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## Courts and New Democracies: Recent Works

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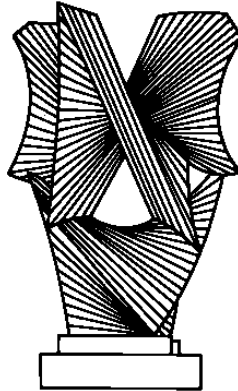
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# CHICAGO

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## COURTS AND NEW DEMOCRACIES: RECENT WORKS

*Tom Ginsburg*

THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

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## COURTS AND NEW DEMOCRACIES: RECENT WORKS

Tom Ginsburg<sup>1</sup>

Helmke, Gretchen and Julio Rios-Figueroa, editors. 2011. *Courts in Latin America*. New York: Cambridge University Press.

Hilbink, Lisa. 2007. *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile*. New York: Cambridge University Press, 2007.

Couso, Javier, Alexandra Huneeus and Rachel Sieder, editors. 2011. *Cultures of Legality: Judicialization and Political Activism in Latin America*. New York: Cambridge University Press.

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<sup>1</sup> Leo Spitz Professor of International Law, University of Chicago Law School; Research Faculty, American Bar Foundation. E-mail is [tginsburg@uchicago.edu](mailto:tginsburg@uchicago.edu)

The framework here draws on the author's chapter in a forthcoming edited volume by Kapiszewski et al. *Consequential Courts*, and in *Global Perspectives on the Rule of Law*, edited by James J. Heckman, Robert L. Nelson and Lee Cabatingan (Routledge 2010). Thanks to Tun-jen Cheng, Alexandra Huneeus, Alexei Trochev, and Shoaib Ghias for helpful discussions.

Meierhenrich, Jens. 2008. *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652–2000*. New York: Cambridge University Press.

Trochev, Alexei. 2008 *Judging Russia: Constitutional Court in Russian Politics 1990–2006*. New York: Cambridge University Press.

Harding, Andrew and Penelope Nicholson, editors. 2010. *New Courts in Asia*. New York: Routledge.

## **ABSTRACT**

Recent literature on comparative judicial politics reveals a variety of roles that courts adopt in the process of democratization. These include, very rarely, serving as a trigger for democratization, and more commonly, serving as downstream guarantor for departing autocrats or as downstream consolidator of democracy. In light of these roles, this essay reviews six relatively recent books: *Courts in Latin America*, edited by Helmke and Rios-Figueroa (2011); *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile*, by Hilbink (2007); *Cultures of Legality: Judicialization and Political Activism in Latin America*, edited by Couso, Huneeus and Sieder (2011); *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652–2000*, by Meierhenrich (2008); *Judging Russia: Constitutional Court in Russian Politics 1990–2006*, by Trochev (2008); and *New Courts in Asia*, edited by Harding and Nicholson (2010).

## INTRODUCTION

The past generation has seen two great trends in much of the developing world: democratization and judicialization. A rapidly expanding comparative literature on courts focuses on the intersection of these trends, applying diverse methodologies to a wide array of new contexts. This essay reviews several key contributions to the burgeoning corpus, focusing specifically on the roles of courts in democratization and in democratic politics more broadly. The roles of courts depend, of course, on many contextual and strategic factors. Fortunately, we are beginning to accumulate a sufficient body of case studies to make some broad comparative generalizations.

I argue that the growing literature has great potential to expand our thinking about the relationship between democracy and law, particularly outside the relatively stable North American and Western European contexts that have informed most theorizing to date. In more unstable environments, courts find themselves in more risky positions, but also may be called upon to perform essential governance functions when other institutions are weak or ineffective. These courts thus may have more constraints but also more opportunities for innovation than do their counterparts in stable democratic environments. Instability requires careful consideration of the role of time, as judicial power can ebb and flow in response to particular circumstances.

In addition, thinking about courts from a broader governance perspective—as “one governing institution among many” (Shapiro 1964, 6)—shifts the focus away from abstract theory of what courts *should* do and toward empirical evaluation of what courts *actually* do. This is particularly important in transitional situations. While the normative literature on law, under the rubric of the countermajoritarian difficulty, has tended to treat

democracy and judicial power as in some tension, casual empiricism suggests that democratization has been accompanied or paralleled by judicialization in many countries, including the creation of many new courts and the empowerment of old ones. This has led to a new diversity in the domains in which courts are active, with many new roles and approaches.

This essay reviews several recent contributions to the comparative literature on courts. Three are single-country monographs that use a longitudinal approach: Hilbink's *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile*, which seeks to understand why Chile's judiciary was so quiescent both during and after Pinochet's dictatorship; Meierhenrich's *Legacies of Law*, which traces South African law before, during, and after the apartheid era; and Trochev's *Judging Russia: Constitutional Court in Russian Politics 1990–2006*, which examines the life and sometimes death of three institutions charged with constitutional adjudication in the Soviet Union and Russia. Two are edited volumes that seek to document the more prominent role of courts in Latin America, which has undergone a wave of democracy in recent decades. *Cultures of Legality: Judicialization and Political Activism in Latin America*, edited by Couso, Huneeus, and Sieder, emphasizes the role of ideas and non-strategic action. *Courts in Latin America*, edited by Helmke and Rios-Figueroa, uses an explicitly strategic lens, while not completely jettisoning the role of ideas (e.g., p. 17). The two collections focus, implicitly rather than explicitly, on the period of democratic consolidation. Finally, *New Courts in Asia*, edited by Harding and Nicholson, brings together a diverse set of case studies from that region. (I should disclose that I have a chapter in this volume.)

Together, these books provide a very rich set of studies about the growth of judicial power in several regions of the world.<sup>1</sup>

In the discussion that follows, I emphasize the concept of the *roles* of courts in the broader political and social system as being crucial for understanding courts in fragile environments. The more conventional approach is to frame the inquiry in terms of judicial empowerment (Hirschl 2004; Ginsburg 2003) or judicial independence (Peerenboom 2010). These are useful concepts in some contexts, and, assuming that measurement issues can be overcome, are a sound basis for cross-national research. But as scholars working on these concepts have well recognized, the power or independence of a court can vary widely by issue area, case type, the identity of the parties, and especially across time (Kapiszewski et al. forthcoming). The particular configuration of exercised power along these parameters constitutes the role of the court.

The concept of *roles* is broader and less normatively laden than the notion of power or independence. Judicial power is, in our rule-of-law-obsessed world, sometimes treated as an end in itself, and judicial independence is sometimes emphasized at the expense of judicial accountability (cf. Kosar forthcoming). The concept of role does not make implicit normative assumptions about the optimal level of judicial power. Judges might in theory play various roles: gadfly or scapegoat, regime supporter or opponent, protector of minorities or tool of majority rule. The only assumptions are that judges find themselves confronted with different problems, audiences, and constraints in different contexts, and have some ability to shape their own role in response.

