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JUDICIALIZATION IN THE AMERICAS

by

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JUDICIALIZATION IN THE AMERICAS

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ABSTRACT

The rise in judicialization research recognizes the influence of politics on the judicial branch. Judicialization is the acceptance and trial of traditional political quandaries by national courts that result in landmark cases and leads to the creation of new legislation. A rise in the number of landmark cases signals a fundamental alteration and understanding of the power and purpose of the judiciary. This thesis substantiates the claims of rising contentious political issues reaching national courts for adjudication. It addresses the causes for judicial empowerment via constitutionalization and determines the effects judicialization has on the process of democratization in Latin America using Brazil and Uruguay as case studies.

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I am eternally grateful to my family, friends, and mentors for supporting a modest attempt to understand the political climate of the times. I would particularly like to thank my husband, Rafael, for his unwavering support, and my advisors for maintaining their faith in me and in this project.

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I. INTRODUCTION

Judicialization of politics is a global trend[1] that identifies a rising importance of court determinations in the policy-making[2] of modern democracies.[3] Judicialization involves topics typically addressed outside the judicial branch, most commonly in the executive and legislative branches. Since national courts produce permanent legal precedents that affect the *demos* as a whole, a rise in cases signals, according to some scholars, a fundamental alteration and understanding of the power and purpose of the judiciary. Research in the field of judicialization predominantly centers on the United States[4] with a few case studies available on other regions and in more than one country.[5] Examining location, causes, and consequences of judicialization, I attempt to contribute to the current body of knowledge in hope of bringing further understanding to a topic growing in importance and popularity.[6]

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[1] John A. Ferejohn, "Judicializing Politics, Politicizing Law," *Law and Contemporary Problems* 65, no. 3 (June 22, 2002): 41.

[2] Ferejohn, 41.

[3] Torbjörn Vallinder's definition of judicialization is two-fold. "(1) the expansion of the province of the courts of the judges at the expense of the politicians and/or the administrators, that is the transfer of decision-making rights from the legislature, the cabinet, or the civil service to the courts or, at least (2) the spread of judicial decision-making methods outside the judicial province proper." Torbjörn Vallinder, "When the Courts Go Marching In," in *The Global Expansion of Judicial Power*, ed. Chester Neal Tate and Torbjörn Vallinder (New York: New York University Press, 1995), 15; Ran Hirschl, "The Judicialization of Politics." in *The Oxford Handbook of Political Science*, ed. Robert E. Goodin (New York: Oxford University Press Inc., 2013), 256, http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199604456.001.0001/oxfordhb-9780199604456-e-013?print=pdf.

[4] Michael C. Munger, "Comment on Ferejohn's 'Judicializing Politics, Politicizing Law,'" *Law and Contemporary Problems* 65, no. 3 (2002): 87–93, https://doi.org/10.2307/1192404.

[5] Diana Kapiszewski and Matthew M. Taylor, "Doing Courts Justice? Studying Judicial Politics in Latin America," *Perspectives on Politics* 6, no. 4 (December 2008): 742, https://doi.org/10.1017/S1537592708081899.

[6] Kapiszewski and Taylor, 753.

A. SIGNIFICANCE

My thesis explores *constitutionalization*[7] in the United States as a starting point, followed by case studies into judicial review cases of two Latin American countries, Brazil and Uruguay, in order to determine the effects of judicialization on consolidating democracies.[8] This research is of particular concern for policymakers and political and judicial actors of democratic and/or democratizing countries because it identifies how the judicial branch currently offsets executive and congressional power.[9] A deeper understanding of core changes in the political environments of Brazil and Uruguay could provide insight into the overall organization and strength of consolidated democracies facing highly politicized executive and legislative branches. Furthermore, the study of court outcomes may identify a more accurate standing of advancement or decline of democratic norms in the region.

B. DEFINING JUDICIALIZATION

Diana Kapiszewski and Matthew Taylor contend that the study of judicial politics involves significant variations of analytical approaches to judicialization, as well differences in the definition of the term itself.[10] John Ferejohn defines judicialization as a "shift in power away from legislatures and towards courts and other legal institutions."[11] Ran Hirschl expands the definition of "reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies" by including "mega-politics" or "matters of outright and utmost political significance that often define and divide whole polities."[12] For Hirschl, judicialization of politics entails

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[7] Girardeau A. Spann defines constitutionalization as "the process by which political preferences acquire constitutional stature that is of greater concern." Girardeau A. Spann, "Constitutionalization," *Saint Louis University Law Journal* 49 (April 2005): 710.

[8] The study of judicialization requires that a set of laws be available for research. In many countries, including those to be studied in this thesis, supreme rule is outlined in a nation's constitution; therefore, judicialization in the context of Latin America involves constitutionalization.

[9] Rachel Sieder, Line Schjolden, and Alan Angell, *The Judicialization of Politics in Latin America* (New York: Palgrave Macmillan, 2005), loc. 196 of 6123, Kindle.

[10] Kapiszewski and Taylor, "Doing Courts Justice?," 742.

[11] Ferejohn, "Judicializing Politics," 41.

[12] Hirschl, "The Judicialization of Politics," 257.

"the transfer to courts of contentious issues of an outright political nature and significance."[13] Åsa Casula Vifell and Ebba Sjögren argue that the expansion of power of the judiciary is completed via structural and cognitive dimensions[14] and limit their definition on "the influence of legal norms … beyond the formal remit of the judiciary."[15] Duncan McCargo presents two definitions, one positive and one negative. The first identifies a judiciary that contends with social and political matters in the name of "progressive activism and constructive engagement," while the other, is used to describe the tool used to "curtail the power and influence of elected politicians."[16]

Beyond the term itself, experts offer a notion of time that conveys the transformation of judicial procedures. Experts claim that "judicialization of politics is advancing" and use statements to indicate that a global "profound shift," "ever-accelerating transformation," or "worldwide tendency towards judicialization"[17] has occurred, yet Diana Kapiszewski and Matthew Taylor say that current empirical evidence is uncoordinated and limited.[18]

C. A NEW DEFINITION

Empirical proof for judicialization relies on the study of the judicial branch as an institution[19] and the legal processes outlined in each country's constitution. Due to the broadness of the term, I am forced to scale down the definition of judicialization into a

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[13] Hirschl, 254.

[14] Åsa Casula Vifell, and Ebba Sjögren, "The Legal Mind of the Internal Market: A Governmentality Perspective on the Judicialization of Monitoring Practices," *Journal of Common Market Studies* 52, no. 3 (May 2014): 464–465.

[15] Vifell and Sjögren, 463.

[16] Duncan McCargo, "Competing Notions of Judicialization in Thailand," *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 36, no. 3 (2014): 418, http://muse.jhu.edu/journals/contemporary_southeast_asia_a_journal_of_international_and_strategic_affairs/v036/36.3.mccargo.html.

[17] Armen Mazmanyan, "Judicialization of Politics: The Post-Soviet Way," *International Journal of Constitutional Law* 13, no. 1 (January 2015): 200.

[18] Kapiszewski and Taylor, "Doing Courts Justice?,"742.

[19] New Institutionalism can be defined as "approaches … [that] seek to elucidate the role that institutions play in the determination of social and political outcomes." Peter A. Hall and Rosemary C. R. Taylor, "Political Science and the Three New Institutionalisms," *Political Studies* xliv, no. 5 (December 1996): 936, Proquest.

more specific, manageable sphere via the inclusion of the concept of justiciability. The justiciability doctrine in regards to a political question, serves as a litmus test that gauges the limits of the court in addressing cases.[20] If the court identifies a case as political in nature, then it labels it as "nonjusticiable," which is grounds for rejection.[21] According to Torbjörn Vallinder, judicialization occurs when courts go beyond their judiciary role by deciding cases based not on the "the best correct," but "the best politically possible solution."[22] The judicial branch's duty is to "say what the law is,"[23] that is why a process that routinely accepts judicial review cases of "core moral predicaments"[24] outside traditional limits set in the constitution elevates federal courts from interpreters of laws to political institutions primed for their development and legitimization.

For the purpose of this thesis, "judicialization" is defined as the acceptance and trial of traditional political quandaries by a country's national court, which result in landmark cases, and leads to the creation of new legislation. Historical research of constitutional democracies in North and South America ensures that case studies remain in the national sphere, and exclude international or transnational law and judicial proceedings. Judicial data from gathered from official sources will span a twenty-year period (1999–2017).[25] Since identifying landmark cases is subjective, the final overall

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[20] "Political Question Doctrine," Cornell Law School Legal Information Institute, accessed May 1, 2018, https://www.law.cornell.edu/wex/political question doctrine. "It is important to distinguish the political question doctrine from cases presenting political issues. Courts adjudicate controversies with political ramifications on a regular basis." The "political question doctrine applies to issues that courts determine are best resolved within the politically accountable branches of government–Congress or the executive branch," however this determination is challenging. Jared P. Cole, *The Political Question Doctrine: Justiciability and the Separation of Powers*, CRS Report No. R43834 (Washington, DC: Congressional Research Service, 2014), 2.

[21] "Justiciability," Cornell Law School Legal Information Institute, June 5, 2018, https://www.law.cornell.edu/wex/justiciability.

[22] Torbjörn Vallinder, "The Judicialization of Politics—A World-wide Phenomenon: Introduction," *International Political Science Review* 15, no. 2 (April 1994): 92.

[23] "Marbury v. Madison," Cornell Law School Legal Information Institute, accessed May 1, 2018, https://www.law.cornell.edu/supremecourt/text/5/137.

[24] Hirschl, "The Judicialization of Politics," 1.

[25] I selected this timeframe to answer the question posed by Ran Hirschl: Are courts today significantly more involved in dealing with core political predicaments than they were, say, a generation ago? Ran Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts," *Annual Review of Political Science* 11 (June 2008): 113, https://doi.org/10.1146/annurev.polisci.11.053006.183906.

determination will derive from the Latin American country itself, as stated in official communiqués, media, or scholarly works.

D. LITERATURE REVIEW

The main body of literature combines available research from judicialization experts, who are mainly legal scholars, with the work on democratic consolidation by Juan Linz and Alfred Stepan, which indicates how court determinations affect the five arenas that characterize consolidated democracies.[26]

With regard to the rule of law, according to the Supreme Court of the United States, a democratic governmental system that includes checks and balances, constitutional judicial review, and "living" rules[27] protects the *demos* from overreaching the very institutions that guarantee citizens' supreme power. Chief Justice John Marshall highlighted that democracies place the rule of law as a "fundamental principle of society"[28] that allows for "a balance between society's need for order and the individual's right to freedom."[29] Likewise, David Strauss argues that a flexible and provisional constitution relies on the judicial branch to determine if new laws fall within its scope, effectively establishing or denying norms according to its needs.[30] In the same vein, Martin Shapiro and Alec S. Sweet, stress that the rule of law is the "norm that the government must govern by actions in accord with existing law until it chooses to change that law."[31] "[T]hroughout Latin America, perceptions of corruption are strongly and negatively related to regime legitimacy" because corruption "distorts the criteria by

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[26] Juan L. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore: Johns Hopkins University Press, 1996), loc. 550 of 14177, Kindle.

[27] "The Court and Constitutional Interpretation," Supreme Court of the United States, accessed May 1, 2018, https://www.supremecourt.gov/about/constitutional.aspx.

[28] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), http://cdn.loc.gov/service/ll/usrep/usrep005/usrep005137/usrep005137.pdf.

[29] Supreme Court of the United States, "The Court and Constitutional Interpretation."

[30] David Strauss, "The Living Constitution," The University of Chicago the Law School, last modified September 27, 2010, https://www.law.uchicago.edu/news/living-constitution.

[31] Martin Shapiro and Alec S. Sweet, *On Law Politics and Judicialization* (New York: Oxford University Press, 2002), 166–167.

which public policies are chosen and thereby undermines the efficiency, efficacy, and public-regardingness of these policies."[32] In order for strengthen trust between citizens and government, measures of accountability must be effective and fair. In democracies, "all significant actors—especially the democratic government and the state apparatus—must be held accountable to, and become habituated to, the rule of law."[33] The survivability of this system of governance rests on the premise that each branch– executive, legislative, and judicial, have specific functions that limit their reach and power. As such, in the view of the U.S. Senate, each branch operates within boundaries that also curb the encroachment of others in order to protect the "interests of majority rule and minority rights, of liberty and equality, and of the federal and state governments."[34]

Leslie Friedman Goldstein notes that the concept of judicial review has roots in colonial British-American legal procedures that continue to influence how constitutional democracies empower judicial branches throughout the globe.[35] The author further stresses that judicial review is a checking and balancing mechanism used to assess executive orders and legislative laws based on their constitutional standing; while this "check" ensures that laws are subordinate to the interpretation of each country's constitution.[36] Additionally, adoption for judicial review rests on the notion that the "rule of law is preferable to the unchecked rule of individual will," while rejection stems from lack of authority of non-elected judges versus elected representatives.[37] There is no

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[32] "Presidentialism, federalism, and proportional representation electoral systems are associated with greater levels of perceived corruption. Brazil is one of four countries to possess all three of these institutional characteristics. Timothy J. Power and Matthew M. Taylor, "Introduction," in *Corruption and Democracy in Brazil*, ed. Timothy J. Power and Matthew M. Taylor (Notre Dame: University of Notre Dame, 2011), 4, 32.

[33] Juan J. Linz and Alfred Stepan, "Toward Consolidated Democracies," *Journal of Democracy* 7, no. 2 (April 1996): 19, https://muse.jhu.edu/journals/journal_of_democracy/v007/7.2linz.html.

[34] "Constitution Day," United States Senate, accessed May 1, 2018, https://www.senate.gov/artandhistory/history/common/generic/ConstitutionDay.htm.

[35] Leslie Friedman Goldstein, "Judicial Review," in *International Encyclopedia of Political Science*, ed. Bertrand BadieDirk Berg-Schlosser and Leonardo Morlino (Thousand Oaks, CA: SAGE Publications, Inc., 2011), 1374–1376, https://doi.org/10.4135/9781412959636.n313.

[36] Goldstein, 1374–1376.

[37] Goldstein, 1374.

consensus at this time to determine if judicial empowerment in democratic countries translates to overreach and ultimately leads to positive or negative outcomes.

In the same context, Juan Linz and Alfred Stepan, note that a functioning democratic state must "exercise effectively its claim to the monopoly of the legitimate use of force" through a usable bureaucracy.[38] A democracy must have the ability "to command, regulate, and extract" to protect citizen's rights and it must do so via a usable state bureaucracy.[39] Malcolm Langford maintains that judicial review determinations forge usable bureaucracy for the state apparatus by "building social trust via regime legitimation, accountability for commitments, and the deliberative potential of constitutional orders."[40] Consequently, any trace of political influence over national courts has direct consequences on the democratic standing of the government.[41]

To clarify, the act of judicializing is in and of itself innocuous as it provides the *raison d'être* of a national court system in constitutional democracies with judicial review processes.[42] However, national courts conducting judicial review of executive and/or legislative branch actions are limited to producing a determination of constitutionality.[43] The strict adherence to this boundary is impossible when confronted with the reality of landmark or policy-making trends.[44]

Regarding civil society,[45] Philipe Schmitter and Terri Karl note that democratic freedoms allow democratic societies to determine common needs through procedural

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[38] Linz and Stepan, *Problems of Democratic Transition and Consolidation*, loc. 484.

[39] Linz and Stepan, loc. 474.

[40] Malcolm Langford, "Why Judicial Review?," *Oslo Law Review* 2, no. 1 (2015): 85, https://www.idunn.no/oslo_law_review/2015/01/why_judicial_review.

[41] Pilar Domingo, "Judicialization of Politics or Politicization of the Judiciary? Recent Trends in Latin America," *Democratization* 11, no. 1 (February 1, 2004): 111, https://doi.org/10.1080/1351034041233129152.

[42] Strauss, "The Living Constitution."

[43] Vallinder, "The Judicialization of Politics," 92.

[44] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004), 1.

[45] Civil society is an "arena of the polity where self-organizing groups, movements, and individuals, relatively autonomous from the state, attempt to articulate values, create associations and solidarities, and advance their interests." Linz and Stepan, *Problems of Democratic Transition and Consolidation*, loc. 413.

norms, without the use of a coercive central authority, which encourages the creation of laws to serve the general, will of the people.[46] However, these same authors also warn that "[a]ny polity that fails to impose such restrictions [procedural norms] upon itself, that fails to follow the "rule of law" with regard to its own procedures, should not be considered democratic" meaning that judicialization of politics affects the overall governmental structure of a country, questioning its commitment to core democratic norms.[47] A consolidated democracy focuses on safeguarding the ability for civil society to thrive.[48]

Arie M. Kacowicz and David R. Mares argue that governments "developed a distinctive juridical tradition of embedded principles of national sovereignty,"[49] which is inherent in each American constitution. "[A] democratic polity must entail serious thought and action concerning the development of a normatively positive appreciation of those core institutions of a democratic political society–political parties, elections, electoral rules, political leadership, interparty alliances, and legislatures–by which society constitutes itself politically to select and monitor democratic governance."[50] Furthermore, institutional routinization, like compulsory voting and the habituation of procedures for conflict regulation are the main components of consolidated democracies.[51] A political society is responsible for the structure to challenge the legitimacy and power of the state.[52] The political society "must somehow achieve a workable agreement on the myriad in which democratic power will be crafted and exercised."[53] According to Juan Linz and Alfred Stepan, a political society[54] is

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[46] Philippe Schmitter and Terri Karl, "What Democracy Is. . . and Is Not," *Journal of Democracy* 2, no. 3 (1991): 7–8, https://muse.jhu.edu/journals/journal_of_democracy/v002/2.3schmitter.pdf.

