenure to supreme court judges—but flexible dismissal procedures rendered it largely ineffective. *Id.* at 283 tbl.9.3, 286–87.

66. *See* Patrick Del Duca, *The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization*, 51 UCLA L. REV. 35, 40 (2003) (explaining how the 1994 amendments to Mexico's constitution increased the supreme court's independence from the president). The culmination of this process took place in 1987 when a constitutional amendment transferred to the supreme court the power to control the material resources of the judiciary, including not only the budget, but also decisions over the number and jurisdiction of courts. Héctor Fix-Fierro, *La reforma judicial en México, ¿de dónde viene? ¿a dónde va?* [*Judicial Reform in Mexico: Where Did It Come From? Where Is It Going?*], REVISTA MEXICANA DE JUSTICIA [MEX. REV. JUST.] July–Dec. 2003, at 251, 252, 278–79. These new capacities added to the supreme court's control over the appointment and promotions of lower court judges, a prerogative that the court had enjoyed since 1917. *See* Magaloni, *supra* note 65, at 283 tbl.9.3 (indicating that the supreme court has had the power to appoint magistrates and judges since 1917).

and with weak powers of judicial review.[67] That year, however, the supreme court was delegated considerable powers of judicial review and its membership was reduced in order to increase its legitimacy and independence vis-à-vis the other branches of government.[68] The 1994 reform substantially increased the policy making and lawmaking capacities of the supreme court judges, augmenting in particular the capacities of the supreme court to adjudicate conflicts among the political actors within the executive and legislative branches of government.[69] The main political motivation behind this reform was to have a neutral arbiter to resolve political conflicts—a role that the executive (who was, simultaneously, leader of the hegemonic party and president of the country) could no longer carry out successfully in a context of increasing political fragmentation.[70]

The reform of 1994 also created a judicial council, which was delegated the enormous administrative power formerly enjoyed by the supreme court, both in terms of the administration of the judiciary's budget and also in terms of the appointment of judges and the management of their careers.[71] The political motives behind the creation of the council were, first, to make the constitutional jurisdiction the special focus of the supreme court, and second, to reduce the supreme court's corporatist management of judicial careers.[72] According to former Justice Jorge Carpizo, supreme court judges used to take turns filling a vacancy at any level of the judiciary, and the new judge's career was overseen by his "mentor" on the court, so that after some time each supreme court judge had his own loyal clientele within the judiciary.[73] Also, supreme court judges protected unprofessional and dishonest judges whom they had mentored, reasoning that public scandals damaged the reputation of the entire judiciary.[74] The corporatist logic within the judiciary

67. *See* Magaloni, *supra* note 65, at 291–92 (describing the limited constitutional powers of the Mexican supreme court prior to 1994 and suggesting that the court "tended to serve as [an] agent of the politicians").

68. *See id.* at 294 (noting that the number of judges dropped from twenty-five to eleven and detailing the "new mechanisms for the control of constitutionality" instituted by the 1994 reform).

69. *See id.* ("The Court can adjudicate controversies among different branches or levels of government . . . [such as] the executive and the legislative branches . . . .").

70. *See id.* at 295 (arguing that the new electoral pluralism after decades of PRI dominance drove the political branches to delegate increased constitutional authority to the Mexican supreme court).

71. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, arts. 94, 97, 99, Diario Oficial de la Federación [DO], 31 de Diciembre de 1994 (Mex.). *See also* Michael C. Taylor, *Why No Rule of Law in Mexico? Explaining the Weakness of Mexico's Judicial Branch*, 27 N.M. L. REV. 141, 150 (1997) (explaining the creation and role of the judicial council); Stephen Zamora & José Ramón Cossío, *Mexican Constitutionalism After* Presidencialismo, 4 INT'L J. CONST. L. 411, 421 (2006) (describing the restructuring and repurposing of the supreme court).

72. *See* Carpizo, *supra* note 46, at 212 (describing how the council was granted powers to designate, appoint, promote, and discipline members of the federal judiciary, and that these powers had previously allowed the supreme court to engage in "clientelism" and corruption).

73. *Id.* at 211.