To organize the discussion of the books under I am considering, I apply a temporal categorization, analyzing the role of courts at different stages of the



democratization process. The analysis includes courts in authoritarian regimes, transitioning democracies and more established democracies. Examining the trajectory of judicial roles at different times allows us to inductively generate insights about judicial choices as well as the factors that constrain them.

## **THE AUTHORITARIAN STATE**

Let us begin with the *status quo ante*: an authoritarian regime. While scholars have traditionally assumed that courts play no role in such contexts, this assumption was badly mistaken. Regime-supportive roles do exist in authoritarian settings. Trochev (2008, 6) makes the point concisely: “rulers—regardless of their authoritarian or democratic pedigree—create and tolerate new constitutional courts as long as the latter: (a) provide important benefits for the new rulers, and (b) do not interfere too much with public policies.”

What are the “important benefits” that courts might provide? Moustafa (2007; Moustafa and Ginsburg 2008) categorized a series of roles that courts can play in such regimes. These include (1) establishing social control and sidelining political opponents, (2) bolstering a regime’s claim to “legal” legitimacy, (3) strengthening administrative compliance within the state’s own bureaucratic machinery and solving coordination problems among competing factions within the regime, (4) facilitating trade and investment, and (5) implementing controversial policies so as to allow political distance from core elements of the regime. An increasingly rich literature grapples with these roles in a wide array of authoritarian contexts (Barros 2003 on Chile; Brown 1997 on the Arab world; Mazmanyan 2010 on the post-Soviet world; Moustafa 2007 on Egypt; Pereira

2005 on Latin America; Solomon 1996 on Russia). The literature demonstrates a surprisingly diverse set of regime-enhancing roles.

For example, as documented by Connie Carter (2010) in her contribution to *New Courts in Asia*, China established specialized benches and divisions within the court system when confronted with international pressure to improve protection of intellectual property rights. This was part of an overall policy of enhancing judicial capacity in China, in this case to facilitate trade and investment. Pittman Potter's account of courts in Xinjiang in the same volume shows how the Chinese regime uses courts to implement vital policies of social control and economic development in a very sensitive geographic area. These examples show that courts are used instrumentally, subject to shifting demands of policymakers, and yet are increasingly important to authoritarian governance. Yet not all attempts by authoritarians to use courts are effective. Penelope Nicholson's analysis of the Vietnamese economic court shows an institution that has not developed an effective reputation for dispute resolution, and is marginalized both by users and the government. It has not been able to shape its environment to any significant degree.

Both Trochev and Meierhenrich focus on a single context over a long period and emphasize the historical institutionalist approach to courts (Gillman 1999; Graber 2006). Both studies are very helpful for understanding temporal dynamics, Trochev covers three different institutional periods: the establishment of the Committee for Constitutional Supervision of the USSR from 1988 to 1991; the first Russian Constitutional Court, which sat from 1992 to October 1993, when it was suspended by President Yeltsin; and the second Russian Constitutional Court, reconstituted under the December 1993 Constitution, which has operated continuously since then. The creation of the Committee

for Constitutional Supervision under Gorbachev in 1988 seems to be adequately explained in the authoritarian framework by functionalist needs to discipline lower-level administrative agencies and to clear the legal system of pre-reform laws that blocked Gorbachev's *perestroika* program.<sup>2</sup> When we move to the creation of the first Russian Constitutional Court in 1991, however, historical contingency seems to play a greater role. Trochev describes the careful maneuvering of legal elites and their ability to frame the court as a constraint on, alternatively, the parliament, the president, and the justice agencies. Rule-of-law rhetoric played an important role, and the dissolution of the USSR as the Court was being set up provided opportunities for political elites to tinker with the Court for their own short-term ends. We thus have a highly contingent account, and one cannot read the Court as serving any particular set of strategic elites, save perhaps the lawyers who sought its creation. Within a year, however, the Court successfully lobbied for amendments expanding its jurisdiction, shaping its operating environment.

The search for more strategic space in which to work can motivate judicial expansion. A common theme of analyses of courts in authoritarian settings is that courts serve regime interests, even as they facilitate the expression of opposition in some contexts. Courts are not exclusively a tool, but rather a forum that is established for strategic reasons, with the potential to facilitate activities that undermine the regime. This “two-sided” feature (Moustafa 2007) may disincentivize the use of courts in some circumstances, or be thought of as a necessary price or even costly signal in other contexts.

Meierhenrich's account of South African law from its inception, through the creation of the authoritarian apartheid regime 1948–61, and eventually through

democratization in the 1990s, highlights this feature of courts. Law, he argues, “was sword and shield in South Africa” (p. 129). Drawing on Ernst Fraenkel’s (1941) notion of the dual state, he shows that law was a tool of prerogative power but also a source of normative constraint on the regime. In the 19<sup>th</sup> century, law played a role in liberal constraint of the state, and legal positivism served as a force for state-building in the early 20<sup>th</sup> century. As apartheid emerged in full force in the middle of the 20<sup>th</sup> century, it relied extensively on law to effectuate oppressive practices, even as courts continued to constrain the regime at its outer edges. For example, the regime responded to adverse rulings by the Appellate Division of the Supreme Court by packing the bench and limiting its jurisdiction. The dual character of law as both constraining and empowering government is artfully demonstrated in Meierhenrich’s book.

The availability of courts to regime opponents makes it possible to think of courts playing a role in facilitating democratization of authoritarian states. Let us first distinguish *upstream* roles from *downstream* roles in democracy. Upstream roles are those that occur before democratization is accomplished. They consist of activities either in the authoritarian setting or in the early phases of gradual transitions. Downstream roles are those that occur once democratization has become irreversible, even if not complete. We can distinguish two alternative scenarios for each phase: upstream, courts can serve primarily as instruments of repression or as upstream triggers for democratization; downstream, courts can serve as guarantors of authoritarian position and privilege or as democratic consolidators, in which courts follow the initial decision to democratize and facilitate the process in various ways. A final possibility at either phase is judicial irrelevance, in which courts play no discernible role, either as guarantors,

triggers, or consolidators. With this framework in mind, let us examine the evidence presented by the recent literature.

## **UPSTREAM TRIGGERS OF DEMOCRACY**

In very rare instances, courts play a central role triggering democratization when the autocrat is *not* seeking to withdraw, but is confronted by a rising opposition. In these situations, courts are in fact at the center of the transition decision. These are situations of conflict and contingency, in which democratization is not yet the only feasible outcome. The role of the court decision is to serve as a focal point around which activists mobilize (Weingast 1997; see also Law 2008). In these models, a ruler conspires with some citizens to dominate other citizens, using a combination of repression and selective incentives for regime insiders. The dominated group can be very large, but can only limit the ruler if it can coordinate to overturn the narrow ruling coalition. Coordination is very difficult to achieve, because citizens may not agree on what exactly constitutes a violation of the rules, and may not know whether other citizens will join in an effort to take power. Any subset of citizens thinking of rising up to challenge the regime can only succeed if others join them. Otherwise, the opponent ends up in jail—or worse—and the regime maintains power. The contrast between the 2011 democratic revolts in Egypt and Syria illustrates the stakes. Since any particular citizen is uncertain as to what other citizens will do, the prospective mobilizers will likely stay quiescent and authoritarianism will be sustained. Only when there is agreement on what constitutes a violation and mutual expectations that citizens will in fact enforce the rules will democracy emerge and be sustained.