[47] Schmitter and Karl, "7–8.

[48] Linz and Stepan, *Problems of Democratic Transition and Consolidation*, loc. 462.

[49] Arie M. Kacowicz and David R. Mares, "Security Studies and Security in Latin America in *Routledge Handbook of Latin American Security*, ed. Arie M. Kacowicz and David R. Mares (London: Routledge, 2016), 16.

[50] Linz and Stepan, *Problems of Democratic Transition and Consolidation*, loc. 438.

[51] Linz and Stepan, loc. 462.

[52] Linz and Stepan, loc. 427.

[53] Linz and Stepan, loc. 462.

supported and "maintained by [an] impartial state apparatus,"[55] yet this notion is challenged by Martin Shapiro who argues that the judicial branch is not free from political influence, because it *is* a political organization.[56]

Lastly, Juan Linz and Alfred Stepan define economic society as "socio-politically crafted and socio-politically accepted norms, institutions, and regulations … that mediates between state and market."[57] Martin Shapiro affirms that "judges redistribute values and resources with their decisions, and thereby create categories of winners and losers within society."[58] The idea is that politicized courts have the power to assign victories or failures that will be accepted by the polity, based on "social policy … that cannot depend on neutral principles."[59] Furthermore, the court "is asked to perform the same tasks that every other political decision-maker is asked to perform and to do so as a complementary and supplementary segment of the whole complex of American political institutions."[60] Ferejohn agrees that the problem stems out of judicial empowerment and calls for reform of the judicial branch to prevent politicizing the courts. He claims that requiring a supermajority to appoint judges and limiting the number of terms served, will yield a "different" decision-making culture.[61] Pilar Domingo has a more acquiescent view of the topic, noting that judicialization is an irreversible trait of democracies.[62]

E. FRAMEWORK

I first borrow from Ran Hirschl's categorization of judicial empowerment theories to

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[54] Political society is an "arena in which the polity specifically arranges itself to contest the legitimate right to exercise control over public power and the state apparatus." Linz and Stepan, *Problems of Democratic Transition and Consolidation*, loc. 433.

[55] Linz and Stepan, loc. 550.

[56] Shapiro and Sweet, *On Law Politics and Judicialization*, 22–23.

[57] Linz and Stepan, *Problems of Democratic Transition and Consolidation*, loc. 497.

[58] Shapiro and Sweet, *On Law Politics and Judicialization*, 293.

[59] Shapiro and Sweet, 25.

[60] Shapiro and Sweet, 25.

[61] Ferejohn "Judicializing Politics," 67.

[62] Domingo, "Judicialization of Politics or Politicization of the Judiciary?," 111.

cluster research approaches,[63] and proceed to analyze the impact of judicialization on consolidating democracies using Linz and Stepans' five arenas.[64] I will analyze the constitutions of Brazil and Uruguay to address my research question. However, it is imperative that this study corroborates or negates the widespread idea of judicialization prior to using it as a concept for case studies. Additionally, any research that focuses on non-U.S.-centric studies, will avoid what Ran Hirschl calls "traditional American parochialism."[65] Selection of Brazil and Uruguay as case studies is dependent on constitutionality standing, as well as consideration as a consolidated democracy. The reason for such strict and narrow specifications is to ensure a parallel exists among various dissimilar variables. Table 1 is an illustration of this framework. In Table 1, an assessment of high, medium, low or absent, will signal if effects in the democratic arenas of case studies correlate with particular constitutionalization theories.

Table 1. Theoretical Framework

THEORETICAL FRAMEWORK	**Arenas of a Consolidated Democracy**				
	Civil Society	**Political Society**	**Rule of Law**	**Usable Bureaucracy**	**Economic Society**
Theories	**Constitutional Politics**				
	Evolutionist				
	Systemic, Needs Based				
	Microlevel, Rational Choice				
	Hegemonic Preservation				

Assessment values are based on the 2018 Bertelsmann Stiftung Transformation Index (BTI), in particular, civil society participation, political and social integration, rule of law, and governmental steering capacity, while also taking into account the definitions

63 These theories will be discussed in detail in Chapter II. Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts," 95–97.

64 Linz and Stepan, *Problems of Democratic Transition and Consolidation*, 550.

65 Traditional American parochialism is the notion that an issue is best understood using a U.S.-centric model. This shortsighted approach ignores the lessons that can be learned when other scenarios outside the United States are considered Ran Hirschl, "The Political Origins of Judicial Empowerment through "Constitutionalization Revolution: Lessons from Israel's Constitutional Revolution," *Comparative Politics* 33, no. 3 (2001): 93.

presented in Linz and Stepan's work regarding the arenas of democratic consolidation. A low marking constitutes an assessment on a scale from 0 to 3. A medium assessment is identified with values from 4 to 6. The remaining values, 7 to 10, correspond to a high marking.

F. THESIS OVERVIEW

This thesis is organized into five chapters. The introduction covers the definition of judicialization. To produce a modicum of empirical data regarding a judicialization trend, I scope a new definition of judicialization from a generalized idea, to a more specific notion of the legal process. Vague definitions are discarded or incorporated into a clearer concept to address confusion in the political science field. This section also discusses the development of constitutional rule in the Americas and demonstrates the relationship between a constitution and judicialization. At the core of the second chapter, is the exploration of Latin American constitutions and constitutionalism. The historical background of constitutionalism aims to clarify how judicial powers differ by country. Additionally, an in-depth view of judicial review functions determines how federal courts exercise constitutional powers. The third and fourth chapters address statistics on constitutional judicial review cases that determine, if in fact, judicialization of this type has developed and risen over time in Brazil and Uruguay. As findings of increased judicialization are true in both countries, each chapter is organized to compare its effects on five major arenas of consolidated democracies: civil society, political society, rule of law, state apparatus, and economic society.[66] Based upon my findings, I prove or deny the existence of judicialization in Latin America and gather recommendations for democratic and/or democratizing countries.

G. POTENTIAL EXPLANATIONS AND HYPOTHESES

Hypothesis I: I hypothesize that judicialization is a growing trend among American consolidated democracies due to constitutionalization in the region. The continuous use of national courts in Brazil and Uruguay address contentious issues that

66 Linz and Stepan, *Problems of Democratic Transition and Consolidation*, loc. 550.

have a positive effect on civil society, political society, and rule of law, the core requirements of a consolidated democracy.[67] The expansion of judicial power signals positive state growth.[68]

Hypothesis II: Judicialization in Brazil and Uruguay yields varying degrees of judicial empowerment that does not support the progression of democracy. Judicialization usurps the power of executive and legislative power and leads to weakened institutions. Increased judicialization could lead to a debilitated civil society, political society, and rule of law. A higher number of judicial review cases could signify dodging of essential state duties, a negative quality of judicial power.[69]

[67] Linz and Stepan, loc. 476.

[68] Sieder, Schjolden, and Angell, *The Judicialization of Politics in Latin America*, loc. 6057.

[69] Sieder, Schjolden, and Angell, loc. 6057.

II. AMERICAN CONSTITUTIONS

In this chapter, I discuss the source of power and the structure in which organizations use said power to establish governmental behavior. Furthermore, I explore the various features of American organizations that allow for differences in constitutional norms. In particular, I explain how the legacies of legal systems, evolution of constitutions, influence of judicial power, and outlook of key judicial actors affect the constitutional identity of a society via constitutional norms, and continue to shape the creation of new norms. Lastly, I review five theories that explain the causes for empowered national courts.

To understand the phenomenon of judicialization, it is critical to first understand basic concepts of the nature of power and how it harnessed by a democratic government. Power derives from three sources: personality, property, and organization and can be exercised via condign, compensatory, or conditioned methods.[70] A person, or the leadership qualities he or she embodies, can exercise condign and conditioned power. The former instrument of power relies on a person's strength and physicality, and the latter "is the product of a continuum from objective, visible persuasion to what the individual in the social context has been brought to believe is inherently correct."[71] Wealth or income, identified here as property, exercises only compensatory power because it can punish disobedience and reward compliance.

"[T]he most important source of power in modern societies," derives from an organization. An organization, like a strong state, has "a foremost relationship with conditioned power" yet is capable of exerting effective coercive and compensatory powers as well.[72] Democratic regimes[73] hold and apply a unique combination of powers that are

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[70] John Kenneth Galbraith, *The Anatomy of Power* (Boston: Houghton Mifflin Co., 1983), 6.

[71] Galbraith, 29.

[72] Galbraith, 57.

[73] "A state has to be governed according to some set of rules and practices. It is the rules and practices that constitute the regime. … a democratic regime is one in which those who make decisions are ultimately accountable to citizens via elections (and more specifically, elections that offer real choice, the freedom of parties and individuals to compete over differing visions of how the state should be governed)." Steven L. Taylor et al., *A Different Democracy: American Government in a 31-Country Perspective* (New Haven, Yale University Press, 2014), 14.

"tolerant of personality, protective of property, and in somewhat qualified defense of organization."[74] Since "[o]rganizations *do* influence government, bend it and therewith the people to their need and will,"[75] this means that each governmental branch is inherently political.[76] But why does power matter so much in politics? Simply put, "politics is about the authoritative allocation of values."[77] This means that those who hold power, make the rules (set values) and shape the environment to their liking.[78]

The source of power behind each political branch and the democratic method of governing[79] as a whole derives from conscious and unconscious obedience of the people it governs. Mass submission depends on effective conditioning of the polity to accept the hierarchical order,[80] and via the promise of accountability,[81] deem governmental statutes as legitimate.[82] In the Americas, modern democratic systems of governance are politically

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74 Galbraith, *The Anatomy of Power*, 82.

75 Galbraith, 12–13.

76 Max Weber believes that "politics" means striving to share power or striving to influence the distribution of power, either among states or among groups within a state. Max Weber, "Politics as a Vocation," in *Essential Readings in Comparative Politics*, ed. Patrick H. O'Neil and Ronald Rogowski (New York: W. W. Norton, 2013), 40.

77 Martin Shapiro, "Law and Politics: The Problem of Boundaries," in *The Oxford Handbook of Law and Politics*, ed.Gregory A. Caldeira, R. Daniel Kelemen, and Keith E. Whittington, Online Publication (Oxford: Oxford Handbook of Law and Politics, 2009), 2, https://doi.org/10.1093/oxfordhb/9780199208425.003.0045.

78 Ran Hirschl, "The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions," *Law & Social Inquiry* 25, no. 1 (Winter 2002): 94, https://jstor.org/stable/829019.

79 Government is the "institutional arrangement for arriving at a political decisions which realizes the common good by making the people itself decide issues through the election of individuals who are to assemble in order to carry out its will." Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (London: Routledge, 2006), 250.

80 The authors state that "[i]n a hierarchy, one actor is subordinate to another. That is, agents exercise authority, but only at the behest of the principals, who continue to hold ultimate authority. This is hierarchy because authority flows in one direction, from the principals to the agents." Taylor et al., *A Different Democracy*, 15.

81 "In politics, accountability means that the agent's rights to exercise authority can be revoked by the principal if the principal is not satisfied with the ways in which the agent exercising the delegated authority." Taylor et al., 15.

82 "Organized domination, which calls for continuous administration, requires that human conduct be conditioned to obedience towards those masters who claim to be the bearers of legitimate power." Weber, "Politics as a Vocation," 40.

engineered[83] and traditionally institutionalized[84] via a written constitution.[85] The constitution is used not only to provide the composition and intent of governance, but also as a means to connect and condition citizens and their government.[86] A constitutional democracy[87] obtains contingent consent[88] from the population by securing "freedom of the individual from arbitrary authority"[89] and institutionalizing political uncertainty.[90] "A push toward democratic participation develops out of what we might call *the logic of equality*."[91] In short, the link between democratization and constitutionalization acknowledges the power of the individual, encourages the power struggle between institutions,[92] and defines the structure in which political power operates.[93]

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[83] Political engineering is the application of the principles of political science to a specific set of problems ... (like)the failure of than existing set of institutional structures and the need to design replacements." Taylor et al., *A Different Democracy*, 25.

[84] "the various powers must be habitually known, practiced, and accepted by most, if not all, actors." Schmitter and Karl, "What Democracy Is..And Is Not," 204.

[85] Constitutions are documents … that establish a basic framework for governance. Constitutions are, by definition, the highest law in a polity and therefore the source of all other laws." "In the democratic tradition constitutions translate the abstract notion of popular sovereignty to paper and serve as a foundation upon which to build government." Taylor et al., *A Different Democracy*, 60–61.

[86] A constitution serves as "codes of rules which aspire to regulate the allocation of functions, powers and duties among the various agencies and offices of government, and define the relationship between these and the public," quoted in Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (New York: Cambridge University Press, 2009), 36, per Finer; S. E. Finer, *Five Constitutions, 1979* (Atlantic Highlands, NJ: Humanitis Press, 1988); S. E. Finer, *Five Constitutions* (Harmondsworth, England: Penguin, 1979), 15.

[87] A constitutional democracy "unites beliefs that although the people's freely chosen representatives should govern, those officials must respect certain substantive limitations on their authority." Walter F. Murphy, *Constitutional Democracy* (Baltimore: Johns Hopkins University Press, 2007), 10.

[88] Schmitter and Karl, "What Democracy Is..And Is Not," 208.

[89] Fareed Zakaria, "A Brief History of Human Liberty," in *Essential Readings in Comparative Politics*, ed. Patrick H. O'Neil and Ronald Rogowski (New York: W. W. Norton, 2013), 189.

[90] Schmitter and Karl, "What Democracy Is..And Is Not," 208.

[91] Robert A. Dahl, *On Democracy* (New Haven, CT: Yale University Press, 1998), 10.

[92] "Institutions … provide the structures and processes by which the authority of the principals are communicated to agents as well as through which the agents are made accountable to those principals. Furthermore, institutions are the vehicles through which the preferences of the principals are made manifest via the actions of the agents." Taylor et al., *A Different Democracy*, 20.

[93] Taylor et al., 60.

A. CONSTITUTIONALISM IN AMERICA

In a democracy, each branch of government is meant to reinforce the accountability-hierarchy relationship, yet "the institutional structures that delegate popular sovereignty[94] into governance are … imperfect, and the degree to which politicians and bureaucrats can fulfill their roles as agents is flawed as well."[95] To address governmental structural defects, political engineers instituted a complex separation[96] and balance of power[97] mechanism responsible for curbing conflicting ambitions between factions.[98] Balance of power is conducted to "weaken the omnipotence of the State, spreading its prerogatives."[99] The creation of three departments, legislative, executive and judiciary, guarantees "the distribution of governmental powers … to save the people [from] autocracy."[100] Thus, constitutionalism in its broadest terms "is the practice and method whereby limits on governmental powers are established and maintained."[101]

Constitutional guidelines for how the government operates are vague and generalized.[102] "The precise working out of this blueprint as well as the daily function of

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[94] Popular sovereignty is defined as "a government that derives its authority to govern from the people, not from a king or aristocratic class that could assert power over a territory, or from a religious order that could claim a divine right to rule. Rather, when sovereign power comes from the populace, it becomes quite vital to define what that actually means in a practical sense. Taylor et al., 59.

[95] Taylor et al., 12.

[96] "The separation of powers does not mean their isolation because each branch of power participates in the functioning of the other through a system of mutual control and balancing." Emilian Ciongaru, "The Principle of Separation of Powers—Constitutional Guarantee," *Challenges of the Knowledge Society* 7 (May 2017): 414, Proquest.

[97] "The concept of the separation of powers is a theory about the proper organization of government in which power is checked by power." David Fellman, "The Separation of Powers and the Judiciary," *The Review of Politics* 37, no. 3 (July 1975): 357, https://www.jstor.org/stable/1406203.

[98] Taylor et al., *A Different Democracy*, 32–33.

[99] Ciongaru, "The Principle of Separation of Powers," 412.

[100] *Myers v. United States*, 272 U.S. 52, 293 (1926) (dissenting opinion). Fellman, "The Separation of Powers and the Judiciary," 357.

[101] Mark Tushnet, Thomas Fleiner, and Cheryl Saunders, "Constitutions," in *Routledge Handbook of Constitutional Law*, ed. Yasuo Hasebe and Cesare Pinelli (London: Routledge, 2012), 13, https://www.routledgehandbooks.com/doi/10.4324/9780203072578.ch1.

[102] "unlike the powers of Congress, which are enumerated, the Constitution vests in the president, in the most general of terms, "the executive Power," Fellman, "The Separation of Powers and the Judiciary," 363.

government is left to the legislative and executive powers of the state."[103] The power of the judiciary branch derives from its ability to interpret the constitutionality[104] of laws and actions adopted by sister branches, as well as its own.[105] Consequently, "constitutional interpretation is applied politics,"[106] in so that national courts determine definitive[107] governmental support, rejection, or neglect for particular policies and enforce submission by the polity.[108] Such polices generate overall "changes in the structure and operations of a political system−or … go as far as to create a different constitutional order."[109]

Constitution-making environments in America differ from one another.[110] The creation of the constitution of the United States, for instance, was developed under a free and consensual process,[111] while regional constitutions were cultivated under particular

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[103] Taylor et al., *Different Democracy*, 62.

[104] "The clauses of constitutional texts are typically general in nature; discovering their more specific meanings and applications to particular problems requires judgment and prudence as much as, and usually more than, linguistic and syllogistic skills." Murphy, *Constitutional Democracy*, 4.