74. *Id.*

reached its summit in 1993: that year, a former supreme court judge was convicted on corruption charges in connection with a case in which circuit judges had liberated a defendant charged with the rape and murder of a young girl after their "mentor" on the court asked them to do so in exchange for a sum of money paid by the defendant.[75]

The 1994 reform was debated with the scandals over the corruption and self-serving behavior of the supreme court in the background.[76] It was difficult for the supreme court to question openly the creation of an independent judicial council that would take away from its huge administrative powers.[77] However, at that time, the supreme court managed to quietly influence the content of the reform by resorting to informal mechanisms. In particular, two senators from the PRI who were in the senate's justice committee at the time of the reform were highly receptive to suggestions from the then-members of the supreme court and convinced other senators to include a provision according to which procedural decisions of the council could be revised by the supreme court (the so-called *recursos de queja*).[78] This was a seemingly harmless inclusion because the constitution still stated that decisions of the council were final,[79] but it actually proved to have huge consequences when combined with the supreme court's increased power resulting from the 1994 reform and increasing political fragmentation.[80]

Just after the 1994 reform, the new supreme court started to lobby strongly to regain control over the administration of the judiciary and of judicial careers.[81] This time the court used not only informal mechanisms but

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75. *See* Carmina Danini, *Ex-Justice Indicted on Bribery Charge*, SAN ANTONIO EXPRESS-NEWS, Apr. 2, 1993, at 8A (reporting the indictment of former supreme court judge Ernesto Díaz Infante Aranda on corruption charges); *Ex-Justice is Being Held in Bribe Case*, HOUS. CHRON., June 22, 2001, at A21 (reporting the arrest of Díaz Infante after several years as a fugitive in the U.S.). Not surprisingly, the infamous case captured the attention of the public. *Id.* The supreme court judge in question apparently served only one year of an eight-year sentence, then died in 2006. *See* Pepe Figueroa, Opinión, *Café Avenida* [*Coffee Avenue*], EL HERALDO DE CHIAPAS [CHIAPAS HERALD], Dec. 6, 2007, *available at* http://www.oem.com.mx/esto/notas/n516363.htm (criticizing the Mexican supreme court for continuing to pay Díaz Infante's pension during and after his incarceration).

76. *See* Julio Ríos-Figueroa, *Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002*, 49 LATIN AM. POL. & SOC'Y 31, 36 (2007) (describing the supreme court, in the years leading up to the reform, as "just another stop in a political career").

77. The judicial council was originally composed of a majority of judges selected by lottery, which effectively took control over lower court judges away from the supreme court. *See infra* Appendix A.

78. Carpizo, *supra* note 46, at 212–13. Interestingly, the senators also happened to be ex-ministers of the supreme court. *Id.* at 213.

79. C.P., *as amended*, art. 100, DO, 31 de Diciembre de 1994 (Mex.).

80. *See* Ríos-Figueroa, *supra* note 76, at 38 (describing how the increasing political diversification in elected offices provided an incentive for the PRI to give the judiciary more political power); Arianna Sánchez et al., *Legalist Versus Interpretativist: The Supreme Court and the Democratic Transition in Mexico*, *in* COURTS IN LATIN AMERICA, *supra* note 62, at 187, 190–91 (describing the increased power granted to the supreme court by the 1994 amendment).

81. *See* Carpizo, *supra* note 46, at 210 (noting that ministers and ex-ministers of the supreme court expressed opposition to the creation of the council).

also formal ones. In particular, two judicial employees filed an *amparo* suit against a decision of the council that the supreme court accepted—despite the constitutional provision stating that decisions of the council were "final and unassailable"[82]—and decided in the employees' favor.[83] This action illustrated the fight between the court and the council, and prompted the president of the court to present a proposal for constitutional amendment to then-president Ernesto Zedillo, who, despite some important voices criticizing the proposal, submitted it to congress to formally proceed with the amendment process.[84] The pressure was successful: in 1999, a constitutional amendment changed the mechanisms for appointing judicial council members.[85] In essence, the amendment transformed the process from selection of judges from different levels by lot into a direct designation by the supreme court of judges from the district and circuit courts.[86] This effectively gave the supreme court control over the majority of the seats in the council, which essentially gave back to the courts control over the material resources of the judiciary and over the careers of lower court judges.