To achieve coordination requires focal points (Schelling 1960, 57). The particular focal points that will allow citizens to find ways to overcome their collective action problem are not obvious *ex ante*, and are not uniform across all times and places. Indeed, a constructivist approach that takes social reality as partially constructed by groups and individuals may be helpful to illuminate why particular messages and frames become effective focal points. Yet there are also institutional reasons why a court decision can serve as a focal point for citizens to coordinate their efforts against the regime.

Why might citizens focus on a court decision? First, a court decision against the government can provide clarity as to what constitutes a violation of the rules. Lacking an authoritative pronouncement, regime opponents might disagree about whether a violation occurred and may thus fail to coordinate to enforce the rules. By creating common knowledge that a violation of the rules has occurred, a court decision can help citizens to overcome the collective action problem. Second, a court decision against the government is an information transmission device, communicating the view that the government apparatus is not completely unified on policy. It also indicates, at a minimum, that judges do not believe their personal safety is in jeopardy from challenging regime rules, and this may allow opponents to update their own assessments of the risks of challenge. Third, a court decision is a resource that can be used by activists to rally supporters to their cause; it legitimates regime opposition and raises the costs of repression. A regime that arrests citizens after an unfavorable court decision will suffer greater reputational loss than it would before that decision. This is not to say that the court decision guarantees implementation—only that it can facilitate mobilization by raising the marginal costs of repression.

Publicity and transparency are unifying factors in the judicial ability to produce clarity about violations, to generate information on tensions within the regime, and to raise the cost of repression. It is the public, broadly transmitted nature of court decisions that allow them to serve as focal points. But of course publicity is not a given; regimes can influence the publicity given to court decisions through both formal and informal means.

In sum, the incentives for courts to produce “trigger” decisions are not obvious *ex ante*. Courts have an institutional incentive to ensure that their decisions are implemented rather than ignored, which requires predicting that citizens will actually respond to calls for change. Attempting to provide a focal point for regime opposition carries grave institutional risks in the event that the citizenry does not ultimately back enforcement of the decision. The regime can respond in myriad ways to punish the courts. We should expect, then, that courts will engage in providing focal points only when they have strong institutional and political links to outside institutions that can defend them from punishment, or are sufficiently confident for other reasons that their decisions will be implemented. These conditions are not always present.

Gretchen Helmke’s (2004) notion of “strategic defection” provides one set of conditions in which we might see the courts being willing to provide such focal points. Helmke focuses on highly unstable institutional environments (Argentina in particular), where new governments come in with some frequency and typically change the composition of the high courts when they do. In such places, argues Helmke, “the relevant inter-temporal conflict of interest shifts from the standard scenario of a judge appointed by a past government who is primarily constrained by a current government, to

a more uncertain situation in which a judge appointed by the current government faces potential constraints at the hands of a future opposition government” (p. 13). Under such circumstances, judges may start to rule against the current government as soon as it begins to weaken so as to preserve their position under a future regime. Judicial decisions in such circumstances provide information to the opposition about the imminence of decline, and thus can help to facilitate anti-regime coordination. Beyond signaling, such defection provides institutional resources for regime opponents through supportive decisions, and makes judicial independence a political issue around which to organize.

One example of judges playing a triggering role occurred during the “Orange Revolution” in the Ukraine of 2004–2005 (see generally Trochev forthcoming). President Kuchma had sought to use his position to promote the candidacy of his chosen successor Viktor Yanukovich. Using a variety of methods, including seeking to poison the opposition candidate Viktor Yushchenko, the government rigged the results of a run-off election in November 2004. Yushchenko’s supporters refused to accept the results, and he held a symbolic inauguration. He also gathered a set of resolutions from local governments promising support. His supporters initiated widespread protests and demonstrations, as well as a court case seeking to annul the election results. In addition, the parliament voted no confidence in Yanukovich, who was serving as prime minister. Dramatically, on December 3, 2004, the supreme court resolved the immediate political deadlock when it ordered a re-vote for the presidential election later that month. Held under intense international scrutiny, Yushchenko won the second election handily and the court dismissed Yanukovich’s various legal challenges. The court was thus at the center



of forcing a change in power, providing the capstone to a broad movement and turning back continued dictatorship.

The decision at least appeared to serve as a trigger because of its temporal proximity to broader efforts at social mobilization. The Ukrainian decision emboldened the opposition and buried the regime. The court did not pick the leader directly, but was involved in structuring political competition to ensure that the choice was made in a transparent manner, providing an opportunity for the opposition forces to exploit. This illustrates, again, one of the themes of how courts can assist with democratization: holding the regime to its nominal promises and providing fora for political forces to pursue their agendas. While the *independent* power of courts is open to debate—at least some analysts believed that the court acted only after the major political forces had reached a consensus that a new election was the appropriate course—it is clear that it played a major role. Counterfactually, without the court decision in the electoral cases, the outcome may have been very different.<sup>3</sup>

More often, however, attempts to provide focal points may trigger a backlash. Moustafa's (2007) account of the Egyptian Supreme Constitutional Court in dealing with Mubarak's regime provides one illustration. The Court, empowered to enforce administrative discipline and to signal to foreigners the credibility of property rights, engaged in a series of increasingly bold decisions that challenged government policies. But when the Court started to give an ear to political opponents of the regime, it had its jurisdiction restructured, and key appointments were made to ensure a pro-government line.

This framework provides an interesting lens to consider Trochev's story of the first Russian Constitutional Court, which sat from 1992 to October 1993. It was then suspended by President Yeltsin as a result of his confrontation with the former communist party in the Russian Socialist Federation of Soviet Republics (RSFSR), which involved the shelling of parliament. When Court Chairman Valery Zorkin organized the judges to sit all night to condemn Yeltsin's action as unconstitutional, he set the Court on confrontation with what was perhaps destined to be a strong-executive system. Might Russia today be a different place had the Court decision provided a focal point for a popular reaction against Yeltsin? One can only speculate, though the ultimate emergence of the Putin phenomenon suggests that the upstream trigger role would never have worked.

The broader strategic account of judicial behavior suggests that there will be an ongoing dialogue or interaction between courts and political branches. In equilibrium, courts will never overstep the boundaries of what is politically feasible, but of course in the real world, we should expect occasional mistakes. Courts may lack good information on the intentions of the authoritarian regime. For example, if courts have been empowered to provide credible commitments to foreign investors, they may rule against the government even in cases that the government feels very strongly about—provoking a curtailing of judicial power. Another factor that tends to mitigate against anti-government tendencies are the relatively high institutional stakes in an authoritarian setting. Courts may be extra cautious when the consequences are not only institutional but may spill over into personal safety (Widner 2008).