[105] "As the highest appellate court in the national government, [it] is often called upon to determine what the terms legislative, executive, and judicial power mean." Fellman, "The Separation of Powers and the Judiciary," 358.

[106] "The Zeitgeist and the Judiciary," talk at the 25th anniversary of the Harvard Law Review (1912); reprinted in E. F. Pritchard and Archibald MacLeish, eds., *Law and Politics: The Occasional Paper of Felix Frankfurter* (1939; reprint New York: Capricorn Books, 1962), 6; Murphy, *Constitutional Democracy*, 4.

[107] "The Court, as a tribunal of last resort, speaks with finality, subject only to the possibility of being overruled by a constitutional amendment." Murphy, 358.

[108] "Constitutional structures control social reality in general and public powers in particular." Markus Kotzur, "Constitutionalism," in *Encyclopedia of Global Studies*, ed. Helmut K. Anheier and Mark Juergensmeyer (Thousand Oaks, CA: SAGE Publications Inc., 2012), 278.

[109] Murphy, *Constitutional Democracy*, 18.

[110] Linz and Stepan list six constitution-making environments: "1. The retention of a constitution crated by a nondemocratic regime with reserve domains and difficult amendment procedures … 2. The retention of a "paper" constitution that has unexpected destabilizing and paralyzing consequences when used under more electorally competitive conditions … 3. The creation by a provisional government of a constitution with some *de jure* nondemocratic powers … 4. The use of constitution created under highly constraining circumstances reflecting the *de facto* power of nondemocratic institutions and forces … 5. The restoration of a previous democratic constitution … 6. Free and consensual constitution-making." Linz and Stepan, *Problems of Democratic Transition and Consolidation*, loc. 1645.

[111] "Delegates of the Continental Congress Who Signed the United States Constitution," United States House of Representatives, accessed June 13, 2018, http://history.house.gov/People/Continental-Congress/Signatories/.

constraints.[112] The first and oldest democratic constitution in the western hemisphere[113] was drafted by its Framers with purpose of "creat[ing] in America a republic that would retain the virtues of the English system without the vices of the monarchy."[114] The tenets and overarching values of the U.S. constitution have since been used as cornerstones for 33 subsequent constitutions[115] of Latin American countries, though "the exact manifestation of democratic governance globally differs from the U.S. model."[116] The global influence of the original text extended so much so, that it is now considered standard practice for nation-states to adopt written constitutions.[117] In fact, at one point, Latin American countries like Argentina and Brazil adopted exact excerpts of the U.S. constitution in their national constitution.[118]

Constitutional influence or transplants "once grafted onto a different … .system … can grow, evolve, or atrophy."[119] Growth and evolution are normal as new ideas take shape in the state, while atrophy "stem[s] from a transplant being a mistake or mainly strategic with the importing polity having designs altogether different from those established in the exporting polity."[120] However, continued global influence of the United States is

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112 "The Latin American experience illustrates that even borrowed institutions, such as written constitutions and judicial review, may function when planted in alien soil, albeit in a fashion that was not envisioned by their designers." Miguel Schor, "Mapping Comparative Judicial Review," *Washington University Global Studies Law Review* 7, no. 2 (January 2008), 264, http://operscholarship.wustl.edu/law_globalstudies/vol7/iss2/4.

113 Taylor et al., *A Different Democracy*, 3.

114 Dahl, *On Democracy*, 21.

115 United States House of Representatives, "Delegates of the Continental Congress Who Signed the United States Constitution."

116 Taylor et al., *A Different Democracy*, 4.

117 Dahl, *On Democracy*, 120.

118 "Latin American constitutionalists continued to emulate North American ideas and institutions. Huge sections of two constitutions—Argentina's in 1853 and Brazil's in 1891—were copied word for word from the U.S. Constitution." George A. Billias, *American Constitutionalism Heard Round the World, 1776–1989: A Global Perspective* (New York: New York University Press, 2009), 243.

119 Michel Rosenfeld and András Sajó, "Introduction," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (United Kingdom: Oxford University Press, 2012), 14–15.

120 The text notes various Latin American countries as examples of atrophy after constitutional influence or transplants take place. Rosenfeld and Sajó, "Introduction," 15.

debated,[121] as it appears that similarities between Latin American and U.S. constitutions are in decline.[122]

1. Historic Constitutionalism in the Americas

Constitutionalism is the idea, often associated with the political theories of John Locke and the founders of the American republic, that government can and should be legally limited in its powers, and that its authority or legitimacy depends on observing these limitations.[123] Constitutionalism "function[s] in the interest of the human being" by supporting civil rights and the social contract theory.[124] Constitutionalism exists worldwide because "all legal systems have the same purpose of regulating and harmonizing the human activity within their respective societies."[125] Roman law and feudalism influenced English constitutionalism, which led to the creation of the common law legal system.[126] Influenced by Napoleonic social, legal, and political revolutions, the civil law legal system, referred to the power of the state to form new institutions in accordance with a constitution.[127] Though the two types of legal systems developed outside the Western Hemisphere, they were adopted in various areas of the American continent as indicated in Figures 1–4.

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[121] "other countries have, in recent decades, become increasingly unlikely to model either the rights-related provisions or the basic structural provisions of their own constitutions upon those found in the U.S. Constitution." David S. Law and Mila Versteeg, "The Declining Influence of the United States Constitution," *New York University Law Review* 87, no. 3 (2012): 762; "Constitutions have incrementally and regularly taken on new bells and whistles; we call this constitutional modernization … despite this modernization, the influence of the U.S. Constitution remains evident; in fact, it has become increasingly more central compared to competing nineteenth-century alternatives. Zachary Elkins, Tom Ginsburg, and James Melton, in response to Law and Versteeg, "The Declining Influence of the United States Constitution," 11.

[122] Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (New York: Cambridge University Press, 2009), 26, Figure 2.1 Similarity between Latin American Constitutions and the U.S. Constitution, over Time.

[123] *Stanford Encyclopedia of Philosophy*, s.v. "Constitutionalism," revised December 20, 2017, https://plato.stanford.edu/entries/constitutionalism/.

[124] Kotzur, "Constitutionalism," 278; Tushnet, Fleiner, and Saunders, "Constitutions," 13.

[125] Joseph Dainow, "The Civil Law and the Common Law: Some Points of Comparison," *The American Journal of Comparative Law* 15, no. 3 (1966–1967): 419, https://www.jstor.org/stable/838275.

[126] Thomas Fleiner and Cheryl Saunders, "Constitutions Embedded in Different Legal Systems," in *Routledge Handbook of Constitutional Law*, ed. Mark Tushnet, Thomas Fleiner, and Cheryl Saunders (London: Routledge, 2012), 22, https://www.routledgehandbooks.com/doi/10.4324/9780203072578.

[127] Fleiner and Saunders, 23.

Figure 1. Geographic Distribution of Legal Systems in America: North America[128]

Figure 2. Geographic Distribution of Legal Systems in America: Central America[129]

[128] Source: "JuriGlobe: World Legal Systems," University of Ottawa, accessed October 30 2018, www.juriglobe.ca/eng/rep-geo/index.php.

[129] Source: University of Ottawa.

Figure 3. Geographic Distribution of Legal Systems in America: South America[130]

Figure 4. Geographic Distribution of Legal Systems in America: Caribbean[131]

[130] Source: University of Ottawa.

[131] Source: University of Ottawa.

Common law "is built out of precedents and traditions that accumulate over time … [and] allow room for adaptation and change, but only within certain limits and only in ways that are rooted in the past."[132] Civil law states develop constitutions via a "process that equates to an act of a sovereign people" that rejects a constituent assembly and "distinguish[es] between the procedures used for total and partial constitutional revision.[133]

One striking difference between legal systems is that in common law jurisdictions, judicial review pertains only to established laws, whereas in civil law systems, a party can challenge a law before, *priori*, and after, *posteriori*, it has passed by the legislature.[134] Furthermore, rulings in civil cases typically compel only the parties involved.[135] The concept of *inter partes* is not applicable for common law rulings because decisions have *erga omnes* affect, which allows decisions to apply to similar or linked cases.[136] Even though both systems are driven towards "gradual convergence," common law systems "have a greater role in law making through open judicial interpretation" while civil law systems limit "judicial interpretation … [to] applying the written letter of the case, reflecting a stronger mistrust of the judges."[137]

A fundamental similarity between legal systems involves the idea that each country's constitution "is best understood as a repository of shifting cultural values."[138] Though there are considerable and noteworthy parallels between the two systems like

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[132] David A. Strauss, *The Living Constitution* (Oxford: Oxford University Press, 2010), 15. "Common law constitutions may also provide different mechanisms for alteration of different parts of the constitution. Failure to comply with the prescribed requirements may also lead to an unconstitutional constitutional amendment … the problem is one of process rather than substance, however , and likely to be analyzed in terms of constitutional interpretation rather than by reference to constituent power." Fleiner and Saunders, "Constitutions Embedded in Different Legal Systems," 24.

[133] Fleiner and Saunders, 24.

[134] Teresa M. Miguel-Stearns, "Judicial Power in Latin America: A Short Survey," *Legal Information Management* 15, no. 2 (June 2015): 100, https://doi.org/10.1017/S1472669615000274, cited by Miguel Steans in Craig L. Arceneaux, *Democratic Latin America* (London: Pearson, 2013), 192.

[135] Miguel-Stearns, 100.

[136] Miguel-Stearns, 100.

[137] Domingo, "Judicialization of Politics or Politicization of the Judiciary?," 106–107.

[138] Spann, "Constitutionalization," 709.

acquiescence to "a tripartite separation of powers,"[139] "the methods used to reach [similar solutions to legal problems] are nevertheless extremely divergent."[140] However, one thing is for certain, every written or unwritten code of law, outlines a political order that is reached through negotiations between agents that hold power.[141] For example, "[i]n civil law jurisdictions, such as those in Latin America, courts traditionally are limited to applying the laws that have been created by the legislature or by executive decree" meaning that unlike common law jurisdictions,"[j]urisprudence[142] has not historically been a source of law" within that system.[143]

Latin America has "fertile ground for experiments in democratic governance," and each state formed a distinct balance of power responsible for the outcome of current democratic systems.[144] Nonetheless, the establishment of democracies in the region is not indicative of permanence.[145] In fact, there have been democratization and reverse waves in the region.[146]

The third wave of global democratization brought with it the creation of 29 democratic nation-states,[147] as well as the adoption of 36 new national constitutions.[148]

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139 Fleiner and Saunders, "Constitutions Embedded in Different Legal Systems," 24.

140 Dainow, "The Civil Law and the Common Law," 434.

141 Javier Corrales, "Constitutional Rewrites in Latin America, 1987–2009," in *Constructing Democratic Governance in Latin America*, ed. Jorge I. Dominguez and Michael Smith (Baltimore: Johns Hopkins University Press, 2013), 15.

142 Latin for *juris prudentia*, the "study, knowledge, or science of law." "Jurisprudence,", Cornell Law School, accessed October 16, 2018, https://www.law.cornell.edu/wex/jurisprudence.

143 Miguel-Stearns, "Judicial Power in Latin America," 100.

144 Michael Shifter, "Introduction: New Structures in Democratic Governance," in *Constructing Democratic Governance in Latin America*, ed. Jorge I. Dominguez and Michael Smith (Baltimore: Johns Hopkins University Press, 2013), 7.

145 Samuel P. Huntington, *The Third Wave* (Norman: University of Oklahoma Press, 1991), 11.

146 A wave of democratization is a group of transitions from nondemocratic to democratic regimes that occur within a specified period of time and that significantly outnumber transitions in the opposite direction during that period of time." Huntington, *The Third Wave*, 15. A reverse wave occurs when "some but not all of the countries that had previously made the transition to democracy reverted to nondemocratic rule." Huntington, *The Third Wave*, 15–16.

147 Huntington, *The Third Wave*, 44.

148 "Download CCP Data," Comparative Constitutions Project, accessed September 28, 2018, http://comparativeconstitutionsproject.org/download-data/.

Between 1974 and 1990, the total number of democratic states worldwide nearly doubled from 30 to 59.[149] Figure 5 depicts a link between the number of new countries and the rise in number of constitutions worldwide.

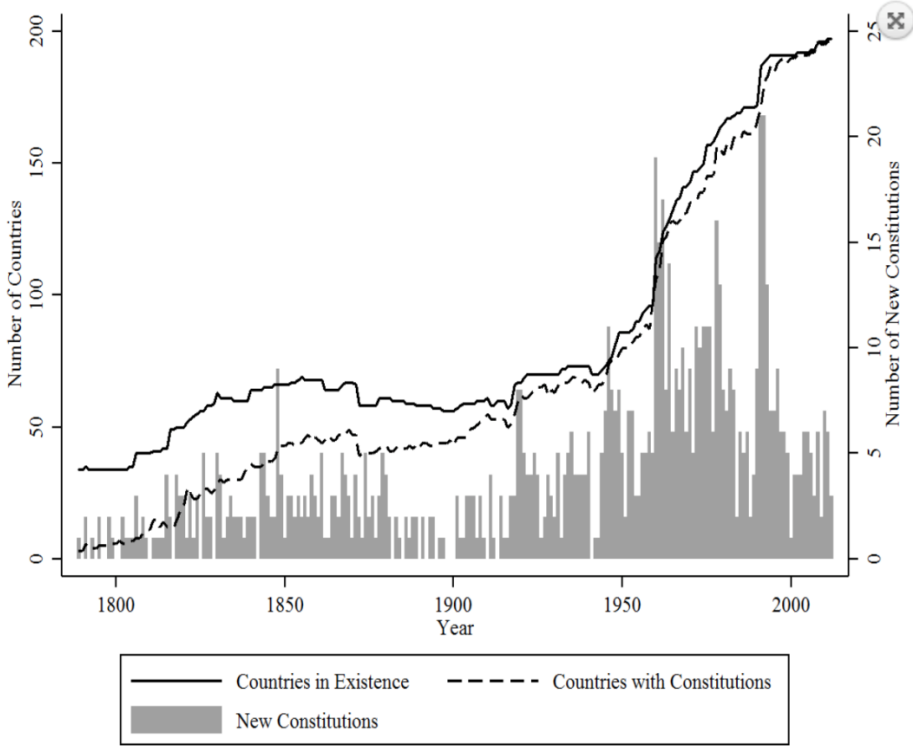

Figure 5. New Constitutions[150]

"[E]conomic development, industrialization, urbanization, the emergence of the bourgeoisie and of a middle class, the development of a working class and its early organization, and the gradual decrease in economic inequality" triggered the first wave of democratization.[151] The second was in response to "[t]he victory of the established Western democracies in World War II and decolonization by those democracies after the war."[152]

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149 Huntington, *The Third Wave*, 26.

150 Source: "Visualizations: New Constitutions," Comparative Constitutions Project, 2016, http://comparativeconstitutionsproject.org/ccp-visualizations/#.

151 Huntington, *The Third Wave*, 39.

152 Huntington, 40.

Legal transitions also occurred in parallel with democratization and the third wave and "alter[ed] political dynamics by raising the constitutional and judicial stakes."[153] However, the apparent popularity of democratic governance was short lived as various nations regressed and reestablished nondemocratic regimes along with compromised legal institutions after each wave.[154] Samuel Huntington argues that Argentina and Uruguay suffered democratic setbacks on both the first and second waves, Chile, Bolivia, Brazil, Ecuador, Peru endured a reverse democratic wave in the second phase, and a Suriname and Haiti maybe facing a third reverse.[155]

The third wave crested when democracies peaked at 65 in 1990,[156] and currently reflect a "crisis syndrome" as Latin American countries falter in their democratic transformation process.[157] Experts express concern over the decline of democratic countries and link them with weakening[158] or decay[159] of political institutions.[160] If this notion is true, consolidated democracies face the same challenges in "behavioral, attitudinal, and

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153 Diana Kapiszewski, *High Courts and Economic Governance in Argentina and Brazil, A Comparative Analysis* (New York: Cambridge University Press, 2012), 37.

154 "The third wave crested after the late 1990s, however, and a "democratic recession" emerges in the first decade of the twenty-first century." Francis Fukuyama, "The Necessity of Politics," in *Essential Readings in Comparative Politics*, ed. Patrick H. O'Neil and Ronald Rogowski (New York: W. W. Norton: 2013), 26.

155 Huntington, *The Third Wave*, 14.

156 Huntington, 14; Dahl, *On Democracy*, 8.

157 "Transformation Index BTI, Latin America and the Caribbean," Bartelsmann Stiftung, accessed October 16, 2018, https://www.bti-project.org/en/key-findings/regional/latin-america-and-the-caribbean/.

158 "Nation-states exist to deliver political goods−security, education, health services, economic opportunity, environmental surveillance, a legal framework of order and a judicial system to administer it, and fundamental infrastructural requirements such as roads and communications facilities−to their citizens." "Nation-states fail because they can no longer deliver positive political goods to their people." "State failure is man-made, not merely accidental nor−fundamentally−caused geographically, environmentally, or externally. Robert I. Rotberg, "The New Nature of Nation-State Failure," in *Essential Readings in Comparative Politics*, ed. Patrick H O'Neil and Ronald Rogowski (New York: W. W. Norton, 2013), 61–65.

159 "Political decay occurs when political systems fail to adjust to changing circumstances." Fukuyama, "The Necessity of Politics," 28.