The important role the supreme court played in the content of the 1999 executive proposal of amendment and on its approval and enactment was explicit. In several interviews, the justices themselves openly talked about it. For instance, an article published in the national newspaper *Reforma* noted,

> [T]he chief justice, Genaro Góngora Pimentel, states that the court has been talking with several senators and that the secretary of interior has been promoting the amendment. "Secretary Labastida is optimistic; they have been doing very good work," Góngora Pimentel affirms. "I would not want to speculate on what may happen. I believe that the legislative power will have the doors open to any clarification we can make."[87]

Similar stories can be found in other countries. In El Salvador, for example, after the judicial council was constitutionally created in 1983, "the Supreme Court had successfully lobbied for modifications to guarantee that it would dominate the body. Court domination meant that the selection of judges continued much as it had occurred under direct court management."[88] An example of the second mechanism we discussed in Part III (i.e., declaring

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82. C.P., *as amended*, art. 100, DO, 31 de Diciembre de 1994 (Mex.).

83. Carpizo, *supra* note 46, at 213.

84. *Id.* at 213–14.

85. *Id.* at 214, 217.

86. *Id.* at 217. It is important to mention that the council was not backed by the members of the judiciary because, among other things, the lottery mechanism resulted in the selection of some councilors who were not well regarded by their peers. Interview with Alfonso Oñate Laborde, former minister, Council of the Federal Judiciary (Apr. 14, 2011).

87. Lorena Canales, *Recuperar el poder* [*Retrieving Power*], REFORMA [REFORM], Apr. 13, 1999.

88. Hammergren, *supra* note 13, at 38. Sixteen years later, another amendment in El Salvador produced a strong council with no judges in it. *Id.*

unconstitutional an amendment that created a council) can be found in Colombia, where in 1981 the supreme court declared unconstitutional, for procedural reasons, a constitutional amendment adopted in 1979.[89] This amendment, among other things, created a judicial council and reduced the tenure of supreme court judges from life to eight years.[90] It will also be interesting to watch the dynamic in the Dominican Republic, where the new constitution (enacted in 2010) created a judicial council in which the supreme court has more influence than what it had in the previously existing council.[91]

V. Conclusion

Constitution-making processes are often considered extraordinary events where the passions and interests of ordinary politics cede their place to "order and concord."[92] We have challenged this view by arguing that it is rooted in scholarship that mostly focuses on the creation of new constitutions (what we called original constitution-making processes) and overlooks the processes and politics behind amendments to existing constitutions (i.e., derived constitution making events). Amendment processes are considerably more susceptible to the intromission of ordinary politics because actors that participate in the derived constituent power are, at the same time, members of the constituent entity that embodies the popular will and also constituted governmental actors with ordinary political interests.

To explore the previous idea, the Article focused on amendment processes that adopted or reformed judicial councils and the influence that supreme court judges can exert upon these processes. In particular, we argued that the more powerful supreme court judges are, the more likely it is that they will successfully influence future amendments to shape the composition and functions of judicial councils in such a way as to serve the judges' interests. We collected all the instances of adoption or creation of judicial councils in Latin America since the first council was established in the region in Venezuela in 1961. We also coded the degree of power that supreme court judges enjoyed before a particular reform process took place. The empirical analysis suggests support for the argument presented in the Article in our sample of Latin American cases. In addition, the Mexican case illustrates the mechanisms through which supreme court judges influence constitution-making processes.

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89. MARIO CAJAS SARRIA, EL CONTROL JUDICIAL A LA REFORMA CONSTITUCIONAL: COLOMBIA, 1910–2007 [JUDICIAL CONTROL OF CONSTITUTIONAL REFORM: COLOMBIA, 1910–2007], at 78–83 (2008).

90. Carlos Ariel Sánchez, *La administración de justicia en Colombia, siglo XX: Desde la Constitución de 1886 a la Carta Política de 1991* [*The Administration of Justice in Colombia, 20th Century: From the Constitution of 1886 to the Political Charter of 1991*], BANCO DE LA REPÚBLICA [BANK OF THE REPUBLIC] (Apr. 2000), http://www.banrepcultural.org/blaavirtual/revistas/credencial/abril2001/136sxx.htm.

91. *See infra* Appendix A.

92. THE FEDERALIST NO. 49, *supra* note 1, at 315.

This Article has two clear implications that could be explored in future research. First, we would expect powerful judges to try to also influence amendment processes aimed at reducing their adjudicatory powers. In particular, we would expect them to use every resource at hand to block the creation of an autonomous constitutional tribunal. In that case, the causal mechanisms linking the judges' power and their capacity to influence representatives would differ from those we presented in this Article, since the threat of future adverse decisions and the declaration of unconstitutionality would not be available for supreme court judges if the tribunal was successfully created. Nevertheless, in a fragmented political context, powerful supreme court judges can block an amendment by convincing one or more of the political actors with veto power over the amendment that they are better off without that amendment (i.e., that maintaining the status quo is in their interest). If this is so, we would expect autonomous constitutional tribunals to be created (1) via an amendment when supreme court judges have low powers of constitutional review, or (2) through the enactment of a new constitution. Prima facie, this relation holds in Latin America, where all the constitutional tribunals have been created through a new constitution[93] except that of Chile in 1970 (at which time the Chilean supreme court had low powers of judicial review).