In sum, there are many reasons that we should not expect courts to be at the very forefront of democratization. In very rare cases, courts may make crucial decisions that turn out to be focal points for broader oppositional coalitions to mobilize. In such moments the court decision can become the moment at which regime change coalesces. But court decisions are neither necessary nor sufficient for democratic transition to occur. And a historical review suggests such moments do not often occur.

### **DOWNSTREAM GUARANTORS**

A more common scenario occurs when the authoritarian regime seeks to withdraw from active involvement in politics rather than maintain power indefinitely. This may be typical of some coup-makers, or a regime which relied on a short-term emergency to justify repressive policies. It may also be a rational decision once a regime realizes it cannot survive. In such cases, the autocrat faces the problem of guaranteeing that his or her core policies will not be overturned after a transition back to majoritarian rule. The autocrat may also be concerned with the property and liberty of his supporters, who are likely threatened by a change in power.

In this type of situation, the autocrat may seek to empower courts to act as downstream guarantors of the bargain for exit, providing policy security after the dictator goes. Hirschl (2004), writing in the context of industrial democracies, calls this function “hegemonic preservation,” in which a declining powerful group uses courts to secure its policies and limit downstream actors. Hirschl is normatively critical of this function, suggesting that it hampers more progressive transformation. My version of this argument (2003) focuses on minorities in general (which can include departing autocrats) and suggests that courts provide political insurance to prevent policy reversal and minimize

the risks of the future. This should not strictly speaking be seen as an anti-democratic function—sometimes it can be necessary to induce the autocrat to give up power in the first place. But the court plays a basically conservative role of preserving a bargain against future disruption.

This scenario is only likely for certain kinds of transitions, typically gradual ones in which the autocrat is able to write the rules of the game and negotiate the terms of exit. Some accounts of Chile's negotiated transition under Pinochet fit this account, in that property rights and an institutional veto for the departing autocrats were entrenched into the constitution (but see further discussion below). Turkey's military-drafted 1982 Constitution seemed to contemplate a similar role for courts, which served to discipline Islamist political parties for many years (Bâli 2012; Shambayati 2004, 2007) The strategy of using courts to entrench policies is effective in a wide variety of settings, but there is also no guarantee that it will be fully effective, particularly if courts are tainted as instruments of the earlier regime. The classic account of French judicial politics traces fear of *gouvernement des juges* back to the French revolution, in which the Magistrates served as a reactionary force and thus could not guarantee even their own heads. The judges' political decision is believed to have continuing institutional consequences two centuries later. One can imagine, however, an alternative French history in which the judges induced the King to step down through guarantees that his property would remain intact. In such an instance, French attitudes toward judges (and much else) might be different. Whether the particular counterfactual story here is credible or not, the basic point is that judges can serve democracy by upholding the rights of the former dictators, because such institutional guarantees can induce resignation without revolution.

Perhaps the paradigm example of courts serving as a downstream guarantor is from South Africa, in which the National Party negotiated an extensive set of judicially enforceable rights as a condition of turning over power to the black majority and the African National Congress (ANC). As Hirschl (2002; 2004) argues, there was a “near-miraculous conversion to constitutionalism and judicial review among South Africa’s white political and business elites during the late 1980s and early 1990s, when it became clear that the days of apartheid were numbered and an ANC-controlled government became inevitable.” For much of South Africa’s history, white elites had opposed the creation of judicially created bills of rights, precisely because law would then serve as more of a constraint than an instrument of oppression. But when it became clear that the regime could not be maintained, the regime shifted views and drafted its own version of a bill of rights. This was designed not only to preserve the rights of a prospective minority in the face of near certain electoral loss but also, crucially, to preserve the economic leverage of the elite (Meierhenrich 2008, 203–04). There would be inevitable pressures for redistribution after the new majority took over; drafting a new constitution to secure property rights and establishing a new constitutional court to monitor violations were ways of entrenching the power and wealth of the old elite.

Crucially, the existence of a tradition of autonomous law that had operated even during apartheid made it possible for the African National Congress to make a credible commitment to the National Party (Meierhenrich 2008). Without a tradition of law, the National Party might not have been willing to trust the new majority to uphold its promises. But the existence of courts that upheld the law in the authoritarian phase, even when it conflicted with the regime’s demands, made law a viable solution for the post-

authoritarian commitment problem. The new constitutional court oversaw the transition, even demanding changes in the final draft constitution to meet the requirements of the Interim Constitution. To be sure, the constitutional court has played many other roles in democratic transition (Klug 2003; Lollini 2010), helping to define the new order and to incorporate global human rights discourse into the country. In this sense, it has also been a vehicle of democratic consolidation. But it would arguably not have been created without its ability to serve as a downstream guarantor of the bargain ending apartheid. The core elements of this bargain—democratic rule in exchange for security of property rights and limited transitional justice—have remained intact against great political pressure, and the country’s courts have been part of the reason. This has led to criticisms, to be sure, but all in all has garnered respect for the constitutional court. And it would not have been possible without a long tradition of law as both sword and shield in the pre-democratic period.

### **DOWNSTREAM DEMOCRATIC CONSOLIDATORS**

In other times and places, courts may serve as instruments of the newly democratic regime, becoming central to the process *after* the crucial moment occurs. In these scenarios, the change from autocracy to democracy involves a removal of constraints on the legal system, or in some cases affirmative empowerment of legal actors. In these instances, the courts can become important sites of contestation between elements of the old regime and new, devices for facilitating transitional justice, allies of the new order, or systematic dismantlers of the legal infrastructure of the old regime. For example, in post–World War II Italy, the transition from fascism was ambiguous, in that the Italian position was that they had won the war and hence there was no push for a

complete institutional overhaul. This left many of the old fascist statutes on the books. It became the task of the constitutional court to work through challenges to these statutes one at a time, cleaning the legal system of its fascist legacy. The Court's role was essentially one of building up its own power through cleaning up the legacies of authoritarian rule. But the timing was one of follower rather than leader in democratization.

To state the matter this way is not to assert that judges and law are unimportant to democratic transitions. On the contrary, courts become crucial to structuring an environment of open political competition, free exchange of ideas, and limited government. It is only to point out that, in most instances, legal actors are not at the very center of the transition decision, but rather are involved in the phase of consolidation. In that phase, they can play a central role in ensuring accountability and transparency (Gloppen et al. 2010).

Often (though not in the Italian case, since the Italian court was a new institution) this scenario results from a reinvention of the judicial role after democratization. Formerly quiescent institutions can become more powerful and capable should they choose to do so, and skillful judges can adjust to the new era. Furthermore, as judicial personnel change, they are likely to become more daring and to express the values of a new era. It is not surprising, for example, that the South African negotiations called for the creation of a *new* constitutional court, rather than relying on institutions affiliated with apartheid. But in general, new elites lack the breadth and depth of personnel to staff a full judiciary after transition, so that of necessity low-level judicial staff may remain

who have been appointed by the previous regime. This can have significant downstream effects at low levels of policy conflict, in which judges can hamper the new regime.