160 "The perennial enemies of popular government: economic decline, corruption, oligarchy, war, conquest, seizure, of power by authoritarian rules, whether princes, monarchs, or soldiers." Dahl, *On Democracy*, 15–16. "If and when many citizens fail to understand that democracy requires certain fundamental rights or fail to support the political, administrative, and judicial institutions that protect those rights, then their democracy is in danger." Dahl, 50.

constitutional dimension[s]" as they did during the consolidating process.[161] According to Samuel Huntington wave ebbing occurred because "(1) the weakness of democratic values among key elite groups and the general public; (2) economic crisis or collapse that intensified social conflict and enhanced the popularity of remedies that could only be imposed by authoritarian governments; (3) social and political polarization often produced by leftist governments attempting to introduce or appearing to introduce many major socioeconomic reforms too quickly; (4) the determination of conservative middle- and upper-class groups to exclude populist and leftist movement and lower-class groups from political power; (5) the breakdown of law and order resulting from terrorism or insurgency; (6) intervention or conquest by a nondemocratic foreign government; (7) snowballing in the form of the democratization effects of the collapse or overthrow of democratic systems in other countries."[162] Hence, to protect democratic norms from atrophy, constitutional changes must back the behavioral and attitudinal strengthening of political institutions. For this to take place, however, the judicial branch must secure enough power to establish "provisions … allowing for revision or amendment of the constitution … so future generations [are] able to deliver themselves from the yolk of those previous."[163]

2. Timeline and Revisions Chart of Constitutions

As with governmental systems, the "lifespans of written constitutions" are unspecified.[164] Though most original framers intended constitutions to endure,[165] democracies face the challenges of accommodating multiple agents vying for power, and in

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[161] Behaviorally, the polity produces no significant actors that aspire secession or the creation of a nondemocratic regime. Attitudinally, the polity accepts a general consensus that democratic rule is superior to nondemocratic options. Constitutionally, the polity accepts and upholds "laws, procedures, and institutions sanctioned by the … democratic process." Linz and Stepan, *Problems of Democratic Transition and Consolidation*, loc. 371, 382.

[162] Huntington, *The Third Wave*, 290.

[163] Claude Klein and András Sajó, "Constitution-making: Process and Substance," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (United Kingdom: Oxford University Press, 2012), 438–439.

[164] Tom Ginsburg, Zachary Elkins, and James Melton, *DRAFT: The Lifespan of Written Constitutions* (Chicago: University of Chicago, 2007), 1, http://jenni.uchicago.edu/WJP/Vienna_2008/Ginsburg-Lifespans-California.pdf.

[165] One famous dissenter in the topic is Thomas Jefferson, who opted for a rewrite of the constitution during each lifetime (19 years). Elkins, Ginsburg, and Melton, *The Endurance of National Constitutions*, 1–2.

the struggle, endanger their very existence.[166] Since "a certain degree of habitation must occur before … institutions can take shape," democracies with new constitutions tend to reflect the stable or turbulent nature of the times.[167] In fact, "most constitutions die young, and only a handful last longer than fifty years."[168] The mean life expectancy for Latin American constitutions is 12.4 years, but the global baseline is 19 years.[169] The baseline statistic provides a "sense of when in their life cycle constitutions are most vulnerable," meaning that Latin American constitutions are especially susceptible.[170] A solution to the mortality issue can be a catch 22, as the only way to solve the "compressed time" dilemma is to allow governments even more time to address political power sharing.[171]

According to Zachary Elkins, Tom Ginsburg, and James Melton, the longer a democratic constitution is in place, the stronger the democratic system it enables.[172] Compared with nondemocratic regimes, democracies tend to promote regime stability by increasing the expectancy of a constitution from 15 to 21 years.[173] This is not to say that the goal of a regime is to seek a long-lasting, unchanging constitution, much the opposite. A regime must balance the "social, economic, and technological changes [that] occur" and determine if it is "altogether appropriate that the constitution be shed, let it stunt the growth of the nation inside it."[174]

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166 Philippe C. Schmitter and Terry L. Karl, "What Democracy Is … and Is Not," in *Essential Readings in Comparative Politics*, ed. Patrick O'Neil and Ronald Rogowski (New York: W.W. Norton, 2013), 207.

167 Elkins, Ginsburg, and Melton, *The Endurance of National Constitutions*, 3–4.

168 Elkins, Ginsburg, and Melton, 1.

169 Tom Ginsburg, Zachary Elkins, and James Melton, "The Lifespan of Written Constitutions," The University of Chicago Law School, October 15, 2009, https://www.law.uchicago.edu/news/lifespan-written-constitutions; Elkins, Ginsburg, and Melton, *The Endurance of National Constitutions*, 129.

170 Elkins, Ginsburg, and Melton, *The Endurance of National Constitutions*, 129.

171 "Written constitutions do not specify all the details of their institutions … (nor) ensure their implementation." Ginsburg, Elkins, and Melton, *DRAFT: The Lifespan of Written Constitutions*, 13.

172 "Enduring constitutions are good for young democracies. Endurance allows the polity to grow into the institutions of government, but also adapts the constitution to its own needs." Elkins, Ginsburg, and Melton, *The Endurance of National Constitutions*, 35; "We are most struck by a general finding that most of the purposes that are ascribed to constitutions, such as entrenching fundamental principles or providing normative guidance for the polity, seem to improve with age."). Elkins, Ginsburg, and Melton, *The Endurance of National Constitutions*, 6.

173 Elkins, Ginsburg, and Melton, 137.

174 Elkins, Ginsburg, and Melton, 35.

Such constitutional changes tell a story of democratic stability and instability, when seen in parallel with the passage of time. Figure 6 provides an overview of a country's constitutional transformation since its creation.[175]

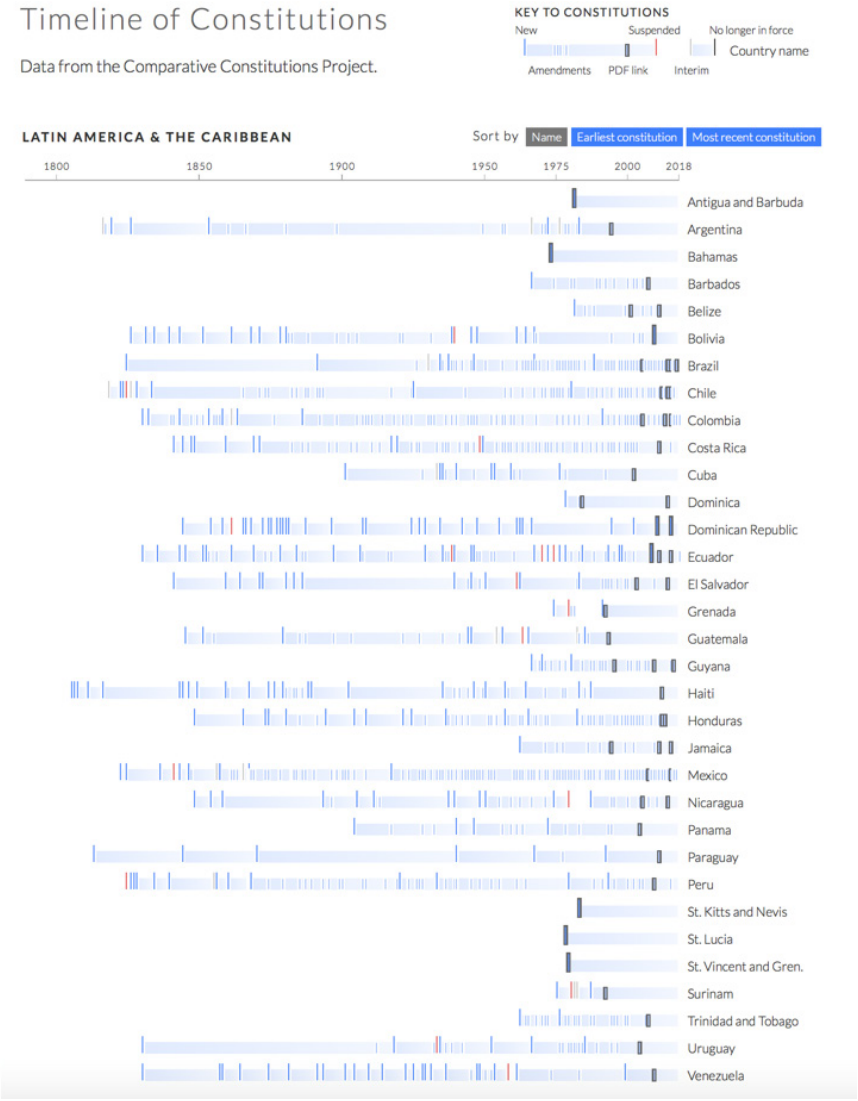

Figure 6. Timeline of Constitutions[176]

[175] The Comparative Constitutions Project provides information on active and defunct historical states. For example, the constitutions of Great Colombia and the United Provinces of Central America were no longer in force in 1830 and 1839. "Timelines of Constitutions," Comparative Constitutions Project, 2016, http://comparativeconstitutionsproject.org/chronology/.

[176] Source: Comparative Constitutions Project, "Timelines of Constitutions."

Concern over regime stability is marred with the need to keep constitutions relevant, because "[a] constitution that cannot change cannot endure."[177] Furthermore, the common finding among experts is that "most of the purposes that are ascribed to constitutions, such as entrenching fundamental principles or providing normative guidance for the polity, seem to improve with age."[178] The general ideas of permanence and flexibility are central to the study of constitutions. As seen in Figure 7, there have been 843 changes in Latin American constitutions since the creation of the first regional constitution in 1805.[179] Out of these, 245 were due to the adoption of new constitutions and 583 were amendments,[180] but still, regime stability is not easily determined by these figures.

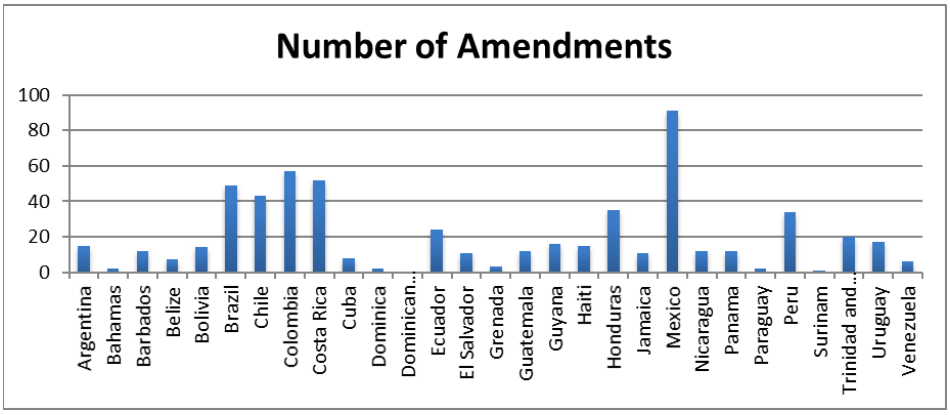

Figure 7. Latin America Constitution Statistics[181]

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[177] Murphy, *Constitutional Democracy*, 333.

[178] Elkins, Ginsburg, and Melton, *The Endurance of National Constitutions*, 6.

[179] Comparative Constitutions Project, "Timelines of Constitutions."

[180] Adapted from Comparative Constitutions Project, "Timelines of Constitutions." I downloaded the CCP data from the site and made a spreadsheet with LATAM-only countries. Note: Except for material identified as copyrighted by other parties, the content of constituteproject.org is provided under a Creative Commons Attribution-NonCommercial 3.0 Unported License (which allows you to make free use of information from the site for noncommercial purposes). Comparative Constitutions Project, "Download CCP Data."

[181] Adapted from Comparative Constitutions Project, "Timelines of Constitutions." I downloaded the CCP data from the site and made a spreadsheet with LATAM-only countries. Note: Except for material identified as copyrighted by other parties, the content of constituteproject.org is provided under a Creative Commons Attribution-NonCommercial 3.0 Unported License (which allows you to make free use of information from the site for noncommercial purposes). Comparative Constitutions Project, "Download CCP Data."

Democratic standing is not directly attributable to the number of new constitutions or amendments. Written constitutions have the ability to change via modifications, or amendment procedures than undoubtedly modify the standing balance of power.

B. JUDICIAL POWERS

A review on the history and structures of constitutions is helpful, but limited with regard to the issues raised in this thesis. Further research on judicialization rests on judicial empowerment (or over-empowerment) reinforced through constitutionalization. Key research approaches are based on cases that ignore the long-standing tradition of the justiciability doctrine,[182] advance toward constitutional judicial review,[183] and ultimately affect the democratic process.[184]

To study judicialization is to study the judicial review powers of supreme courts.[185] The United States and Latin America, as the "two greatest regions in the world for judicial review in the nineteenth century,"[186] have solidified the legitimacy and supremacy of constitutional interpretations as court norms.[187] As discussed previously, the power to set judicial norms rests on a country's constitution, which also outlines its limits.[188] "Judicial adherence to the doctrine of the separation of powers preserves the courts for the decision of issues, between litigants, capable of effective determination.

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[182] The justiciability doctrine determines the limits of federal courts to adjudicate disputes. It impedes the court from accepting and deciding cases where "resolution is more proper within the political branches." Cole, *The Political Question Doctrine*, 4; Hirschl, "The Judicialization of Politics," 1.

[183] Judicial review cases guarantees the power of the judicial branch to interpret and uphold the supreme law. *Marbury v. Madison*, 180.

[184] Russell A. Miller, "Lords of Democracy: The Judicialization of "Pure Politics" in the United States and Germany," *Washington and Lee Law Review* 61, no. 2 (March 2004): 587–662, http://scholarlycommons.law.wlu.edu/wlulr/vol61/iss2/3.

[185] Martin Shapiro, "The United States," in *The Global Expansion of Judicial Power*, ed. C. Neal Tate and Torbjörn Vallinder (New York: New York University Press, 1995), 45.

[186] Billias, A*merican Constitutionalism Heard Round the World, 1776–1989*, 107.

[187] "Comparative Constitutional Study," Political Database of the Americas, last updated March 8, 2009, http://pdba.georgetown.edu/Comp/Judicial/normas.html.

[188] *United Public Workers v. Mitchell*, 330 US. 90 (1947) from Fellman, "The Separation of Powers and the Judiciary," 360.

Judicial exposition upon political proposals is permissible only when necessary to decide definite issues between litigants. When the courts act continually within these constitutionally imposed boundaries of their power, their ability to perform their function as a balance for the people's protection against abuse of power by other branches of government remains unimpaired."[189] However, if courts excessively abstain or indulge in the duties outlined by the constitution, an imbalance occurs in the other powers of the state.

The overall power of the supreme court is expressed via potential and active powers.[190] Potential power involves jurisdiction and discretion, while active power covers assertiveness and authoritativeness of courts.[191] Jurisdiction involves the scope of and ability "of a court to adjudicate cases and issue orders"[192] and the "court's decision-making latitude [as] constrained by legal-institutional rules, and by political calculations and context."[193] The potential aspect of judicial power is largely reliant on the ability of the court to exert legitimate power where able.[194] The active power of the court means that it is capable of challenging power-players and producing compelling, binding rulings when those power-players are defeated in court.[195]

The perils of indulging in judicial power beyond the scope outlined in the constitution leads to judicialization. It is important to keep in mind that "while unconstitutional exercise of power by the executive and the legislative branches of the Government is subject to judicial restraint, the only check on [judicial] exercise of power

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189 *United Public Workers v. Mitchell* from Fellman, "The Separation of Powers and the Judiciary," 360.

190 Kapiszewski and Taylor, "Doing Courts Justice?," 750.

191 Kapiszewski and Taylor, 750.

192 "Jurisdiction," Cornell Law School Legal Information Institute, accessed May 1, 2018, https://www.law.cornell.edu/wex/jurisdiction.

193 Kapiszewski and Taylor, "Doing Courts Justice?," 750.

194 Kapiszewski and Taylor, 750.

195 Kapiszewski and Taylor, 750.

is [its] own sense of self-restraint."[196] Equally important, is the rationale by which a statute is considered unconstitutional, particularly if developed by legislative representatives that draw their legitimate power from the same constitution as do judges.[197] Concerns over who controls judges and what judges control are always at the center of the debate. Supreme court judges are known to utilize control mechanisms that affect the timing and exposure of cases

1. Docket Control

Docket control exemplifies the power of judges to abstain from hearing a case.[198] This power is not unlike the "agenda control" powers exercised by the legislative and executive branches.[199] The apparent bias in case acceptance allows the court to align the decisions of controversial constitutional cases with more palatable times in the course of a country's social-political progress. Docket control, or *certiorari*,[200] gives the court "power to decide what to decide" increasing the court's legitimacy and lessening political damage.[201] One of the most important questions to ponder is whether courts "may be a suitable setting–perhaps even the best one, both in terms of their institutional position in a democracy and in terms of the judges' expertise–for assessing evidence, for

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196 *United States v. Butler*, 297 U.S. 1, 78 (dissenting opinion) from Fellman, "The Separation of Powers and the Judiciary," 358–359.

197 "A statute cannot be unconstitutional because, if it is truly unconstitutional, it is invalid and an invalid statute is not a statute at all. In other words, although the content of a statute may be contrary to the constitution, it has been enacted by a legislature that draws its authority from the constitution and remains valid until annulled by the body constitutionally entitled to do so. Thus, because of the essential requirement of hierarchical validation for every legal norm, the project of constitutionalism cannot eliminate all state actions contrary to the constitution." Tushnet, Fleiner, and Saunders, "Constitutions," 15.