The second implication is that, in amendment processes, we would expect other social and political actors with leverage over representatives to try to influence the outcomes of amendments that affect their interests. For instance, we would expect the army to try to influence an amendment over the jurisdiction of military courts. Or we could expect the Catholic Church to try to influence an amendment that affects their interests in education, for example. We hope that this Article contributes to the understanding of the politics of amendments and that it will encourage further studies on this interesting and relatively unexplored topic.

93. CONSTITUCIÓN POLÍTICA DEL ESTADO DE BOLIVIA [BOL. CONST.] Feb. 6, 1995, art. 119; CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 102 (Braz.); C.P. arts. 239–45 (Colom.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR [ECUADOR CONST.] art. 159; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA [GUAT. CONST.] art. 260; CONSTITUCIÓN POLÍTICA DEL ESTADO REPÚBLICA DEL PERU [PERU CONST.] art. 296.

Appendix A. Composition and Functions of Latin American Judicial Councils

Country	Composition		Tenure (years)	Functions	
	Judges	**Non-Judges**		**Administration**	**Judicial Career**
Argentina (1994)*	Three: judges from different levels of the judicial hierarchy chosen by open election; judges and lawyers can vote	Ten: six legislators; two representatives of the lawyers; one representative of the executive; one representative of academia	4	Appoints and regulates general administrators of judiciary; reviews the budget project sent by the executive; organizes education programs	Proposes candidates for judges; opens the process of removal for judges and presents the respective accusation before the disciplinary jury; applies sanctions
Brazil (2004)	Nine: all selected by different courts in the country	Six: one federal and one state prosecutor selected by the attorney general; two lawyers named by the bar association; two citizens (one appointed by deputies, the other by the senate)	2	Controls the administrative and financial situation of the judiciary; represents the Public Ministry in cases of crime against the public administration or abuses of authority	Selects, removes, transfers, and disciplines judges
Bolivia (1995) *amended in* 2002 and 2005[1]	One: president of the supreme court	Four: lawyers with at least ten years of experience; elected by two-thirds of congress	10	Elaborates and executes the judiciary's budget	Proposes candidates for supreme court (to the congress) and for lower courts (to superior courts); exercises disciplinary and regulatory power over the members of the judiciary

Bolivia (2009)	Members of the council are directly elected by the public from among the candidates proposed by the National Assembly.		6	Controls and administers the judiciary's budget and oversees its implementation	Proposes candidates for appellate courts (to the Superior Justice Tribunal) and designates judges at the district level; exercises displinary and regulatory powers over members of the judiciary
Colombia (1979)	Members of the council designate their successors. (A transitory provision established that first council members were to be designated by the president, but this reform was declared unconstitutional in 1981.)		8	Resolves conflicts of competence	Proposes candidates for lower court judges to supreme court; controls judicial careers; examines and sanctions the conduct of all judiciary employees
Colombia (1991)	Administrative chamber—Three: two named by the supreme court, one by the Constitutional Court Jurisdictional and disciplinary chamber—None	Administrative chamber—Three: named by the Council of State Jurisdictional and disciplinary chamber—Seven: elected by congress	8	Elaborates and administers judiciary's budget; resolves conflicts of competence; proposes laws related to administration of justice; creates, eliminates, merges, or moves judicial personnel posts; decides jurisdiction/number of courts	Proposes candidates for judges; administers judicial careers; examines and sanctions conduct of judges and lawyers

*Council mentioned in the constitution, but details obtained from organic laws

(cont.)

**Council mentioned in the constitution, but details obtained from the official web site of the Council

[1]In 2002, an amendment made the length of judicial council members' tenure six years instead of ten. In 2005, another amendment again increased the length of tenure to ten years. All other characteristics were not changed.

Appendix A (cont.).