New courts are the central concern of the Harding and Nicholson volume (2010). The creation of new courts provides an opportunity to understand the dynamics of institutional design and the political motivations behind judicialization. Sometimes, as described above, new courts are created because old courts are not trusted to carry out the task because of either corruption, incompetence, or political inclination. Other times, the old courts may not *want* the task. Special jurisdictions to fight corruption (in Indonesia and the Philippines), to engage in administrative adjudication (Indonesia), and to exercise exclusive jurisdiction over previously immune royals (Malaysia) are all examples.

One very common move is to set up a new institution assigned the central task of constitutional adjudication.<sup>4</sup> Thailand's Constitutional Court of 1997–2006, as described in Andrew Harding's chapter in his co-edited volume (2010), found itself playing a role of resolving major political cases involving elections, corruption, and economic regulation. In human rights cases, on the other hand, it was fairly deferential toward government. The role of political adjudicator was a risky one, given the contentious state of Thailand's politics, and the Court found itself oscillating between the rising political forces of Thaksin Shinawatra and the Bangkok elite. Oscillation turned out not to be a good strategy, as the Court was ultimately disbanded following a coup in 2006. The mix of cases that defines a court's role, it turns out, has much to do with its ultimate success or failure.

Understanding the type of case in which constitutional adjudicators have an impact is the central problem for Helmke and Rios-Figueroa in their edited volume. Their



chief axis is rights vs. structure: the extent to which constitutional courts are willing to protect individual rights and the extent they are willing to arbitrate interbranch disputes in the political system. These categories are, of course, not mutually exclusive. Some courts in Latin America (e.g., the constitutional court in Costa Rica) have played an active role in both rights adjudication and interbranch conflict; others (e.g., in Brazil and Mexico) have focused more on the latter set of issues instead of individual claims; yet others (in Colombia) focus primarily on rights.

Helmke and Rios' synthetic introduction does not provide a theory of case selection but does effectively interrogate other issues related to judicial power. One theory drawn from the strategic literature that is squarely confirmed in the case studies is what the editors label the fragmentation thesis: that judicial power expands with divided politics. This is pursued through both longitudinal analysis and comparative approaches. In Argentina, for example, Chavez, Ferejohn, and Weingast show that judicial willingness to confront the government increased during periods of divided government relative to periods in which it was unified. Scribner compares the Argentine and Chilean courts to make the same point. Sanchez, Magaloni, and Magar analyze the Mexican Supreme Court using Bayesian ideal point estimation techniques, surely one of the first instances of this approach being used outside the United States.<sup>5</sup>

Role designation may be a crucial factor in determining when courts become active. This is brought out in Wilson's account of the Costa Rican Court's creation of a constitutional chamber in 1989, when it was hardly expected to emerge as the most powerful and active court in the region. But the new chamber, created as a technical improvement to the constitutional adjudication system rather than as a result of any drive

for political insurance, took its designated and exclusive role seriously, abandoning formalism and empowering new claims from various actors. As the party system transformed, smaller political parties began to use constitutional adjudication to challenge government policies, in turn strengthening the court. The phenomenon of judges who were expected to be quiescent engaging in a broad spectrum of political issues goes to the central issue of the self-articulation of the judicial role, and the ability of judges in certain circumstances to greatly alter their operating environment.

It is not always advantageous to be a new institution. While new courts have the advantage of a clearly defined role which can facilitate judicialization, they also may become involved in conflicts with older courts that are jealous of their prerogatives. Indeed, the idea of roles emphasizes that it is not just possible but likely that different courts will assume different roles in the political and legal system—if one court is already occupying a particular political space, the other may have to take an opposing view to maintain relevance. Conflicts between supreme and constitutional courts have become commonplace, as described for Indonesia (Hendrianto) and Korea (Ginsburg) in the Harding and Nicholson volume. A supreme court may play a role of downstream guarantor even while its counterpart constitutional court tries to play a transformative role. Trochev, in a comparative chapter at the end of his volume, describes the conflicts that have broken out between constitutional and supreme courts in various countries, as each struggles to define its own role.

At the same time, institutional constraints besides the presence of other adjudicative bodies will limit the ability to define a role clearly. The Supreme Federal Tribunal of Brazil, for example, has a very wide jurisdiction but lacks docket control, and

so has been flooded the court with as many as 160,000 cases a year (Brinks 2010, 135–36). In addition, until 2004, it lacked any formal ability to establish a binding precedent. These institutional constraints however are offset by wide political support from the country’s presidents (Nunes 2010).

A related theme highlighted in these volumes is the lack of perfect correlation between formal institutions and actual powers exercised by courts. The entire region has gone through a wave of judicial reform designed to enhance the independence and insulation of the constitutional judiciary, but these institutional reforms are not sufficient to guarantee substantive independence. The gap between formal and actual levels of power is perhaps best illuminated through the historical institutionalist or ideational approaches. Institutional conceptions drift over time, and key interpretive junctures will establish patterns that can persist, even through significant environmental change. In addition, ideas and local cultures can play an important role in shaping how formal institutions operate. In the case of Latin America, there is a significant contrast between the highly unitary civil law positivism that is common to the formal legal histories of the region and the actual legal pluralism that operates in practice. This gap surely shapes the behavior of courts, high and low, and is a target of the *Cultures of Legality* volume, which adopts a dynamic and plural notion of culture.

Another element that surely is relevant for understanding the Latin American cases is the regional dimension. As the region has undergone a wave of democratization, it has also developed norms to prevent backsliding. These were in evidence in the 2009 backlash against the “coup” in Honduras ousting President Manuel Zelaya. Zelaya was part of the region’s turn toward populist leftism, and, like Hugo Chavez, Evo Morales,

and Daniel Ortega, he sought to do away with term limits. The supreme court held that his mere suggestion that a referendum might be held on the issue was sufficient to trigger provisions in the Honduran constitution.

As a parenthetical matter, the term-limit issue is a good example of a repeated issue across many contexts that gives us clues into the political role of courts and which side they align themselves with (see generally Ginsburg et al. 2011). In Colombia, the constitutional court rejected an attempt by Alvaro Uribe to bypass term limits through constitutional referendum, thus arguably serving an important role in preserving political competition. In Nicaragua, on the other hand, the supreme court held that term limits were themselves unconstitutional. In the latter case, the court was clearly aligning itself with Daniel Ortega's populism; in the former, the court was playing a more systemic role. The Costa Rican court issued two decisions on Oscar Arias' attempt to argue that a 1969 constitutional amendment prohibiting reelection was a violation of liberties protected under the Inter-American Convention on Human Rights; in the first case, it rejected his argument, but in the second, the constitutional chamber had a new membership and upheld the argument, paving the way for Arias to resume the presidency in 2006 (Wilson 2011, 66–67).

What of the Honduran court? It seems to have been, from one perspective, an example of hegemonic preservation or downstream guarantor. It helped ensure that the conservative elites would not be pushed aside by a new rising competitor. But the regional dimension came into play. The Organization of American States reacted quite strongly, characterizing Zelaya's forced removal in the middle of the night as a coup.

Memories of military intervention thus affected the framing of the incident by external actors, and this led to a long period of uncertainty in Honduran politics.