198 David Fontana, "Docket Control and the Success of the Constitutional Courts in Comparative Constitutional Law," *George Washington University Law School*, 624, 2011, https://ssrn.com/abstract=2256946.

199 Fontana, 624.

200 A writ of certiorari allows the Supreme Court to request a case from lower courts for review. "It is not under any obligation to hear these cases, and it usually only does so if the case could have national significance, might harmonize conflicting decisions in the federal Circuit courts, and/or could have precedential value." "Supreme Court Procedures," United State Courts, accessed October 16, 2018, http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1.

201 Fontana, "Docket Control and the Success of the Constitutional Courts in Comparative Constitutional Law," 624.

determining responsibility for alleged wrongdoing, or for dealing with matters of procedural justice and fairness, it is ultimately unclear what makes courts an appropriate forum for deciding what are quandaries of a purely and substantively political nature," and when exactly is the best time to address them.[202] The main complication is that there are no clear measures for justiciability. Furthermore, even if measures did exist, it begs the question as to why various national court agents are endowed with such power. While some constitutional judicial review courts enjoy the benefits of docket control, others do not.

Institutional variation between docket control countries and those that require national courts to hear all dispute cases means there are efficiency differences among courts.[203] It is no surprise, that a court's efficiency level affect the ability of the organization to project power. In countries with docket control, like that of the United States, courts tend to focus on difficult cases while outright rejecting others and neglecting to provide litigants with the "justice" they seek.[204] Countries without docket control have an overworked courts and a buildup of cases.[205]

2. Judge Outlook

When supreme or constitutional court judges do accept cases, it is worth noting that they too, fall into two frames of thought when making decisions. The distinct outlooks are polarized and contribute to "the great debate."[206] According to Richard Duncan, judicial interpretation rests on polarization between theories regarding the interpretation of the constitution itself. Judges who ascribe to originalism, according to them, are said to adhere to the *real* rule of law of the constitution versus political decrees

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202 Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts," 99.

203 Tom S. Clark and Aaron B. Strauss, "The Implications of High Court Docket Control for Resource Allocation and Legal Efficiency," *Journal of Theoretical Politics* 22, no. 2 (2010): 247–248, https://doi.org/10.117/0951629809359036.

204 Clark and Strauss, 265.

205 Clark and Strauss, 265.

206 Richard Duncan considers the great debate between originalism and the living constitution to originate from the debate between Justice Chase and Justice Iredell in *Calder v. Bull*. Richard F. Duncan, "Justice Scalia and the Rule of Law" Originalism vs. The Living Constitution," *Regent University Law Review* 29, no. 1 (2006): 12–13.

made by judges.[207] Real rule of law, for originalists, means that the constitution is taken as a set of laws with "original intent" to address specific problems.[208] This position is summed by the idea that a nation's "Constitution is not a living organism. It's a legal document, and it says what it says and does not say what it doesn't say."[209] A judge that subscribes to the originalism outlook supports the evolution and modification of a nation's constitution only when amendments follow the steps outlined within.[210] A correlated idea of originalism is that "amendments should come from the people, not the Supreme Court."[211] Clearly stated, "the Court's job is to apply the Constitution, not to write the Constitution."[212]

Nonoriginalist judges are those who believe in a "living constitution," versus a written one.[213] They affirm that the world changes at a rapid pace and the inability to easily process amendments is at fault for out-of-date constitutional interpretations.[214] The nonoriginalist argument centers on the idea that there are various parts of the constitution that are clear and those that "do not give us such unequivocal instructions," making interpretation necessary.[215] Nonoriginalists believe that looking at the constitution with a historical lens addresses limited issues, prevents progress, and forces

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[207] Duncan, 9.

[208] Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review*, 1989, 852.

[209] Duncan, "Justice Scalia and the Rule of Law," 12. As referenced In a 2014 speech entitled "Interpreting the Constitution: A View From the High Court," Justice Scalia said this: "The Constitution is not a living organism. It's a legal document, and it says what it says and doesn't say what it doesn't say." "Justice Scalia: 'Constitution Is Not a Living Organism,'" Fox News Politics, March 15, 2014, http://www.foxnews.com/politics/2014/03/15/justice-scalia-constitution-is-not-livingorganism.html; see also Antonin Scalia, "Constitutional Interpretation," C-SPAN, video, 18:38, March 14, 2005, https://www.c-span.org/video/?185883-1/constitutional-interpretation&start=1073.

[210] Duncan, "Justice Scalia and the Rule of Law," 13.

[211] Duncan, 13.

[212] Duncan, 12.

[213] "A "living constitution" is one that evolves, changes over time, and adapts to new circumstances, without being formally amended." Strauss, *The Living Constitution*, 14.

[214] Strauss, 14.

[215] Strauss, 17–18.

people to ascribe to decisions made under a much different reality than the one they currently face.[216]

The issues in the great debate are not just theoretical; they expand into the actual decision-making process of each judge. Siding with either originalist and nonoriginalist interpretation means that judges concur or dissent based on their own individual moral values. When originalists make a call, they exercise judicial restraint.[217] When nonoriginalists provide their view of the case, they are conducting judicial activism.[218] Either decision is in and of itself affirming the reason for a constitution and its acceptable flexibility based on a moment in time.

Adopting constitutions or amendments and justifying their interpretation "are products of a larger legal project."[219] Constitutions "are … exercises in practical politics," and reflect the attitudes of law and beyond it; furthermore, the use of constitutions is rationalized and justified with "arguments from political philosophy."[220] The overall legal project exerts control over "a wide network of human relations, [that] inevitably interacts with the broader culture, sometimes shaping it, sometimes shaped by it."[221]

3. Landmark Cases

Court decisions that shape society and history are labeled landmark decisions, which, in turn, brand landmark cases.[222] Thought the term is subjective, national courts

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216 Strauss, 14, 23.

217 Judicial restraint occurs when "judges have identified certain questions as being inappropriate for judicial resolution, or have refused on competency grounds to substitute their judgement for that of another person on a particular matter." Jeff A. King, "Institutional Approaches to Judicial Restraint," *Oxford Journal of Legal Studies* 28, no. 3 (2008): 409, https://doi.org/10.1093/ojls/gqn020.

218 "'Judicial activism' is a term of many meanings−sometimes, it is just an epithet−but one relatively clear meaning is the willingness to declare laws unconstitutional, as opposed to giving the benefit of every doubt to Congress or to state legislature that enacted the law." Strauss, *The Living Constitution*, 40.

219 Walter Murphy, "Civil Law, Common Law, and Constitutional Democracy," *Louisiana Law Review* 52, no. 1 (September 1991): 92.

220 Murphy, 92.

221 Murphy, 93.

222 "Supreme Court cases … have shaped history and have an impact on law-abiding citizens today." "Supreme Court Landmarks," United States Courts, http://www.uscourts.gov/about-federal-courts/educational-resources/supreme-court-landmarks, accessed October 18, 2018.

list and publicize the most important cases and their outcomes, relevant to their particular institutional and national history.[223] Due to their novelty, landmark decisions on new cases rarely make the official governmental "landmark case list" though they have long-lasting and transformational consequences. To determine if cases from 1999 to 2017 are landmark cases in Brazil and Uruguay, a subjective approach is also necessary. Landmark status, therefore, stems from the determination of national governmental and non-governmental sources.

C. CONSTITUTIONALIZATION THEORIES

In order to answer *if* and *why* judicialization is taking place in Brazil and Uruguay, and address the diverse arguments surrounding the topic, I draw on the five most prominent legal transformation theories: constitutional politics, evolutionist, systemic, needs-based, microlevel rational choice, and hegemonic preservation.[224] These theories explain, albeit from different perspectives, the unique power context in which judges perform their duties.

1. Constitutional Politics

The theory of constitutional politics "understands judicial empowerment through the constitutionalization of rights either as the outcome of political efforts by well-organized minority groups to limit the policy preferences of majorities or as the by-product of majority political leaders' benign attempts to prevent a disintegration of the polity by creating consociational constitutional arrangements."[225] The theory relies on

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223 "Julgamentos historicos [Historical judgements]," Supremo Tribunal Federal, updated October 11, 2018, http://www.stf.jus.br/portal/cms/verTexto.asp?servico=sobreStfConhecaStfJulgamentoHistorico&pagina=STFlista1; The official website of Urugay's judicial branch allows for the search of key phrases. The phrase "ley de caducidad [Expiration law]" was used to search the database producing seven resources under sentencing and news. "Ley de caducidad [Expiration law]," Poder Judicial, accessed November 7, 2018, http://poderjudicial.gub.uy/contenidos/search?q=ley%20de%20caducidad&cc=p.

224 Drawing on Ran Hirschl, legal transformation theories include "the mainstream constitutional politics, theory, the evolutionist theory, the systemic need-based theory, … the microlevel rational choice theory," and his own theory regarding hegemonic preservation." Hirschl, "The Political Origins of Judicial Empowerment through Constitutionalization," 95.

225 Hirschl, 94.

the belief that peripheral groups utilize judicial review functions to check policymakers' intent thereby preventing "the tyranny of the majority."[226]

2. Evolutionist

Evolutionist theory "defines the trend toward constitutionalization of rights and the fortification of judicial review as an inevitable by-product of a new and near-universal prioritization of human rights in the wake of World War II."[227] The theory rejects the idea of fixed constitutions, draws conclusions form a rapidly evolving world, and leads toward a prediction of a universal human rights singularity.[228] Certainty in progress arises from the "acceptance and enforcement of the idea that democracy is not the same thing as majority rule; that in a real democracy, minorities possess legal protections in the form of a written constitution, which even a parliament cannot change."[229]

3. Systemic, Needs-Based

The systemic, needs based approach "suggest that the expansion of judicial power derives [as a solution] to a structural, organic political problem."[230] The utilitarian theory denies the effects of individual agency and focuses solely on the most logical step for a polarized or deadlocked legal system to take in order to continue operating.[231] The objective of the legal system is to continue to function, so it must do so by adjusting its previous stance to fulfill political requirements.

4. Microlevel Rational Choice

The microlevel rational choice theory accounts for "human choices [that] are likely to reflect the preferences of rational political power holders, who attempt to shape the

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[226] Alexis de Tocqueville, *Democracy in America and Two Essays on America* (New York: Penguin Books, 2003), 292; Hirschl, "The Political Origins of Judicial Empowerment through Constitutionalization," 96.

[227] Quoted from Hirschl, *Towards Juristocracy*, 32.

[228] Fleiner and Saunders, "Constitutions Embedded in Different Legal Systems," 22.

[229] Hirschl, "The Political Origins of Judicial Empowerment through Constitutionalization," 97.

[230] Hirschl, *Towards Juristocracy*, 34

[231] Hirschl, "The Political Origins of Judicial Empowerment through Constitutionalization," 97–99.

institutional setting in which they operate to suit their interests."[232] Whether the decision justifies constitutionalization via "credible commitments," the fulfillment of a "fire alarm" mechanism, or successfully competing in the electoral market, the bottom line is that political actors will support judicial independence only when it is beneficial to their particular situation.[233]

5. Hegemonic Preservation

Hegemonic preservation theory is "[a] realist, strategic approach to judicial empowerment [which] focuses on various power-holders' self-interested incentives for deference to the judiciary."[234] This theory relies on the agency of the individual, as "legal innovators–politicians representing cultural and economic elites, in corporation with the judicial elite–determining the timing, extent, and nature of legal reforms."[235] It stipulates that when powerholders face competition in the political system, they are willing participants in "the voluntarily transfer of policymaking authority to courts through constitutionalization" to produce "new constitutional arrangements … likely to enhance their relative power vis-á-vis other elements."[236]

D. IMPACT OF JUDICIALIZATION THEORIES ON THE ARENAS OF DEMOCRATIC CONSOLIDATION

In establishing the initial assessment of the impact of each theory on democratic consolidation, I assessed four of the five arenas of consolidated democracies. I did not take into account economic society, as this arena would only pertain in judicial review cases dealing with national economic regulation. The constitutional politics theory of judicial empowerment requires high civil society to be in place along with respect for rule of law. That society may not necessarily need to be too politically active or live in a state with a highly effective and usable bureaucracy. Evolutionist theory prioritizes the rule of law over

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[232] Hirschl, 99.

[233] Hirschl, 99–102.

[234] Hirschl, *Towards Juristocracy*, 38.

[235] Hirschl, "The Political Origins of Judicial Empowerment through Constitutionalization," 318–319.

[236] Hirschl, 318–319.

all other arenas meaning that civil society, political society, and a usable bureaucracy is less important or necessary within a country for judicial change to occur because it becomes essentially inescapable. For the systemic, needs based theory, an active civil or political society is not relevant. Respect and innovation in the rule of law is only possible because the government sees it as the most effective way to stamp out political unruliness within its ranks. Constitutionalization according to microlevel, rational choice theory, accounts for actors in the civil and political arenas. These actors are not primarily concerned with the rule of law, but in utilizing the existing bureaucracy to best suit their interest. Lastly, hegemonic preservation theory gives a low priority to a state's civil society and rule of law. At the core, this theory emphasizes support for rule of law only when political actors can increase their power. The usable bureaucracy of the judicial branch provides the avenue to compete for power and still win when new constitutional arrangements are outlined.

Legal transofmation theories account for variances in motivation. Each theory is attached to reasoning that produces unique values concerning the arenas of democratic consolidation. An exclusive power relationship arrangement is thus created between democracy and judicialization. In Table 2, an assessment of high, medium, low or absent illustrates the effects in the democratic arenas of case studies and their correlation with particular legal transformation theories.

Table 2. Theoretical Framework and Consolidated Democracy Status

THEORETICAL FRAMEWORK		**Arenas of a Consolidated Democracy**				
		Civil Society	**Political Society**	**Rule of Law**	**Usable Bureaucracy**	**Economic Society**
Theories	**Constitutional Politics**	H	M	H	M	A
	Evolutionist	M/L	L	H	M/L	A
	Systemic, Needs Based	L	L	M/H	H	A
	Microlevel, Rational Choice	H	H	L	H	A
	Hegemonic Preservation	L	H	L	H	A

E. SUMMARY

Through an exploration of power, organizations, and legal systems, it is evident that distinct constitutional identities have developed in American states. A state's constitutional identity comes from having a constitution that establishes a preferred legal system, how that constitution organizes society, and the role the constitutions plays in shaping that society.[237] Tasked as with the unique role of interpreters, judges fill national courts that determine the constitutionality of cases, and simultaneously, the reality of the society in which they live. The five theories of judicial empowerment are driven by distinct power relationships. When judicialization occurs, the existing power relationships morph to create a new democratic reality. Therefore, through the adjudication of politicized topics, national courts and its agents define the constitutional identity of a nation and exercise power that alters its democratization process.

"As the list of areas in which courts intervene has grown, the judiciary has emerged as one of the most important—if still deeply contested–institutions in posttransition Latin American politics."[238] Therefore, the study of constitutional law via national courts does present the issue of researching the "admittedly most political court and most political body of law," but it also provides clear examples of how top-down decisions affect a country.[239] Undoubtedly, those entrusted to the highest courts "are engaged with the great issues of their times."[240]

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[237] Michel Rosenfeld, "Constitutional Identity," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (United Kingdom: Oxford University Press, 2012), 757.

[238] Gretchen Helmke, *Courts in Latin America* (Cambridge: Cambridge University Press, 2011), loc. 118 of 9909, Kindle.

[239] Shapiro and Sweet, *On Law Politics and Judicialization*, 34.

[240] Peter Irons, *The History of the Supreme Court: Chapter 10*, The Great Courses, narrated by Peter Irons, 2003, Audiobook.

III. CASE STUDY OF JUDICIALIZATION: BRAZIL

This chapter provides an overview of judicialization in Brazil. It begins by explaining the power context in which the judicial branch and the national court operate and proceeds to provide judicialization statistics in Brazil over a 20-year period. The chapter also deep-dives into a case of judicialization and the consequences it has on the arenas of a consolidating democracy.

A. HISTORICAL BACKGROUND OF JUDICIAL POWER

Brazil is a federative republic[241] that has three branches of government.[242] The executive branch is comprised of an elected president that acts as the head of state and fulfills a term of four years.[243] Brazil's legislature is structured as a bicameral national congress comprised of a Senate and a Chamber of Deputies.[244] A legal system at the state and national levels constitutes the legislative branch, where national courts only concern themselves with "disputes between states and matters outside the jurisdiction of state courts.[245] Brazil has a 2-court [judicial], civil-law system that, "help[s] establish the rules of governing the political game, oversee the implementation of rules governing political authorities, and punish those who step over these lines."[246] The electoral court system concerns itself with administrative issues in electoral processes, and has

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241 Federal republic is "a state in which the powers of the central government are restricted and in which the component parts (states, colonies, or provinces) retain a degree of self-government; ultimate sovereign power rests with the voters who chose their governmental representatives." "The World Factbook, Field Listing: Government Type," CIA, accessed October 14, 2018, http://teacherlink.ed.usu.edu/tlresources/reference/factbook/fields/2128.html?countryName=&countryCode=&regionCode=M. "[R]epublic, from *res*, meaning thing or affair in Latin, and *publicus*, public: loosely rendered, a republic was the thing that belonged to the people." Dahl, *On Democracy*, 13.

242 "The Constitution of Brazil 1988 (Rev 2017): Article 2 of the Brazilian Constitution of 1988," Constitutute Project, trans. Keith S. Rosenn, accessed October 14, 2018, https://www.constituteproject.org/constitution/Brazil_2017?lang=en.

243 "Brazil: Political Structure," Economist, Intelligent Unit, December 1, 2018.