Country	Composition		Tenure (years)	Functions	
	Judges	Non-Judges		Administration	Judicial Career
Dominican Republic (1994)	Two: the president of the supreme court and a member of the supreme court	Five: presidents of the republic, of the senate, and of the chamber of deputies; one senator; one deputy (from a different party than that of the president of his chamber)	[NI]	None	Evaluates and appoints candidates for the supreme court
Dominican Republic (2010)	Five: the president and a judge of the supreme court, plus one judge from the appeals, district, and peace courts (chosen by their peers)	None	5	Administration and budgetary control of the judiciary	Presents to the supreme court proposals for judges of all levels; disciplinary control over all members of the judiciary; applies and executes the evaluation instruments
Ecuador (1993)*	Mentioned in the constitution but never regulated	[no information]	[NI]	[no information]	[no information]

Ecuador (1998)*	One: the president of the supreme court or a delegate In case of tie, the president of the council can break it.	Seven: three designated by the supreme court, one by the judicial association in Ecuador, one by the deans of the law schools, one by the lawyers association, and one by the administrative and superior courts	6	Dictates their own regulations and those of other courts; approves budgetary proposals; creates new courts	Appoints judges at all levels; administers judicial careers; imposes disciplinary sanctions
Ecuador (2008)	None	Nine: six law and three administrative professionals; all selected through an open contest	6	Defines and executes policies for the improvement of the judiciary; reviews proposals for the budget of the judiciary; controls the education programs in judicial careers	Directs the process of selection of judges and members of the judiciary; administers judicial careers
El Salvador (1983)**	Five: all members of the Supreme Court of Justice	Five: three lawyers from the bar association; two teaching lawyers of the universities	[NI]	[no information]	Proposes the candidates for judges
El Salvador (1991)*	Mentioned in the constitution but never regulated	[no information]	[NI]	Organizes the school for judicial and legal training (as mentioned in constitution)	Presents lists of candidates to the supreme court and judges of all other levels (as mentioned in constitution)

*Council mentioned in the constitution, but details obtained from organic laws

(cont.)

**Council mentioned in the constitution, but details obtained from the official web site of the Council

Appendix A (cont.).

Country	Composition		Tenure (years)	Functions	
	Judges	Non-Judges		Administration	Judicial Career
El Salvador (1996)*	None	Seven: two-thirds of congress elects from lists of lawyers proposed by bar association (3), by law schools (2), by the Public Ministry (1), and by lower court judges (1)	5	Reviews budget and approves administrative decisions; organizes the school for judicial and legal training	Presents to the assembly lists of candidates to the supreme court; presents to supreme court candidates for judges of all other levels; evaluates and administers judicial careers
Honduras (2000)*	Five: the president and a judge of the supreme court; three judges from lower courts; all appointed by the supreme court	None	2	Administers all financial, material, and human resources of the judiciary; elaborates budget and all regulations	Administers and controls all aspects of judicial careers: appointment, promotion, and disciplinary measures
Mexico (1994) *amended in* 1999[2]	Four: one is the president of the supreme court; other three are selected by lot from different levels of the judicial hierarchy	Three: one designated by the executive and two by the senate	5	Prepares and administers the budget of the judiciary, except that of the supreme court; can adopt general agreements for the functioning of the whole judiciary	Designates, removes, promotes, transfers, and disciplines all federal judges

Paraguay (1992)	One: a member of the Supreme Court of Justice	Seven: one representative of the executive; one senator; one deputy; two lawyers elected by bar association; two law professors elected by peers	3	None	Presents to elected branches candidates for supreme court judges, and to the supreme court candidates for judges of all other levels; evaluates and administers judicial careers
Peru (1979)	Two: representatives of the supreme court	Five: the prosecutor general; one representative of the national and one of the Lima bar associations; two representatives of the law schools	3	None	Presents to elected branches candidates for the supreme court and the superior local courts
Peru (1993)	One: chosen by the supreme court	Six: two chosen by the bar, two chosen by other professional associations, two chosen by the deans of the national and private universities	5	None	Selects and names the judges and prosecutors of all levels, and ratifies them every seven years; sanctions and removes judges (by a direct request from the supreme court)
Venezuela (1961)	[no information]	[no information]	NI	[no information]	[no information]

*Council mentioned in the constitution, but details obtained from organic laws

**Council mentioned in the constitution, but details obtained from the official web site of the Council

[2]In 1999, there was an amendment to the appointment method of judicial council members. Since then, instead of being selected by lot, judges from lower courts are selected by the supreme court. All other characteristics were not changed.