Interestingly, the Honduran story is not atypical in that the relationship between national courts and international bodies is not always a happy one. Scholars of European integration tend to emphasize the collaborative dynamic that developed between national judges and the European Court of Justice, in which references to the regional body empowered lower-court judges in national systems. In contrast, cooperative relations between local judiciaries struggling for status and international bodies are not always the norm in the developing world. Alexandra Huneus, in her contribution to the *Cultures of Legality* volume, describes a set of instances in which Latin American courts have rejected rulings of the Inter-American Court. In Venezuela, this involved a local rejection of an attempt by the Inter-American Court to defend judicial independence in the face of Bolivarian politicization. The courts became the site of an explicitly political project, and technocratic judges fired by populist leader Hugo Chavez were unable to retain their seats. (The Inter-American Court was successful in a similar case involving Bolivia, however, when President Morales falsely accused constitutional judges of taking bribes (Castagnela and Pérez-Liñán, 299). In Chile, the Inter-American Court stepped into a very delicate navigation of transitional justice by calling for invalidation of the 1978 Amnesty Decree, which had been used by General Augusto Pinochet to absolve the military for the 1973 coup. In other words, the regional court rejected the role of downstream guarantor for the local judiciary. Huneus (133) emphasizes the desire of Chilean judges to retain control of and take credit for the prosecutorial turn in Chilean

politics. In her account, role conception and cultural factors are central to understanding court behavior in these instances.

The two Latin America volumes thus emphasize different aspects of the expansion of judicial power in Latin America during the democratic era. Helmke and Figueroa emphasize that the new democratic environment is one that throws up novel cases. Often constitutional allocations of powers are incomplete and unclear, and there is a need for an institution to resolve various political conflicts among branches of government. So one consolidation role can be to serve as the proverbial third party to adjudicate interbranch conflicts over powers. The Couso et al. volume, on the other hand, provides a more thorough account of why we observe such an increase in rights adjudication in the region, particularly the role of courts in delivering on socio-economic rights (Gauri and Brinks 2008). The role of ideas, framing and constructivism is moved to the fore. For example, Rueda's chapter in *Cultures of Legality* applies a linguistic approach to argue that the Colombian constitutional court's articulation of an unenumerated right to *minimo vital*, or subsistence minimum. In the early years, this was framed as a right available to defenseless individuals, but it gradually expanded the scope of protection to new classes of vulnerable people, eventually becoming a general social and economic right available to the middle class after an economic crisis. This involved a careful development of a role in a context of political insecurity, eventually protecting middle class rights through the exercise of abstract review. The court, in short, created its own demand.

Understanding these moves probably requires a synthetic approach that involves both institutional and cultural accounts, nicely demonstrated in Diana Kapiszewski's

chapter in the *Cultures* volume. Along with a detailed account of the institutional structure of Brazil's Supreme Federal Tribunal, she examines actual practices as the embodiment of institutional cultures. A key element is confidence, which is reinforced by formal institutional stability and values of consistency. The role the court has articulated for itself has involved mediating interbranch disputes and consideration of national economic policies, but not considering many rights cases. Kapiszewski provides a useful framework for thinking about what roles courts play when, one that integrates ideas and institutions.

Catalina Smulovitz's chapter on Argentina in the *Cultures* book poses a challenge to the overall framework of the book. She argues for the primacy of institutional reforms and the strengthening of support structures for the courts. In particular, support structures (Epp 1998) can help insulate a court from challenges by other actors.

One of the powerful themes to emerge from the Helmke-Rios volume, explored in the chapter by Helmke and Staton is that attacks on courts are frequent in Latin America. Some of these attacks may themselves *reflect* democratic consolidation; an example are Chilean attempts to get rid of Pinochet-era judges. Other attacks, such as those in the neo-Bolivarian states, may reflect the rise of populist movements bent on social transformation. The puzzle, as Helmke and Staton identify it, is that attacks do not always lead to acquiescence. Indeed, it is interesting that judges may have provoked counterattacks by wading into politically treacherous territory. Whereas the first Russian constitutional tribunal analyzed by Trochev was operating in an environment of institutional uncertainty, courts in Latin America have a long history to provide them information on likely outcomes. Helmke and Staton propose a formal model that goes

beyond the typical strategic approach in that it is multi-period and emphasizes uncertainty over time. Their work provides one way of understanding how it is that courts can shape their strategic environment, and also helps us understand why we observe political clashes that at first blush would seem to be off the equilibrium path. They also provide valuable insight into why formal institutional changes may have perverse effects: when judges value their seats excessively, they may become too deferential, whereas when they value policy output they may be too prone to provoke interbranch conflict. This paper illustrates the payoff that can come from careful formal work that builds on earlier work but helps resolve an ongoing puzzle. It also provides a nice complement to Trochev's finding that Russia's various constitutional adjudication bodies frequently decided cases without compliance.

At the same time, the Helmke/Rios framework, contrasting rights and structure, may be too broad-brush. The rise in socioeconomic rights in particular is an oft-noted contribution of some of the courts in the region, in part reflecting the increase in the menu of legal tools available for political struggle. Article 5 of the Brazilian Constitution, for example, provides standing for a set of political actors including parties, unions, and NGOs. Other legal writs are used in this regard as well (Brewer-Carias 2009). Group rights are the language of the Bolivarian constitutions as well, and there is a new emphasis on indigenous rights. The use of rights and law to resolve distributive struggles pervades Latin America.

Another area in which one sees particularly intense judicial involvement is criminal procedure, which constitutes the legal apparatus of social control. Democracies and dictatorships differ in their use of legal tools in this regard. Typically, judges have a



much greater role in democracies than they do in dictatorships, in which prosecutors and police operate with less judicial scrutiny. Judges asserting the need for greater judicial oversight of criminal procedure are at once advancing their institutional self-interest while ensuring conformity of the new regime with international standards.

Yet another “consolidation” function, quite particular to new democracies, involves dealing with the legacy of the past. Where the old forces are not totally defeated but retain a powerful position in politics, demands for transitional justice are likely to be suppressed (and appropriately so, since pushing too hard can undo the democratic turn). On the other hand, if the old forces are defeated, there will be significant demands for coming to terms with the past, and this frequently, though not always, involves the legal system.

There is a vast literature on lustration, judicial rehabilitation, truth commissions, and retroactive justice. When courts and the legal process are involved, complex technical issues arise involving, *inter alia*, the proscription on *ex post facto* law, statutes of limitations, and command responsibility. Frequently the rule of law, as classically defined, suffers when courts ignore legal formalities to hold accountable elements from the past regime. Nevertheless, from a political rather than formalist perspective, such a role can be helpful in furthering democratic consolidation and legitimation of the new regime in the eyes of the victims of the past one (Lollini 2010; Skaar 2011).

xxIn short, scholars are using a variety of methodologies to understand the wide range of roles of courts in democratic consolidation. My temporal account of the different roles courts play over time through democratic transition suggests that the consolidation function, in which courts work in support of various conceptions of democracy, is

predominant. Scholars seem to be attracted to stories of judicial empowerment, and the consolidation of democracy involves an expansion in judicial power and relevance, in a wide range of arenas. The full effect of the positive literature is to put to rest the idea of the countermajoritarian difficulty. Myriad judicial roles are consistent with vigorous democratic governance, as judges both complement and supplement other political institutions.