244 Economist Intelligence Unit.

245 Economist Intelligence Unit.

246 Matthew Taylor, "The Federal Judiciary and Electoral Courts," in *Corruption and Democracy in Brazil*, ed. Timothy J. Power and Matthew M. Taylor (Notre Dame: University of Notre Dame, 2011), 165.

"additional responsibilities for monitoring malfeasance related to campaigns and voting, and imposing political sanctions such as loss of office.[247] The Brazilian Supreme Federal Tribunal (STF) constitutes the second court system and is "by practice an appellate court and by vocation a constitutional court.[248]

The STF "is composed by eleven Justices, chosen among native Brazilian citizens who are more than thirty-five and less than sixty-five years old and have notable legal knowledge and soundness of character."[249] STF judges are selected via a Presidential nomination, are approved by an absolute majority of the Federal Senate[250] and have the opportunity to serve until 75 years of age.[251] The judges do not have docket control, but are allowed timing control via a *pedido de vista.*[252] Since the political question doctrine does not fully apply, and justices must see all cases brought to them, the STF is "forced to decide important issues of economic and social policy."[253]

The 2004 Judicial Reform "introduced profound alterations" to address relevant constitutional controversies.[254] Recently, an increased caseload, has led the STF to

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247 Taylor, 165.

248 Taylor, 173.

249 "Current Structure of the Supreme Federal Court," Portal STF Internacional, accessed October 12, 2018, http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte_en_us&idConteudo=120283; Constitutute Project, "The Constitution of Brazil 1988 (Rev 2017)."

250 "Federal Supreme Court," Portal STF Internacional, accessed October 14, 2018, http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte_en_us&idConteudo=283524.

251 "The Constitution of Brazil 1988 (Rev 2017): Article 100," Constitutute Project, trans. Keith S. Rosenn, accessed October 1, 2018, https://www.constituteproject.org/constitution/Brazil_2017#s5523.

252 A *pedido de visa* is a legal request for time to analyze case files. When granted, it is responsible for the increase in the length of judicial proceedings. Diego Wernek Arguelhes, and Ivar A. Hartmann, "Timing Control without Docket Control," *Journal of Law and Courts*, 107, 114, Spring 2017, https://www.journals.uchicago.edu/doi/pdfplus/10.1086/690195.

253 Keith S. Rosenn, "Recent Important Decisions by the Brazilian Supreme Court," *The University of Miami Inter-American Law Review* 45, no 2 (Spring 2014): 332, https://www.jstor.org/stable/24375768.

254 Wilson Center, *Brazil Institute, Rule of Law Series: Brazil* (Washington, DC: Wilson Center, 2017), 5, https://wilsoncenter.org/sites/default/files/bi_rule_of_law-toffoli_finalv2.pdf.

increase efficiency.[255] Judges interpret the Brazilian constitution of 1988, which counts with 22 subsequent amendments, the most recent in 2013.[256] Furthermore, an amendment to the constitution allowed the creation of a separate constitutional court in the STF, which acts as the "guardian of the fundamental law."[257] These important purpose and procedural changes have allowed the STF to be considered "one of the most powerful courts in the world."[258]

Brazil's national judicial statistics report the overall annual caseload for the STF. The total caseload for the STF indicate a modest increase from 54,437 in 1999 to 56,257 in 2017, but also highlight extreme variation, as reflected in record-setting statistics of 2006. Out of the STF total caseload, 5,562 cases are categorized as Direct Acts of Unconstitutionality (ADI).[259] ADIs "are the main instrument of judicial review in the Brazilian judicial system" and require decision by all members of the court.[260] The total number of judicial review cases decided by the STF rose from 0 in 1999 to 524 in 2017 signaling a pronounced negative correlation between the total number of cases seen by the STF, and those that deal with judicial review.[261] STF statistics identify the court's mixture of unprecedented willingness to decide cases of unconstitutionality with self-

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255 O número de processos recebidos pelo Supremo Tribunal Federal aumentou 22,95% de 2012 (73.464) até 2016 (90.331). O número de decisões igualmente aumentou, o que significa maior eficiência na prestaçãoda jurisdição. Em 2012, foram proferidas 72.185 decisões finais pelos órgãos do Supremo Tribunal,enquanto, em 2016, chegaram elas ao total de 9.314, num aumento de 32,04% (translated from the Brazilian Portuguese text: The number of cases received by the Federal Supreme Court increased by 22.95% in 2012 (73,464) until 2016 (90,331). The number of decisions has also increased, which means greater efficiency in the provision of jurisdiction. In 2012, 72,185 final decisions were handed down by the Supreme Court, while in 2016 they reached a total of 9,314, an increase of 32.04%). "Palavra da Presidente," Supremo Tribunal Federal, accessed October 12, 2018, http://stf.jus.br/relatorio2016/.

256 Brazil Comparative Constitutions Project, "Timeline of Constitutions," citing Elkins, Ginsburg, and Melton, *The Endurance of National Constitutions*.

257 Wilson Center, *Brazil Institute, Rule of Law Series: Brazil*, 3.

258 Rosenn, "Recent Important Decisions by the Brazilian Supreme Court," 298.

259 "In an ADI the STF directly exerts its role as a constitutional court." Pedro Fernando Almeida Nery Ferreira and Bernando Mueller, "How Judges Think In the Brazilian Supreme Court: Estimating Ideal Points and Identifyin Dimensions," *National Association of Postgraduate Centers in Economics*, August 26, 2014, 277.

260 "In an ADI the STF directly exerts its role as a constitutional court." Ferreira and Mueller, "How Judges Think in the Brazilian Supreme Court," 279.

261 "Estadísticas do STF: ADI [Statistics of STF: ADI]," Supremo Tribunal Federal, accessed October 31, 2018, http://www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=adi.

imposed judicial limits. Figure 8 corroborates the notion that the court engages in the political quandaries of the times, but does so under improved efficiency parameters within judge control.

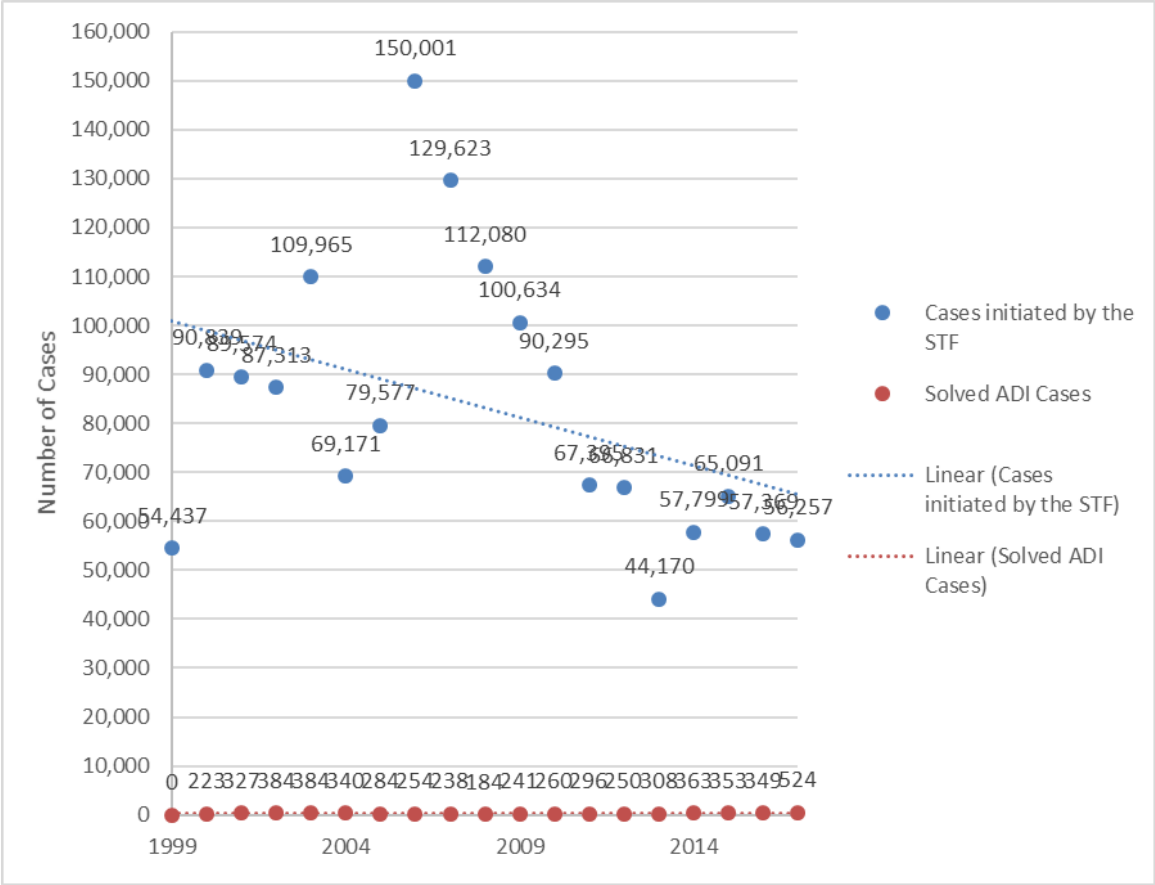

Figure 8. Brazil STF Docket[262]

The "historic, ongoing transformation in Latin America's largest country" reflects shifts in the workings of governmental institutions.[263] The STF has transitioned to occupy an "important role in supporting the growth and development of democratic institutions"[264] to the extent that the court is now the "guardian of … democratic state of

[262] Adapted from Supremo Tribunal Federal.

[263] Wilson Center, *Brazil Institute, Rule of Law Series: Brazil*, iii.

[264] Rosenn, "Recent Important Decisions by the Brazilian Supreme Court," 332.

law and … an institution of fundamental importance to democratic stability in Brazil."[265] The perceived efficiency and judicialization of the court produce unique consequences in the arenas of democratization.

B. CASES AFFECTING DEMOCRACY

Brazil's democratic status is ranked 23rd in the world according to the Bartlesmann Stiftung Transformation Index of 2018.[266] Due to massive corruption scandals and the impeachment of the President Dilma Rousseff, the country currently experiences "the most serious political and economic crisis since … [its] return to democracy."[267] The index warns that democratic institutions are weakened by instability and that the judiciary plays a role in exacerbating the problem.[268] However, Brazil is also "the fourth largest democracy in the world … the largest in Latin America, and ... [it boasts a] remarkable institutional evolution over its most recent–and longest–experiences with democracy.[269]

One of the most recent and memorable experiences in the political history of Brazil, the *Mensalão* scandal, involves unprecedented actions by all three governmental branches.[270] In the briefest of summaries, the *Mensalão* scandal, implicated senior aides of the executive branch in an illegal vote-buying scheme of members of Congress.[271] Though congressional investigations were ongoing, the judicial branch, represented by the members of the national court, "announced it would approve … indictments and that

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265 Wilson Center, *Brazil Institute, Rule of Law Series: Brazil*, 18.

266 "Brazil Overall Results," Bartlesmann Stiftung, accessed November 29, 2018, https://atlas.bti-project.org/share.php?1*2018*CV:CTC:SELBRA*CAT*BRA*REG:TAB.

267 "Brazil Country Report," Bartlesmann Stiftung, 3, accessed November 1, 2018, https://www.bti-project.org/en/reports/country-reports/detail/itc/BRA/.

268 Bartlesmann Stiftung, 3.

269 Power and Taylor, "Introduction," 4.

270 Carlos Pereira, Timothy J. Power, and Eric D. Raile, "Presidentialism, Coalitions, and Accountability," in *Corruption and Democracy in Brazil*, ed. Timothy J. Power and Matthew M. Taylor (Notre Dame: University of Notre Dame, 2011), 31–55.

271 Pereira, Power, and Raile, 33.

each of the accused would have to stand trial in the STF."[272] What is unusual about the case is that the STF "broke all expectations by harshly condemning powerful and well connected politicians … [creating] a watershed in the Supreme Court's history."[273]

"The trial of the century" is only half of the story of Brazil's judicial transformation.[274] The other half comes from the ruling of constitutionality of the Law of Clean Slate or *Lei da Ficha Limpa.* Prompted by the overwhelming corruption present in the Brazilian government system, citizens requested a law to prohibit "anyone from running for political office for eight years if convicted of certain crimes, which include a host of financial crimes, drug trafficking, and assorted forms of corruption."[275] On February 16, 2012, the STF via ADI 4578, declared itself in favor of the Law of Clean Slate, thereby legitimizing it.[276]

Since "a decision made in an ADI extend[s] to all of society," its ramifications factored in criminal cases like *Mensalão*.[277] Even though the STF is "institutionally ill-equipped to serve as a trial court," it is responsible for adjudicating criminal cases of high-ranking politician through privileged forum.[278] Privileged forums "entitles [politicians and cabinet members] to hearings by the Supreme Court [versus common courts], a much slower procedure by what some perceive as a more politically-motivated court."[279] Upholding the Law of Clean Slate grants the STF the power to remove political members in an effort to limit governmental corruption.

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272 Pereira, Power, and Raile, "Presidentialism, Coalitions, and Accountability," 34; Ferreira and Mueller, "How Judges Think in the Brazilian Supreme Court," 290.

273 Fernando Ferreira, and Mueller, 279.

274 "Mensalão será o julgamento do século [Mensalão will be the judgment of the century]," Veja, Abril 6, 2012, https://.abril.com.br/politica/mensalao-sera-o-julgamento-do-seculo/.

275 Rosenn, "Recent Important Decisions by the Brazilian Supreme Court," 306.

276 "STF decide pela constitutionalidade da Lei da Ficha Limpa [STF decides on the constitutionality of the data sheet]," Supremo Tribunal Federal, February 17, 2012, http://www2.stf.jus.br/portalStfInternacional/cms/destaquesClipping.php?sigla=portalStfDestaque_pt_br&dConteudo=200628.

277 Ferreira and Mueller, "How Judges Think in the Brazilian Supreme Court," 277, 290.

278 Rosenn, "Recent Important Decisions by the Brazilian Supreme Court," 305.

279 Diogo Costa and Magno Karl, "The Path Forward for Brazil," *Forbes*, May 15, 2016, https://www.forbes.com/sites/realspin/2016/05/15/brazil-path-forward/#532b611b3542.

Stemming from the aforementioned judicial transformation, the STF "has demonstrated a much greater institutional capacity to gather evidence, implicate defendants and prosecute them while also recouping millions of dollars lost in vast money laundering schemes."[280] The organization is able to replicate and expand its success on new political controversies, like *Lava Jato* and *Odebrecht*.[281]

C. CONSEQUENCES

Defining success in judicial terms is problematic. Lawyers are typically credited with the advancement of liberal democratic doctrine, but they have also made mistakes. Heralded in their day, various monumental decisions by national courts were far from helpful and useful for society. Lest we forget, "successful courts" in a democratic United States legitimized slavery, segregation, and the use of internment camps. In light of past national court failures, objective critical analysis proves advantageous when dealing with landmark cases and the overall assessment of democratic standing. Likewise, it is crucial to understand that the "current state [of Democracy] is that of regression" stemming from "a growing [popular] dissatisfaction from the existing establishments."[282] Subjective thought on behalf of some citizens may lead them to believe institutions within their country are frustrating yet highly democratic, however the objective measurement by the BTI indicates that Brazil is an advanced but defective democracy.[283]

Judicial interpretation in landmark cases disturb the overall constitutional reality of democracies. For Brazil, the consequences of accepting the constitutionality of ADI 4578

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[280] Kelsey L. Finley, "Corruption in Brazil and the Incentives for Change" (master's thesis, Naval Postgraduate School, 2017), 1, cited from Sergio Praça and Matthew M. Taylor, "Inching Toward Accountability: The Evolution of Brazil's Anticorruption Institutions, 1985–2010," *Latin America Politics and Society* 56, no. 2 (Summer 2014): 27–48, https://doi.org.10.1111/j.1548-2456.2014.00230.x.

[281] Lava Jato is an investigation of corruption by a state-owned company, Petrobras. The company is accused of accepting bribes from firms for government contracts. One of the firms is Odebrecht that has been linked with bribery operations in 12 countries. Claire Felter and Rocio Cara, "Brazil's Corruption Fallout," Council on Foreign Relations, https://www.cfr.org/backgrounder/brazils-corruption-fallout, updated November 7, 2018.

[282] Eliezer Ginzberg, "The Economist Intelligence Unit's Democracy vs. Countries' Own Perceptions," *Revistă de Cercetar Ştiinţifică Pluridisciplinară* ix, no. 3 (September 2017): 41.

[283] "Brazil: The Governance Index," Bartlesmann Stiftung, accessed November 29, 2018, https://www.bti-project.org/en/reports/country-reports/detail/itc/BRA/.

have affected four of the five "interconnected and mutually reinforcing conditions" of a consolidated democracy: civil society, political society, rule of law, and usable state bureaucracy.[284]

In the case of Brazil, judicialization of political cases of corruption has had a high impact on the civil society arena. The BTI grants Brazilian civil society participation a score of 7.[285] In this connection, the decision of the STF to adjudicate ADI 4578 is a clear example of national courts understanding and upholding the power of the demos. The Law of Clean Slate originated when the "Movement to Combat Electoral Corruption–a group representing more than 40 civil society organization, non-profits, and religious associations–collected over 3 mission signatures to submit a bill before Congress," which later passed into law.[286] The new petition-to-law legislation, one of only four since 1988, had immediate repercussions on other democratic arenas, particularly on the political realm, the source of public discontent.[287] The capacity of the Brazilian population to "generate political alternatives and to monitor government and state" via new and upheld norms supports a stronger assessment of democracy.[288]

Judicialization in Brazil has had a medium impact on the political society arena. Brazilian political and social integration received a score of 6 in the BTI.[289] For Brazil's Law of Clean Slate, the population (civil society) and Congress (state) worked together to structure the political system in a way that supported the requests of society for a less corrupt government and simultaneously ensured continued support for governmental order. This is not to say that the population is content abiding by mandatory voting laws only to settle with the current state of affairs, far from it. In a recent poll, 78% of Brazilians

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284 Linz and Stepan, *Problems of Democratic Transition and Consolidation*, 7–8.