### **JUDICIAL IRRELEVANCE**

A fourth possible role can also be observed. This is where the courts, for whatever reason, remain on the sidelines without either supporting or hindering democratization. The Chilean experience, so well presented in Hilbink's longitudinal study, *Judges Beyond Politics in Democracy and Dictatorship*, highlights a judiciary with a good deal of formal independence that nevertheless acts in ways that seem complacent or otherwise conservative. The Chilean courts have long been highly professionalized and institutionalized. Yet they did little to restrain the dictatorship of Augusto Pinochet. Nor did they play much of a role in democratization, with the exception of a single decision of the Constitutional Tribunal that decreed that Pinochet had to hold the election he ultimately lost. The Chilean judges had internalized an ideology of "apoliticism" along with a hierarchical, self-reproducing institutional structure that rendered judges unequipped and disinclined to take stands in defense of liberal democratic principles before, during, or after the authoritarian interlude. Nor have courts been particularly effective enforcers of the policies put in place at the end of the Pinochet regime, failing to strike down infringements on property rights as well (Couso 2003). This seems to be a case where the courts were agents of neither the past nor the future. To be sure, after two

decades they have recently begun to play a role in transitional justice, indicting General Pinochet before his death in 2006, but overall, the story seems to have been one of general irrelevance, at least until very recently.

Hilbink's methodological approach focuses on ideational factors and an institutional history that fetishized "apoliticism." It is, in other words, about self-articulated role conceptions of judges (see also Kapiszewski 2007). Judges were viewed essentially as government agents whose job was to bolster a strong executive and avoid "politics." The problem was that politics was defined in a distinctive way, as anything that challenged state authority. The mantra of avoiding politics has been the constant in Chilean judicial history, but the apoliticism was one-sided. It really meant a conservatism in both the small-c and large-C senses. The Chilean judges historically engaged in "actively defending conservative values and interests but reverting to positivist and even formalist reasoning in cases involving defendants of the ideological Left" (p. 77). This gave judges a certain amount of autonomy, even during Pinochet's dictatorship. Pinochet even retained rules allowing constraint of government action, including writ of amparo (habeas corpus) actions and new constitutional remedies, because the courts did little with these tools.

A key point for Hilbink is her assertion that Chilean judges retained the same conservative approach after the return to democracy. In this sense, her account emphasizes the staying power of ideas, and their ability to inhibit judges from exercising latent power that is available to them. In her 2007 book, she grapples with what appeared to be a nascent trend to overturn some of the implicit and explicit amnesties that had been offered to secure authoritarian exit, but argued that these were rather exceptional.

However, as the regional trend toward judicial activism has picked up, Hilbink has had to modify her position, though not her theoretical commitments. In the Helmke and Rios-Figueroa volume (99), she and Javier Couso address what they call the “incipient activism” of Chile’s judges. Couso and Hilbink argue that Chile is on the verge of assuming the “full” role by adding rights adjudication to its portfolio of interbranch dispute resolution (Couso and Hilbink 2011). No doubt the temporal dimension highlighted in the introduction is important here. This is evidenced by an increasing willingness to embrace international norms and to uphold fundamental rights. Even the constitutional tribunal, a quiet institution for its first two decades, has become a central player in politics.

The key factors they identify as contributing to this change are ideological and institutional. Ideologically, regional trends toward greater prominence for rights-oriented constitutional discourse have changed the views of Chile’s legal academy and thus its judges. On the institutional side, the transfer to the constitutional court from the supreme court of the *recurso de inaplicabilidad*, which allows lower courts and litigants to challenge legislation for unconstitutionality, greatly expanded judicial standing and caseload. Combined with the elimination from the constitutional court of designated seats for supreme court justices, these reforms had the effect of empowering younger lower-court judges and freeing them from the direct scrutiny of their superiors in the judicial hierarchy. The result has been a sea change and a delayed but significant role for the courts. Arguably this is a case of quietude during democratic consolidation, but emergence of an empowered judiciary in the consolidated phase. As the authoritarian interlude recedes in time, courts may be less fearful of ruling against government

regimes. We have observed in several countries—chiefly Chile and Argentina—that courts are willing to overturn prior amnesties once the democratic system is sufficiently secure. In some sense, this requires simply extending the time frame under which to examine judicialization.

The ideational frame may be less useful for explaining change, or for tracing mechanisms of influence, than an institutional approach. For example, Couso and Hilbink's assertion that the environment changed and new ideas of constitutionalism crept into the Chilean academy may be correct, but the causal mechanisms that link this to increased judicialization would require tracing the training of specific judges and connections with the academy. In short, the claim lacks the crispness one would normally expect in a historical institutionalist account of a sharp disjuncture. The editors of *Cultures of Legality* argue that because institutions are constructed and reconstructed by behavior, we need to pay attention to ideas and to constructivist dynamics, and this is surely true. But the theoretical issue is whether constructivism provides a better account of observed phenomena, and in the case of institutional change it seems to face an uphill struggle.

Judicial acquiescence, of course, can also result from strategic factors. Castagnela and Pérez-Liñán, in the Helmke and Rios-Figueroa volume, describe the rise and fall of judicial review in Bolivia. With the creation of a new Constitutional Tribunal in 1998, conditions were ripe for activist review. Indeed, the new Tribunal began to challenge government policies, but it was unable to overcome a legacy of public distrust for the judiciary, rendering it (along with the Supreme Court) vulnerable to attacks by the new administration of Evo Morales in 2005. Rather than packing the courts, the politicians

simply encouraged resignations without new appointments. This political strategy was facilitated by the presence of divided forces in the legislature, and illustrates that political gridlock not only expands substantive space for judicial decision making, as in the strategic model, but also can weaken judicial institutions when they need legislative action to keep functioning. The upshot was in Bolivia a constitutional reform with direct election of judges, likely politicizing an office that is formally nonpartisan.

Trochev's account of the Russian Constitutional Court after its reincarnation in 1995 is an example of a court that was relatively constrained by its semi-authoritarian context. But since that time, it has gradually empowered itself. Trochev uses the "zigzagging" metaphor to describe how Russia's Constitutional Court has navigated a treacherous and changing political environment, to generally expand its power. Trochev would acknowledge that the power of the Court has been somewhat curtailed since his study was completed in 2007. But in the 13-year period he examines, the Court demonstrated an ability to navigate the political environment to expand its power. It found implied powers of the president and legislative powers of the regions. On its own accord, it expanded standing for local governments and the procurator general. It demonstrated ample creativity as well, even as it has avoided the outright confrontations that led to the death of the first Constitutional Court in 1993. Trochev emphasizes the prudent political vision of the Court and its active role in the construction of ideas. Covering as it does three different iterations of Russian constitutional adjudication, Trochev's volume provides a valuable longitudinal picture of an iterated interaction between judges and political elites, and a framework for understanding subsequent developments.

## ARTICULATING ROLES

How are we to understand how judicial roles are produced and articulated? There are several lenses through which to view the choices judges make in determining their role, which I characterize using the rubrics of *space*, *ideas*, and *time*. These correspond to the major theoretical approaches in judicial politics: strategic, ideational, and historical-institutional. One set of accounts, known as the strategic approach, emphasizes institutional context and the relationship with other political actors (Epstein and Knight 2000). This approach tends to look at the immediate politics of judicial decision making as determined by the interaction of preferences among multiple actors and the position of courts in the overall political system. This approach emphasizes political *space* rather than *time*, as it tends to bracket longer-run temporal factors, and to set aside the possibility that courts can shape their institutional environment over multiple interactions. Instead, changes in the roles of courts over time tend to be seen as responses to (relatively) exogenous changes to the strategic environment. For example, Helmke and Rios show how court power expands with political fragmentation. The basic point is that courts act within parameters, and the task of scholars is to explain how those parameters both constrain and empower.

*Ideas* are the central emphasis of ideational accounts, in contrast with the strategic account that tends to emphasize interests. Hilbink's argument is a good example here, as she argues that even strategically viable moves are constrained by ideological, cultural, and cognitive limitations. Ideational accounts have great explanatory power in cases when judges choose not to exploit all the discretionary space that they would seem to

possess under a strategic analysis. Still, I have argued that they do not always provide crisp understanding of the issues of temporality and change.

*Time* is the third lens through which to account for judicial politics. This is the central concern of historical institutionalism, a leading approach to courts in the United States. Whereas the strategic approach tends to look to judicial decisions in the context of immediate political constraints, the historical institutionalists emphasize longer-run, regime-type politics, and can integrate the role of ideas. The longer time horizons, and in particular the notion of critical junctures in which contingency is heightened, are particularly useful for understanding the changing roles of courts over time. The lens of time is, I believe, particularly helpful for tackling the problem of how courts *shape* their institutional environment, which is a central challenge for the other lenses.<sup>6</sup>

I have argued that roles can change over time, and that it is helpful to frame these changing roles around the phases of democratization. A logical next step is to draw on further longitudinal studies, akin to those of Hilbink and Trochev, to see whether it is possible to generalize about the relationship among phases. For example, does a passive role in the authoritarian phase increase or decrease the probability that judges will play a vigorous role in democracy? Does it encourage a particular type of role, for example focusing on interbranch conflicts? Do courts that act as triggers provoke a downstream backlash even when they are successful? These questions are only suggestive of a research agenda that takes time seriously.

My framing has implicitly assumed something of a linear progression toward democracy. But we also have partial retrograde movements. What of courts in the environments shaped by Bolivarianism, namely Venezuela, Peru, and Ecuador? These



countries continue a regional tradition of constitutional radicalism (Gargarella 2010) that supports a more regime-supportive populist role by the courts themselves. Here the Russian experience may prove more informative than the Chilean, at least for the moment.

## **CONCLUSION**

In this essay, I identify four broad roles that courts can play in democratic transition. Sometimes they serve as agents of the past, policing a transition or even preserving policies of the authoritarian regime. Sometimes they act as agents of the future, helping to transform the political process and encouraging the consolidation of democracy. On rare occasions, courts trigger the democratization process itself, encouraging mobilization and tipping the regime into transformation. These critical junctures shape subsequent institutional structures and environments profoundly. Finally, courts can be simply marginal players who neither facilitate nor hinder a transition to democracy.

The next step in comparative judicial politics is to understand the interaction of structure and agency, the ability of judges to shape their roles, and how that ability varies according to institutional and environmental factors. I also offered three lenses through which to understand judicial roles: those of space, ideas, and time. Each of these lenses helps illuminate particular problems in understanding courts: the strategic approach to political space emphasizes relationships with other actors and so is useful for analyzing interactions; the ideational approach emphasizes the particular role-conception of judges and their internal understandings of their job; and the historical-institutional approach emphasizes the role of time, in some ways integrating the other two perspectives in a

longitudinal framework. Naturally these are not pure categories, and much of the work discussed here seeks to utilize mixed methodologies depending on the particular problem at hand.<sup>7</sup>

Understanding the interaction of courts with other organizations in the political space, as in the strategic perspective, has provided important insights into the latent capacity of courts to contribute to democratic politics. Yet it does little to explain instances in which courts do not exercise that capacity, as in Hilbink's account of Chile. In this regard, ideas seem to be important. At the same time, a constructivist account of why courts exercise the roles they do, when they do, may not be sufficiently fine grained to predict the precise scope of issues in which courts are involved. Here, tracing the evolution of courts in one context over time, as do Trochev and Meierhenrich, may be the most promising approach in terms of understanding how courts shape their environment. But it is only through the aggregation of several such longitudinal accounts that we will be able to emerge with generalized theories about how courts shape their environments. What we do have so far is a rich array of accounts of judicial power ebbing and flowing over time, in an increasingly diverse range of contexts outside the core of industrialized democracies.

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<sup>1</sup> No doubt there are many others that could be added to the list. My intention in this review essay is to be suggestive rather than exhaustive, and to highlight certain themes that are common to the broader literature.

<sup>2</sup> Note that theories that tie political fragmentation to judicial empowerment do not really apply directly in authoritarian settings, and so we should not be surprised by the weakness of this commission. Compare Trochev (2008, 61).

<sup>3</sup> Parenthetically, the outcome for the Court itself was less than ideal. Yushchenko himself proceeded to try to control the judiciary through appointments and the manipulation of jurisdiction; a similar effort was undertaken in Georgia after the Rose Revolution (Trochev forthcoming). The story illustrates how a particular role at one stage may not carry over to the next; indeed, too much independence in the authoritarian period might lead new democratic leaders to impose more constraints on the court downstream.

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<sup>4</sup> The Harding and Nicholson volume contains chapters on the constitutional courts of Korea (Ginsburg), Indonesia (Hendrianto), and Thailand (Harding).

<sup>5</sup> On the United States, see Martin and Quinn (2002).

<sup>6</sup> The question of whether and how judges have shaped their strategic environment is a key issue in debates over the judicial politics in the European Union. See Carruba, Gabel, and Hankla (2008) and Stone Sweet and Brunel (2010). I contrast my categorization with that of Couso et al., who characterize historical institutionalism as a static approach (p. 13).

<sup>7</sup> Relatively absent from the literature is the attitudinal approach that is so dominant in the study of American courts. See, however, Amaral-Garcia, Garoupa, and Grembi (2009) on Portugal and Garoupa, Grembi, and Lin (2011) on Taiwan.



Readers with comments may address them to:

Professor Tom Ginsburg  
University of Chicago Law School  
1111 East 60th Street  
Chicago, IL 60637  
[tginsburg@uchicago.edu](mailto:tginsburg@uchicago.edu)

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