285 Brazil: The Governance Index," Bartlesmann Stiftung, accessed November 29, 2018, https://atlas.bti-project.org/share.php?1*2018*CV:CTC:SELBRA*CAT*BRA*REG:TAB.

286 Rachel Glickhouse and Luisa Leme, "Explainer: Brazil's Clean Record Law," Americas Society/ Council of the Americas, August 26, 2014, https://www.as-coa.org/articles/explainer-brazils-clean-record-law.

287 Glickhouse and Leme.

288 Linz and Stepan, *Problems of Democratic Transition and Consolidation*, 9.

289 "Brazil Democracy Status," Bartlesmann Stiftung, accessed November 29, 2018, https://atlas.bti-project.org/share.php?1*2018*CV:CTC:SELBRA*CAT*BRA*REG:TAB.

perceived that the level of corruption was on the rise and that the most corrupt were the police, elected representatives, and local government.[290] Brazilians recognize the need for a state to exist, but question the overall benefits of a democracy, particularly if it is ineffective in providing "security, education, health services, economic opportunity, environmental surveillance, a legal framework of order and a judicial system to administer it, and fundamental infrastructural requirements such as roads and communications facilities−to their citizens."[291] A 2017 Pew Research study found that only 21% of the population was committed to representative democracy and 62% of those polled were willing to consider less or nondemocratic options.[292] "In general, public commitment to representative democracy is highest in countries that have a well-functioning democracy," so the Brazilian deviation suggests discontent with the overall governmental system. Brazil is not alone, satisfaction with democracy "is least common in Latin America" versus other areas.[293]

For Brazil, judicialization has had a high impact on the rule of law arena, based on the 7.8 value of the BTI. To begin with, dealing with *Mensalão* has enabled the STF to "guarantee procedural justice and ex post enforcement, independent of partisan power dynamics," brining the theoretic aspect of rule of law closer with reality.[294] The ADI 4578 decision that required politicians to be free from criminal proceeding or claims of corruption before running for governmental positions, developed out the public's need for more robust accountability mechanisms. Furthermore, the ADI case led to the creation and passage of a new amendment to the constitution.[295] Such actions "suggest that Brazil has crossed a

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290 Coralie Pring, "Global Corruption Barometer: People and Corruption: Latin America and the Caribbean," Transparency International, 2017, https://www.transparency.org/whatwedo/publication/global_corruption_barometer_people_and_corruption_latin_america_and_the_car.

291 Rotberg, "The New Nature of Nation-State Failure," 61–65.

292 Richard Wike et al., "Globally Broad Support for Representative and Direct Democracy," *Pew Research Center*, 5, October 16, 2017, http://www.pewglobal.org/2017/10/16/globally-broad-support-for-representative-and-direct-democracy/.

293 Wike et al., "Globally Broad Support for Representative and Direct Democracy,"11.

294 Gregory Michener and Carlos Pereira, "A Great Leap Forward for Democracy and the Rule of Law? Brazil's Menslão Trial," *Journal of Latin American Studies* 48, no. 3 (July 12, 2016): 478.

295 The amendment prohibits Congress from conducting secret voting in proceedings against current members. Michener and Pereira, "A Great Leap Forward," 500.

political threshold of sorts, and the country's political landscape is clearly experiencing a critical moment of institutional fluidity."[296]

"Constitutions must meet changing [polity] needs … .judicially," and the drive for institutional deviation is driven by inefficiencies in the overall government.[297] With regard to the state bureaucracy arena, judicialization has enabled a medium improvement of Brazil's governmental steering capacity. The BTI scores the steering capacity of the state at a 6.3. Prior to *Mensalão* and ADI 4578, Brazilian bureaucracy consistently produced intangible results in corruption investigations.[298] *Mensalão* created usable bureaucracy by enabling Congress to investigate and later confirm the existence of the scheme, culminating in a recommendation to indict on a federal level.[299] Though there was considerable pushback, the process to bring justice to a once lawless governmental arena, signifies the cooperation and coordination of multiple governmental entities. Table 3 shows the theoretical framework created for Brazil. "Above all, the *Mensalão* shows the capacity of Brazil's legal system to remain independent in spite of political dynamics that overwhelmingly appeared to favor immunity."[300] The case also "seemed to stoke a flurry of accountability-enhancing initiatives inside and outside government."[301] The Lei da Ficha Limpa was an initiative that supported players in an old, yet newly revamped bureaucratic environment.

Table 3. Theoretical Framework for Brazil

THEORETICAL FRAMEWORK	**Arenas of a Consolidated Democracy**				
	Civil Society	**Political Society**	**Rule of Law**	**Usable Bureaucracy**	**Economic Society**
Constitutional Politics	H	M	H	M	A

296 Michener and Pereira, "A Great Leap Forward," 502.

297 Linda Greenhouse, "Constitutions, the Good and the Bad," *New York Times*, September 14, 1983, https://www.nytimes.com/1983/09/14/us/constitutions-the-good-and-the-bad.html.

298 Matthew M. Taylor and Vinícus C. Buranelli, "Ending up in Pizza: Accountability as a Problem of Institutional Arrangement in Brazil," *Latin American Politics and Society* 49, no. 1 (Spring, 2007): 59.

299 Michener and Pereira, "A Great Leap Forward," 481.

300 Michener and Pereira, 501.

301 Michener and Pereira, 483.

Overall, the theory of constitutional politics adequately explains judicialization in Brazil versus other judicial empowerment theories. This is because democratic arenas of civil society and rule of law play a major role in the theory. The remaining arenas, political society and usable bureaucracy, factor minimally in incentivizing constitutionalization. Constitutional politics theory in Brazil is supported by the antipathy of the polity and political elites. While political elites enjoyed what was considered institutionalized political immunity, citizens could not fathom why crimes did not apply to government representatives. Accepting and adjudicating politicized cases enabled the STF to prevent the collapse of the state. The democratic transformation in Brazil is partly attributed to a state that makes room for the positive integration of civil society and the rule of law via judicialization. Of concern, are the medium ratings of both political society and usable state bureaucracy. Although the two residual arenas improved with the ruling of the landmark case, both are the areas that prevent Brazil from achieving a more robust democratic status.

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IV. CASE STUDY OF JUDICIALIZATION: URUGUAY

This chapter provides an overview of judicial power in Uruguay. The section describes the power relationship of the judicial branch and the national court. Additionally, the section covers court statistics over a 20-year period and corroborates the existence of the judicialization phenomenon in Uruguay. The analysis of a controversial case allows extrapolation of changes affecting the current democratic standing of the country.

A. HISTORICAL BACKGROUND OF JUDICIAL POWER

The Oriental Republic of Uruguay is a constitutional republic[302] that has three branches of government.[303] The executive branch is comprised of an elected president who is both the head of state and head of government and fulfills a term of five years[304] Uruguay has a bicameral legislature, which governs via a General Assembly made-up of a 31-member Senate[305] and a 99-member House of Representatives.[306] Uruguay has a five-court civil law-based legal system,[307] that is responsible for "issuing and enforcing judicial rulings, guaranteeing the exercise and protection of individual rights as set out in the law, and preserving the peace in the framework of the Rule of Law."[308] The judicial

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302 A Constitutional republic is "a government by or operating under an authoritative document (constitution) that sets forth the system of fundamental laws and principles that determines the nature, functions, and limits of that government." The CIA Factbook defines a republic as "a representative democracy in which the people's elected deputies (representatives), not the people themselves, vote on legislation." CIA, "The World Factbook, Field Listing: Government Type."

303 "CIA World Factbook, Uruguay," CIA, accessed October 14, 2018, http://teacherlink.ed.usu.edu/tlresources/reference/factbook/geos/uy.html.

304 "Legal System of Uruguay," Organization of American States, accessed October 14, 2018, https://www.oas.org/juridico/mla/en/ury/en_ury-int-description.pdf.

305 Note that the Vice President acts also as the President of the Senate. Organization of American States, "Legal System of Uruguay."

306 Organization of American States.

307 CIA, "CIA World Factbook, Uruguay."

308 "Misión del poder judicial [Mission of the judicial power]," Poder Judicial Uruguay, May 10, 2012, http://poderjudicial.gub.uy/institucional/mision, translated in *Report on Judicial Systems in the Americas 2006–2007, Uruguay* (Ithaca, NY: Cornell Law School, n.d.), 462, accessed October 15, 2018, http://ww3.lawschool.cornell.edu/avondocuments/20081228-uruguay-judicialsystem-001.pdf.

system is made up of the Supreme Court of Justice (SCJ), the Courts of Appeal, District Courts, Peace Courts, and Rural Courts."[309] The Courts of Appeal are second instance courts dedicated to contend with civil, family, labor, and criminal disputes in which appeals have been made after first instance sentencing by District Courts.[310] District, Peace, and Rural Courts are jurisdictional organizations that provide first instance sentencing by an individual judge.[311] The SCJ constitutes the apex court in Uruguay and as such, "has national authority…there are no autonomous judicial institutions within each department or city."[312] Since Uruguay follows a civil law legal system, cases are judged individually and the final outcome is not considered a blanket determination for additional cases.

The SCJ is composed of five justices, who have the following qualifications: "1. Forty years or over; 2. Native citizenship in exercise of the rights thereof, or legal citizenship with ten years exercise thereof and twenty-five years of residency in the country; 3 ... [and] have been a lawyer for ten years, or as such to have been a member of the Judiciary of the Public or Fiscal Ministry for a period of eight years."[313] SCJ justices are appointed by the General Assembly with a two-thirds majority,[314] and must serve 10-year terms;[315] the age limit is set at 70 years.[316] Judges interpret the national constitution

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309 International Business Publications, *Uruguay Business Law Handbook Strategic Information and Basic Laws*, vol. 1 (Washington, DC: International Business Publications, 2016), 37.

310 International Business Publications, 38.

311 A breakdown of each individual court and subsequent lower courts is provided in pages 37–40. International Business Publications, 38.

312 International Business Publications, 37; "Uruguay: Description of the Judicial System of Uruguay," Florida International University, Steven J. Green School of Interntional & Public Affairs, October 16, 2018, https://caj.fiu.edu/national-cj-systems/south-america/uruguay/.

313 Article 234 (# of justices) and 235 (eligibility). "The Constitution of Uruguay 1966 (reinst. 1985, rev. 2004)," Constitutute Project, 2012, https://www.constituteproject.org/constitution/Uruguay_2004?lang=en. English translation by William S. Heing & Co., Inc.

314 International Business Publications, *Uruguay Business Law Handbook Strategic Information and Basic Laws*, 38.

315 Article 237 (term). Constitutute Project, "The Constitution of Uruguay 1966 (reinst. 1985, rev. 2004)."

316 Article 250 (70 years old). Constitutute Project.

of 1996, which was reinstated in 1985, and counts with four subsequent amendments, the most recent in 2004.[317]

Based on Uruguay's national judicial statistics report, the caseload initiated by the SCJ increased from 637 in 1999[318] to 2,487 in 2017.[319] Out of the SCJ docket, 2,653 cases were decided strictly on unconstitutionality terms.[320] The total number of judicial review cases decided by the SCJ rose from 23 in 1999 to 120 in 2017 signaling a slight, but noteworthy correlation between the total number of cases seen by the SCJ, and those that deal with judicial review. As seen in Figure 9, SCJ statistics also outline the unprecedented willingness of Uruguayan judges to accept cases and thus become involved in the modern political issues of the country.

317 Comparative Constitutions Project, "Timeline of Constitutions," citing Elkins, Ginsburg, and Melton, *The Endurance of National Constitutions*.

318 Departamento de Estadísticas, *Evolución de los asuntos iniciados según competencia de la sede y área geográfica, anuario estadístico año 2010* [Evolution of matters initiated according to the competence of the headquarters and geographical area, statistical yearbook year 2010] (Montevideo: Departamento de Estadísticas, 2011).

319 Poder Judicial Uruguay, "Anuario estadístico 2017—Gráfico 4. Evolución de los asuntos iniciados por la Suprema Corte de Justicia. Periodo 2007–2017 [Statistical yearbook 2017—Chart 4. Evolution of the matters initiated by the Supreme Court of Justice. Period 2007–2017]," 34, accessed October 15, 2018, http://poderjudicial.gub.uy/anuario-estadistico.

320 Poder Judicial Uruguay.

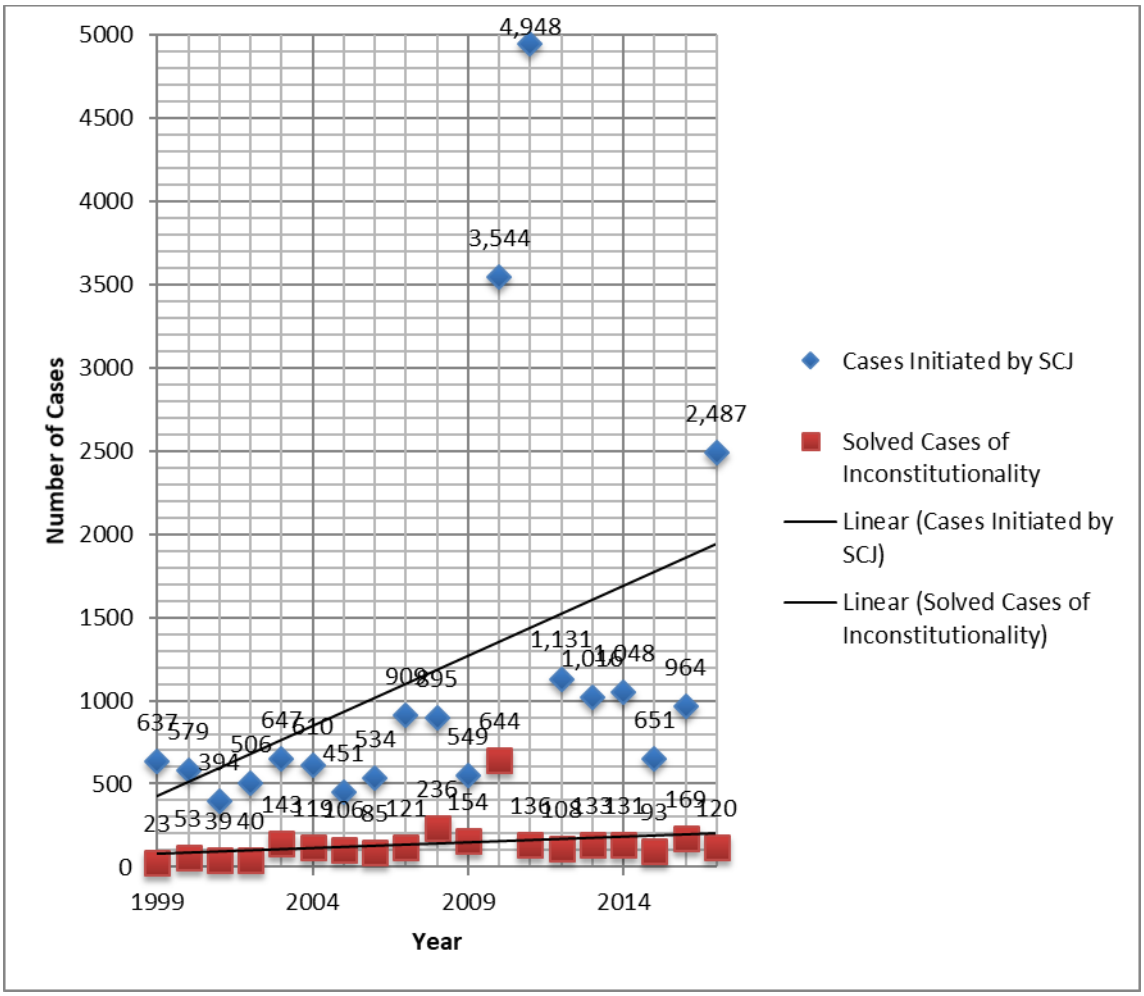

Figure 9. Uruguay SCJ Docket[321]

B. CASES AFFECTING DEMOCRACY

According to 2018 BTI statistics, Uruguay holds the top honor worldwide for democratic standing boasting a highly advanced and consolidated democracy.[322] The country also has "the longest democratic history in Latin America" and receives high

321 Adapted from Departamento de Estadísticas, *Evolución de los asuntos iniciados* [Evolution of matters initiated]; "Base de Jurisprudencia Nacional," Poder Judicial República Oriental del Uruguay, accessed October 18, 2018, http://bjn.poderjudicial.gub.uy/BJNPUBLICA/busquedaSimple.seam. Selectively searched database for statistics on the total of definitive rulings of inconstitutionality in SCJ from January 1, 1999 to December 31, 2017.

322 "Democracy Status—Political Systems," Bartlesmann Stiftung, accessed November 29, 2018, https://atlas.bti-project.org/share.php?1*2018*GV:SIX:0*CAT*ANA:REGION.

praise for sustained democratic norms.[323] However, the rating stands in stark contrast with the country's handling of human rights violations committed during the dictatorship period (1973–1985).[324] Post dictatorship, the *Ley de Caducidad*,[325] or the Expiry of the Punitive Claims of the State, required the state to "renounce its right to prosecute members of the military and police with respect to crimes committed until 1 March 1985."[326] In opposition to the law, the population, non-governmental organizations, and political sectors, organized two unsuccessful referendums in 1986 and 1989.[327] Additionally, the SJC had ruled the law constitutional in 1988 under grounds of an authentic amnesty law by the executive.[328] Thus, "Uruguay is…the only country in the world that has not once but twice democratically approved an amnesty law designed to shield the military from criminal prosecution for violations."[329] The adoption of such unorthodox measure was justified as a requirement to complete Uruguay's transition from dictatorship rule to full constitutional order. Via the amnesty law, the new post-transition government avoided military resistance and the threat of regression.[330]

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323 "Uruguay Country Report," Bartlesmann Stiftung, accessed November 29, 2018, https://www.bti-project.org/en/reports/country-reports/detail/itc/URY/.

324 Peter J. Meyer, *Uruguay: Political and Economic Conditions and U.S. Relations*, CRS Report No. R40909 (Washington, DC: Congressional Research Service, 2010), 4.

325 Also known as Ley No. 15.848 or Expiry Law. The law was approved in Montevideo in 1986. "Republica Oriental del Uruguay [Eastern Republic of Uruguay]," Poder Legislativo, accessed November 1, 2018, https://legislativo.parlamento.gub.uy/temporales/leytemp1899404.htm.

326 Francesca Lessa, "The Many Faces of Impunity: A Brief History of Uruguay's Expiry Law," *The London School of Economics and Political Science* (blog), 2018, http://blogs.lse.ac.uk/ideas/2010/09/the-many-faces-of-impunity-a-brief-history-of-uruguays-expiry-law/.

327 Elin Skaar, *Judicial Independence and Human Rights in Latin America* (New York: Palgrave Macmillan: 2011), 136.

328 Javier Chinchón Álvarez, *Derecho internacional y transiciones a la democracia y la paz: Hacia un modelo para el castigo de los crímenes pasados a través de la experiencia iberoamericana Derecho internacional y transiciones a la democracia y la paz: Hacia un modelo para el castigo de los crímenes pasados a través de la experiencia iberoamericana* [International law and transitions to democracy and peace: Towards a model for the punishment of past crimes through the Ibero-American experience] (Madrid: Ediciones Parthenon, 2007), 398; *Case "Detta, Josefina; Menotti, Noris; Martinez, Federico; Musso Osiris*, Supreme Court of Uruguay; *Burgell, Jorge s/inconstitutioncalidad de la ley*, 15.848. Articles 1, 2, 3, y 4," Judgement no. 112/87, Resolution of May 2, 1988, 2256–2318.

329 Skaar, *Judicial Independence and Human Rights in Latin America*, 136.

330 Skaar, 144–145.

One positive aspect of the amnesty law was that it allowed the free-flow of information in investigations regarding disappearances and abuses. Peace commissions provided a limited level of closure to grieving families, as they would only investigate and produce information on each case, and at the same time, clear the guilty. As Victor Semproni, a political actor in Uruguay proposed, once the military agreed to reveal information about the case, "the issue would be closed forever."[331] On the other hand, the inability to prosecute those responsible for the crimes legally, caused friction domestically. The law requires cooperation between the judicial and executive branches before a human rights case that transpired during the dictatorship, can be heard nationally.[332] At various times, such cases were accepted by the judicial branch, but did not proceed to adjudication because it failed to garner the president's approval.[333]

The fact that a national impunity policy was ruled constitutional, twice upheld via referendum, and vigorously supported by various presidents, including a former Tupamaro, has not deterred a number of family members and practices from seeking justice via national courts. Since the adoption of the *Ley de Caducidad*, the slow but constant trickle of human rights abuse cases has continued to challenge the norm and push the judicial branch to consider further determinations of unconstitutionality. For example, in one such case in 2009, the SCJ delivered a ruling of unconstitutionality of the *Ley de Caducidad*, citing discrepancies in its adoption and declaring that 3 of the 16 articles ran counter to the constitution.[334] This ruling was monumental, because it found fault in a previously addressed law deemed constitutional by the SCJ itself. According to the members that formed the SCJ in 2009, the law was in breach of constitutional

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[331] Skaar, 154.

[332] Daniel Soltman, "Applauding Uruguay's Quest for Justice: Dictatorship, Amnesty, and Repeal of Uruguay Law No. 15.848," *Washington Uiversity Global Studies Law Review* 12, no. 4 (2013): 831, https://openscholarship.wustl.edu/law_globalstudies/vol12/iss4/9/.

[333] Bartlesmann Stiftung, "Uruguay Country Report."

[334] Yolanda Gamarra, "National Responses in Latin America to International Events Propelling the Justice Cascade: The Gelman Case," in *New Approached to International Law: The European and the American Experiences*, ed. José Maria Beneyto and David Kennedy (Netherlands: T. M. C. Asser Press, 2010), 89.

procedures and it endangered the independence of all governmental branches.[335] Furthermore, the landmark case provided an opening for unconstitutional rulings for 20 additional cases and the court acceptance of 140 archived cases.

In contrast to judicial progress regarding human rights abuses, a national plebiscite that same year upheld the continuation of the impunity law with a 52% pro and 48% against.[336] The narrow decision reflects the division of not only popular opinion but political opinion as well. The failed plebiscite and domestic and international pressure finally drove the push for a new avenue to address the issue via the legislative branch. In 2011, after many governmental missteps, law 18.831 was passed that reinstated the ability of the state to punish human rights abusers during the dictatorship.[337] Two years later, the SCJ became the center of attention once again when they delivered a determination of unconstitutionality of law 18.831 citing that the legislative power does not have the ability to abolish a law elected and confirmed by the population.[338]

Judicial transformation in Uruguay in regards to human rights abuse is thought provoking. The composition of the national court has allowed more of these cases to be seen, but delivered divergent jurisprudence.[339] The outcomes of individual cases have institutionalized discrepancies and contradictions that have polarizing effects on the public and political opinions of an already polemic, politically sanctioned measure.[340]

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335 Skaar, *Judicial Independence and Human Rights in Latin America*, 184.

336 Ana Buriano and Silvia Dutrénit, "A 30 años de la ley de caducidad uruguaya? Que y como debemos conmemorar?, ⌈30 years of the Uruguayan expiration law? What and how should we commemorate?⌉," Antiteses, July 2017, 355, https://doi.org.10.5433/1984-3356.2017v10n19p351.

337 Buriano and Dutrenit, 366.

338 Jorge Díaz Almeida, *Fiscalía General de la Nación* ⌈Attorney general of the nation⌉ (Montevideo: Fiscalía General de la Nación, 2016), 2, www.fiscalia.gub.uy/innovaportal/file/1713/1/2338-inconstitutionalidad.pdf.

339 Francesca Lessa, "New Ruling by Uruguay's Supreme Court of Justice once again Jeopardizes the Search for Truth and Justice for Dictatorship-Era Crimes," Washington Office on Latin America (WOLA), November 7, 2017, https://www.wola.org/analysis/new-ruling-uruguays-supreme-court-justice-jeopardizes-search-truth-justice-dictatorship-era-crimes/.

340 Bartlesmann Stiftung, "Uruguay Country Report."

C. CONSEQUENCES

Once again, defining judicial success proves problematic, as upholding liberal democratic standards may not always yield conventional results when dealing with human rights issues. The Uruguayan government upholds the democratic standing of the government via its elected laws and boldly recognizes the will of the people as represented via referendums. Essentially, the SCJ advocates for the constitutional rights of its citizens, while also guaranteeing legal protection of those implicated in abusing the rights of the same.

As was the case in Brazil, judicial interpretation of landmark cases has disturbed the constitutional reality of Uruguay. The consequences of upholding law 15.848 and rejecting the constitutionality of law 18.831 has affected four of the five consolidated democracy arenas: civil society, political society, rule of law, and usable bureaucracy.

Judicialization has had a high impact on the country's civil society arena, corroborated by the BTI civil society participation score of 10. Indeed, Uruguay's constitution outlines the exercise of sovereignty directly by initiative and referendum and indirectly by representative powers.[341] Therefore, the government allows for the active participation of civil society. In the 1980s, a weak human rights movement could not adequately counter the political power behind the amnesty law, nor muster enough support during the country's first referendum.[342] By 2007, civil society had amassed enough political support to launch an initiative for annulment of the amnesty law and a call for a referendum.[343] Referendum results have not been positive for human rights activists, yet increased strength behind Uruguay's civil society is one of the reasons for judicialization though at a slow and measured pace. As citizens "become more active in presenting cases to the courts, … judges too have become activists in the way they rule in rights matters."[344]

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341 Jorge Diaz Almeida, *Fiscalia General de la Nacion*, 2.

342 Elin Skaar, "Uruguay: From Impunity to Trials," in *Judicial Independence and Human Rights in Latin America*, ed. Elin Skaar (New York: Palgrave Macmillan: 2011), 147.

343 Skaar,183.

344 Skaar, 200.

The political society arena has also been highly impacted by adjudicating law 18.831. The BTI assesses political and social integration in Uruguay with a value of 9.8. As such, Uruguayans have learned from past political experiences and adjusted their voting behavior to address current needs.[345] Though voting is compulsory in Uruguay, electoral volatility has been recorded at below 5% in 2014.[346] A robust political society exists in Uruguay, but "political elite may still be able to leverage governance capital accumulated … [and] anchored in institutions."[347]

The assessment of the rule of law proved challenging in the case of Uruguay because of the unique relationship and responsibility between the judiciary and executive branches. Though the Uruguayan judicial branch has a perfect score (10) by BTI standards, it is important to revisit the requirement of the amnesty law to refer to the executive for judicial matters dealing with human rights abuse.[348] In doing so, "the executive controls the courts and takes on an anti-prosecution stance, [making] the likelihood of trials…slim."[349] The specific cases where judicial independence is not guaranteed, affects the efficiency in rule of law and translates to lower quality of democracy for Uruguayans, hence the need for a deviation from BTI statistics. In this context, the Uruguay earns a low score for the rule of law arena.

Judicialization of human rights abuse cases has had a high impact on the usable state bureaucracy arena. The BTI scores the state's steering capacity as 8.3.[350] To validate this fact, the SCJ has processed and upheld 31 laws as unconstitutional.[351] Democratic institutions, like the judicial system, are stable, efficient, and garner the

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345 Linz and Stepan, *Problems of Democratic Transition and Consolidation*, 157.

346 "Uruguay Country Report," Bartlesmann Stiftung, 8, accessed November 30, 2018, https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2018/pdf/BTI_2018_Urguay.pdf.

347 "Latin America and the Caribbean Regional Report," Bartlesmann Stiftung, accessed November 29, 2018, https://www.bti-project.org/en/key-findings/regional/latin-america-and-the-caribbean/.

348 Bartlesmann Stiftung, "Uruguay Country Report," 10.

349 Skaar, "Uruguay: From Impunity to Trials," 138.

350 "Uruguay Overall Results," Bartlesmann Stiftung, accessed November 29, 2018, https://atlas.bti-project.org/share.php?1*2018*CV:CTC:SELURY*CAT*URY*REG:TAB.

351 Bartlesmann Stiftung, "Uruguay Country Report," 10.

support and trust of the population.[352] The SCJ promotes justice in almost all spheres except human rights abuses, as it is bound by previous constitutionality decisions.[353] However, bureaucracy has been effective, particularly through the election of a president in 2004 who exempted 47 cases from the amnesty law providing avenues toward prosecution.[354] See Table 4 for the theoretical framework created for Uruguay. The combination of SJC rulings and current executive representatives with a motivation to pursue retributive justice enables the processing of an additional 600 cases. For this reason, Uruguay's usable state bureaucracy can be labeled as high.

Table 4. Theoretical Framework for Uruguay

THEORETICAL FRAMEWORK	**Arenas of a Consolidated Democracy**				
	Civil Society	**Political Society**	**Rule of Law**	**Usable Bureaucracy**	**Economic Society**
Microlevel, Rational Choice	H	H	L	H	A

Overall judicialization in Uruguay supports the theory of microlevel rational choice versus other judicial empowerment theories. This is due to the existence of three robust democratic arenas, civil society, political society and usable state bureaucracy, which contrast with the minimal consideration for the rule of law. Only when actors, mostly the executive and legislative branches, can further their political standing will the judicial branch be allowed the opportunity to prosecute human rights abuse cases. The democratic transformation in Uruguay is partly attributed to a democracy that may be limited by a deficiency in the rule of law. Although the low standing of the rule of law applies to a limited number of cases, it signals a potential area of concern if the same behavior extends to a growing SCJ docket.

352 "The 2015 Report of the Latinobarómetro Corporation shows that 51% of citizens trust the justice system and 52% evaluate the work of the judicial branch positively." Bartlesmann Stiftung, 10–11.

353 Bartlesmann Stiftung, 11.

354 Skaar, "Uruguay: From Impunity to Trials," 179.

V. ANALYSIS, CONCLUSION, AND RECOMMENDATIONS

This thesis considered five possible theories to explain judicial empowerment via constitutionalization. It assessed the democratic standing of Brazil and Uruguay while taking notice of particular changes that have occurred in four arenas of a consolidated or consolidating democracy after landmark cases were adjudicated at the national level.

A. ANALYSIS

Results indicate that judicialization in Brazil and Uruguay is caused by two distinct reasons, as seen in Table 5. Brazil's STF is affected by constitutional politics and Uruguay's SCJ contends with characteristics of micro-level rational choice. Since the incentives to empower the judicial branch are different, they prioritize or disregard unique arenas of democratic consolidation.

Table 5. Case Study Results

THEORETICAL FRAMEWORK	Arenas of a Consolidated Democracy				
	Civil Society	Political Society	Rule of Law	Usable Bureaucracy	Economic Society
BRAZIL: Constitutional Politics	H	M	H	M	A
URUGUAY: Microlevel, Rational Choice	H	H	L	H	A

In both cases, judicialization bolstered civil society. Through the adjudication of contentious issues, national courts in for Brazil and Uruguay provided an avenue for popular action to thrive. Whether the results were favorable or not, does not retract from the court's support for enhanced civil participation. The judicialization outcome could be caused by the overall governmental and judicial structure that allows the demos to challenge entrenched values.

Results for the political society arena vary by one degree because the realities of each country are different. In the Brazilian case, judicialization assisted a once disorganized political society to coalesce and push for needed anti-corruption measures in government. In short, a stronger national court encouraged increased Brazilian political

participation. Uruguay's high political society remained intact after judicialization because the court justified its actions as a continuation of routinized, legally binding political decisions.

The effects of judicialization on the rule of law in Brazil and Uruguay are two degrees apart. In Brazil, judicial empowerment arose only after citizens demanded the overhaul of both the legislative and executive branches. For Uruguay, judicialization impaired the rule of law in the country as both court outcomes promoted continued restriction of the judicial branch by the executive.

The comparison of each country's usable state bureaucracy yields a one-degree difference. In Brazil, the landmark *Mensalão* case enabled the creation of system that promotes tangible and repeatable results in corruption cases. Judicialization in Uruguay resulted in positive changes for the state bureaucracy. Though limited by decisions of the executive branch, the existing state bureaucracy has allowed an increase in exceptions of amnesty law cases.

The case studies indicate that judicialization in Brazil has yielded better results on the arenas of democratic consolidation than that of Uruguay. Since the effects of an empowered Brazilian judicial branch relate with constitutional politics theory, it means that civil society has a distinguished place in politics and that respect for the rule of law works to benefit all members of the polity. Uruguay's juxtaposition regarding judicialization signals a decline in one arena of democratic consolidation, the rule of law. The decline can explained by microlevel rational choice theory, which highlights the interest-relationship of power holders and the judicial branch.

B. CONCLUSION

The case studies confirm the link between empowered judicial courts and the growth of judicialization cases in the Americas. The adjudication of controversial cases in Brazil and Uruguay reveals positive and negative effects in four of the five arenas of consolidating and consolidated democracies. The handling of Brazil's corruption cases signals positive state growth, while Uruguay's judicialization of human rights cases cast a shadow on the strength and independence of the judicial branch.

This thesis provided quantitative data regarding claims of judicialization and the reasons for judicial empowerment. In doing so, the case studies produced distinct results affecting arenas of consolidated democracies. The outcome highlights divergent results in the enhancement or atrophy of democratic norms in the Americas, in particular Brazil and Uruguay. In the case of Brazil, judicialization as a product of peripheral groups checking the political power of policymakers, formed positive changes that strengthened democracy. What is worrisome, is that judicialization in Uruguay is driven by the interests of political power holders. Circumstances must prove beneficial for Uruguayan power holders before allowing institutional changes that strengthen democracy within the country.

C. RECOMMENDATIONS

Understanding the core purpose behind judicial empowerment should be a top priority for policy makers and the judiciary. When judicialization occurs, it is useful to keep in mind the implications behind each theory. No theory exists that yields high results across all arenas of democratization, so the expectation of judicialization without effecting democratic standing is null. Political stakeholders across the globe must recognize that the judicialization trend anticipates a likely transformation of democracy with each case seen.

Though research for this study was limited to only two countries, it is possible that additional data matches current or new theories of judicial empowerment. A more thorough study with a wider scope including additional American countries, multiple judicial review cases, and a longer time period, would verify that the theoretical framework is successful at identifying patters of democratic change.

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